THE HIGH COURT

[2013 No. 5612P]

BETWEEN

VALERIE POWER

PLAINTIFF

AND

ORLAGH EUSTACE, DEIRDRE EUSTACE AND PHILIP WHELAN

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 3rd day of May, 2017

1. This action arises out of a road traffic accident which occurred on the Bunmahon to Kill Road in County Waterford. The accident occurred at approximately 18.30 hours on Sunday 28th November, 2010. On this particular evening, and for the two days preceding that, the country had been experiencing extremely severe weather conditions. There had been heavy falls of snow in the two days prior to the day of the accident. The melting of snow on the road surface and its subsequent refreezing at night, together with the passage of vehicular traffic over the surface of roads, meant that many of the roads in the country were in an extremely hazardous condition. All the parties were agreed that the surface of the road at the locus of this accident was particularly dangerous due to the fact that the locus was at the bottom of a hill, which had a left turn bend at the end of the hill. The surface of the road was covered with compacted snow and ice.

2. On the evening in question, the plaintiff had walked with her daughter and her daughter's boyfriend to the house of the plaintiff's mother. This house is shown in photograph 9 of the booklet of photographs prepared by Mr. Edward Flahavan, the plaintiff's engineer. It is a small, thatch-roofed cottage with white painted walls. The house itself is situated at the bottom of a hill, which runs in the Kill to Bunhamon direction. The house is just around a left-hand turn at the foot of the hill. Some short time after the arrival of the plaintiff at her mother's house, her brother, Thomas, also arrived to stay the night with his mother.

3. Just after her arrival at the cottage, the plaintiff left the cottage to retrieve something from an outside shed. While she was in the front yard, the second named defendant, who also lived nearby, came across the road and asked the plaintiff as to whether any of her brothers were visiting her mother and, if so, whether they could assist her to move her car from the ditch on the far side of the road. It appeared that the second named defendant had driven down the hill in a car owned by the first named defendant, when she had lost control of the vehicle at the foot of the hill and had slid across the road in the direction of the wall and hedge, which was to the left of the chevron sign as shown in photograph 4. She had initially driven straight towards the wall, but on reaching the grass verge on the far side of the road, her car spun around and came to rest exactly parallel to the hedge. There was some confusion in the evidence as to whether she was able to open the driver's door, or had to exit the vehicle through another door. In any event, she managed to get out of the vehicle and come across the road to speak to the plaintiff. Prior to leaving her vehicle, she had telephoned her husband, who had walked up the road from the Bunmahon direction to come to her assistance.

4. The plaintiff went into her mother's house and summoned help from her brother, Thomas, and her daughter's boyfriend, Trevor. The three of them then walked across the road to give assistance to the second defendant and her husband. The plaintiff's daughter came out of the cottage, but remained on that side of the road.

5. The plaintiff's brother obtained a shovel from the boot of his car and an attempt was made to clear away the snow from in front of the wheels and the men then tried to push the car out of the ditch. While so doing, another car approached coming down the hill from the Kill direction. This car seemed to lose control somewhat as it came to the bend and it went into a zigzag motion crossing over onto the far carriageway, but it managed to right itself and continue on down the road in the Bunmahon direction.

6. When it was not possible to push the vehicle out of the ditch, the plaintiff suggested that she should return to the house for the purpose of phoning a neighbour who had a tractor, who might come to pull the car out of the ditch. However, before she could do this and a short time after the first car had gone into a speed wobble and then proceeded on, a vehicle driven by the third named defendant came down the hill from the same direction. As it entered the bend, the third defendant lost control of the vehicle and crossed over the far carriageway and went into the ditch, where it collided with the rear of the second defendant's vehicle, causing it to be shunted forward and to roll over the plaintiff's left ankle.

7. The plaintiff's brother, Thomas Kiely, stated that when he saw the first vehicle go past the front of his mother's house, he then saw the headlights of the third defendant's car coming down the hill. He stated that he saw the illumination of the headlights first and then saw the headlights themselves. He realised that the third defendant's car was beginning to skid and was coming towards him, so he jumped up onto the wall. The third defendant's car hit the second defendant's car and shunted it out of the ditch.

8. Mr. Trevor Cleary, who was the boyfriend of the plaintiff's daughter at the time and has since become the plaintiff's son-in-law, stated that there was a significant distance between the car that came down the hill first, which went into a wobble and then proceeded on, and the vehicle driven by the third defendant. He stated that the two vehicles were not going bumper to bumper.

9. The plaintiff's daughter, Ms. Catherine Cleary, who had remained on the far side of the road in the vicinity of her grandmother's cottage, stated that the third defendant was driving slowly. She only saw his vehicle when it was heading for the back of the second defendant's car in the ditch. She thought that there had been an interval of approximately one minute between the time that the first car, the Audi, went around the bend and the arrival of the third defendant's vehicle at the locus.

10. While there was some divergence between the witnesses as to whether the second defendant's vehicle was tight up against the wall and hedge, or whether it was possible for her to get out of the driver's door, all of the witnesses were agreed that the second defendant's car, which was a VW Polo, was well off the far carriageway and was mainly in the grass verge and ditch. The verge and ditch were estimated as being 1.5m in width. This would mean that approximately 0.5m of the second defendant's car would have been out on the far carriageway.

11. All the witnesses were agreed that the third defendant's vehicle was travelling slowly when it collided with the second defendant's vehicle. The third defendant himself estimated his speed at approximately 15mph as he came into the bend. The position of the

second defendant's vehicle in the ditch was indicated by the orange traffic cone as shown in photographs 3 and 4. The third defendant thought that the second defendant's vehicle may have been somewhat further on, as he thought that the impact occurred approximately opposite to the pedestrian gate leading to the plaintiff's mother's cottage as shown in photograph 9.

12. The width of the road at the point of impact was measured by Mr. Flahavan as being 10m in total across the two lanes, with the northbound lane towards Kill measuring 4.0m and the southbound lane going towards Bunmahon measuring 6.0m. The downhill gradient at the locus was measured at 7.0 degrees. If the second defendant's vehicle was in the position, as shown by the orange traffic cone in photographs 3 and 4, then the third defendant would have had a line of sight of the second defendant's vehicle from approximately 100m, as shown in photograph 1. A closer view taken 75m from the accident locus is shown in photograph 2. Photograph 7 shows the view looking back up the hill from the accident locus. The point which was approximately 100m up the hill, being the point from which the third defendant would have had sight of the second defendant's vehicle, both from the light given by his headlights and from the flashing lights on the second defendant's vehicle, would be approximately level to the third telegraph pole as shown in photograph 7.

13. Mr. Flahavan stated that there had been severe weather conditions in the days leading up to the day of the accident, the surface of the road was in a very dangerous condition, as it had been rendered particularly slippery due to compacted snow and ice. In these circumstances, there was a heavy onus on a vehicle driver to proceed with extreme caution, particularly having regard to the fact that he was travelling down a hill with a sharp left-hand bend at the foot of the hill. He stated that there were a number of factors which could cause a vehicle to go out of control and to skid across the road. The most likely causative factors were: travelling at an excessive speed for the weather conditions; turning the steering wheel too violently and/or breaking too harshly. He thought that it was probably a combination of these factors which had caused both the second defendant and the third defendant to lose control of their vehicles, when going around the bend and caused their vehicles to end up in the ditch. He thought that having regard to the condition of the locus and the weather conditions then prevailing, the third defendant was travelling too fast, even if going at the speed admitted by him. He stated that it was possible to descend the hill and go around the bend without losing complete control, as this had been done, albeit with some difficulty, by the Audi car which had preceded the third defendant's vehicle and was subsequently done by the ambulances which were called to the scene after the accident.

14. The engineer was asked as to whether the second defendant, or her husband, should have despatched someone to stand some distance further up the hill to warn oncoming traffic of the presence of the second defendant's vehicle in the ditch. Mr. Flahavan stated that he was of opinion that it would have been possible to send someone up to give such a warning to oncoming vehicles. However, in cross-examination, he conceded that to do so may have been putting such person into a position of danger, particularly if they did not have any high visibility jacket, or a strong torch to warn oncoming vehicles of their presence at the side of the road. However, in further cross-examination on behalf of the third named defendant, he accepted that the second defendant, or her husband, should have taken control of the situation. He thought that someone should have been put further up the hill to warn oncoming traffic of the presence of the second defendant's vehicle in the ditch.

15. Evidence was given on behalf of the first and second defendants by Sergeant Ian Sheehan, who had been called to attend the scene of the accident. He stated that the weather conditions at the time were particularly challenging. All the garda patrol cars in the area had been confined to their stations, except where they were called out to attend to a specific incident. He stated that he and a colleague drove to the top of the hill, but did not proceed down the hill, due to the fact that the road surface was covered in compacted snow and they came to the conclusion that it was too dangerous for them to drive down the hill. Accordingly, they parked their vehicle and proceeded down the hill on foot.

16. Sergeant Sheehan stated that he had prepared a sketch for the court, however, that sketch had been taken from another sketch which had been made by him, but which, for some reason, was no longer available. Accordingly, he could not stand over the accuracy of the sketch which he presented to the court.

17. The Sergeant was asked about whether a person should have been despatched to walk up the hill and stand in at the side of the road to warn oncoming vehicles of the presence of the second defendant's vehicle in the ditch. He stated that the road conditions on the hill were very treacherous. The road was like a slide. In these circumstances, he thought that placing a person at the side of the road on the hill, may have put them in a position of considerable risk to their own safety. This would be particularly the case if they did not have an adequate high visibility jacket, or a strong torch. Indeed, he stated that the road surface on the hill was so dangerous that even putting a pedestrian on the side of the road to warn motorists may not have prevented the skid which occurred at the bottom of the hill.

18. Evidence was given by the second named defendant, who recounted the circumstances of the accident in much the same way as had been recounted by the plaintiff and her witnesses. The second defendant stated that when she had initially come to rest in the ditch, she telephoned her husband and told him what had happened. She stated that she told him that she would leave the car lights on and the hazard lights on, so that he would see her car when he walked up the road. She stated that these lights were definitely on at the time of the impact with the third defendant's vehicle. She stated that she was not able to recall the exact time gap between when the Audi car had passed and the arrival of the third defendant at the locus.

19. The second defendant stated that she had been "crawling along" at the time that she had lost control of her vehicle and skidded across the road into the ditch. She stated that the third defendant was also crawling at the time that he impacted with her vehicle.

20. She disagreed with the suggestion that she, or her husband, should have sent someone up the hill to warn oncoming vehicles of her presence in the ditch. She stated that to have done so in the circumstances then prevailing, would have exposed that person to considerable danger.

21. In relation to the position of her vehicle, she stated that her car came to rest opposite the gate to the plaintiff's mother's cottage as shown in photograph 9. She stated that she could not see up the hill towards Kill from where her vehicle had come to rest.

22. Evidence was also given by Mr. Jack O'Reilly, consultant engineer. He visited the locus and had the benefit of the garda statements and the plaintiff's engineer's report. He noted that the plaintiff's engineer put the second defendant's vehicle approximately 12ft. to the left of the chevron sign, as shown in photograph 4. He put the position of the car at approximately the point which was marked by the orange traffic cone. Mr. O'Reilly agreed that if the second defendant's vehicle was at that position, then the third named defendant would have had a line of sight of the vehicle of close to 100m. If the lights and hazard lights were on in the second defendant's vehicle, these would have been visible to the third defendant from that distance. In order for another vehicle travelling in front of the third defendant to block his view, the other vehicle would have had to have been close in front of the third defendant.

23. Mr. O'Reilly also noted that the headlights on a vehicle will normally give illumination for a distance of 325 feet., which was close to 100m. Accordingly, the third defendant would have had illumination of the second defendant's vehicle in his own headlights from a distance of 100m and would also have had sight of the flashing lights on the second defendant's vehicle. He should also have seen people at the locus. There was no obstruction to the line of sight available to the third defendant as he approached the locus. In order to collide with the second defendant's vehicle, the third defendant had to leave his own carriageway, travel across the opposite carriageway and mount the ditch. There was no physical obstruction in the area, which would have forced him to do this. Given that the road surface was described as being "like glass" and the temperature at the time was very low, it was impossible to say what would have been a safe speed. However, Mr. O'Reilly thought that 15mph, which equated to 22 feet per second, was probably too fast, having regard to the condition of the road surface at the time.

24. Mr. O'Reilly pointed out that the roads in the area had been in a treacherous condition for the preceding two days. The third defendant had travelled to Waterford city and was on his way home. In these circumstances, he must have known that the roads were very dangerous. He was travelling at a particularly dangerous area, given that he was going down a hill, which had a sharp left turn at the bottom of the hill. In these circumstances, he thought that it was incumbent on a driver to drive very slowly, at perhaps 5mph at the relevant spot.

25. He was of opinion that the fact that the second defendant's vehicle was in the ditch had no causative effect on the third defendant going into the ditch as well. There had been an intervening car, which had managed to come down the hill and negotiate the bend, albeit with considerable difficulty. The third defendant had lost control of his vehicle in the bend, but that was not due to any fault on the part of the second defendant.

26. Mr. O'Reilly was of opinion that the second defendant did not do anything wrong after the accident. She remained at the scene. The Rules of the Road provide that she should have switched on her hazard lights and the second defendant maintained that she had done that.

27. In relation to the issue as to whether the second defendant should have sent someone up the road to act as a banksman to warn oncoming traffic, Mr. O'Reilly was of the view that having regard to the fact that it was dark at the time of the accident; the air temperature was very low; the road surface was particularly treacherous, due to compacted snow and ice on the surface and the fact that the other people at the scene were ill-equipped to carry out such a task, due to the fact that they did not have high visibility jackets or a torch or adequate footwear, in all these circumstances, he thought that it was somewhat impracticable and possibly dangerous to send someone up the road to act as a banksman. Without proper equipment and high visibility clothing, the person deputed to act as banksman would have been putting themselves in considerable danger.

28. Mr. O'Reilly was of the view that the degree of obstruction caused by the second defendant's vehicle on the highway was minimal. The evidence suggested that the second defendant's vehicle was tight in against the wall and hedge. He had measured the width of the grass margin at 5 feet, so the second defendant's vehicle, the VW Polo, would only have been encroaching on the far side of the road to a small extent. This would only have presented a slight obstruction to vehicles coming from the Bunmahon direction.

29. In cross-examination, it was put to the witness that the second defendant's vehicle may have been further around the bend, when it mounted the margin and entered the ditch. Mr. O'Reilly accepted that if her vehicle was in the region of 12 feet further around the bend, then the third defendant would not have had sight of the vehicle, when he was 50m back from the bend, as shown in photograph 3. It was put to the witness that if the Audi car had been just in front of the third defendant's car, this would have further impeded his view of the second defendant's vehicle. Mr. O'Reilly did not accept that the Audi was circa 30ft. ahead of the third defendant. The witnesses had said that there may have been a minute between the time that the Audi passed by them and the arrival of the third defendant at the scene. If that was correct, the Audi would not have blocked his line of sight. However, the witness agreed that both the second defendant and the third defendant, could be criticised for losing control of their cars at the bend. It was put to the witness that if the second defendant had not asked the plaintiff to help her, there would have been no personal injury caused to the plaintiff. Mr. O'Reilly did not think that the second defendant could anticipate that by getting help, those who came to help her would be injured. The second defendant's main concern was to remove her car from the ditch. Her car was virtually completely off the roadway. He did not think that the second defendant could be criticised for asking people to help her move her car. He accepted that it would have been dangerous to send someone up the road to act as a banksman to warn oncoming traffic. He accepted that some risk of danger existed in relation to the people helping the second defendant at the locus.

30. He had heard the evidence of the garda witness, to the effect that even with extreme caution it was difficult for a driver to negotiate this bend. However, he remained of the view that driving at 15mph was too fast in the prevailing weather conditions. The slower a driver went, the more control he would have of the vehicle. The second defendant had said that she was driving at approximately 10mph when she lost control of the vehicle, so that was probably too fast for the bend. While the road was certainly in a dangerous condition, the ambulances had managed to drive down the hill. The Audi car had also managed to do so. The road was not closed, so it was technically driveable.

31. Evidence was given by the third defendant. He stated that he was travelling at approximately 15mph as he came to the locus. There was a green Audi car in front of him. He had kept a distance from that vehicle of approximately 30m. He saw the Audi car doing a fishtail manoeuvre as he went around the bend and then he lost sight of it. As he came into the bend, he started to turn, but got no response. As he slid into the far lane on the carriageway, he saw the second defendant's vehicle. He could not say if there were any lights on in the Polo. His car went onto the grass margin and struck the back of the Polo. He stated that he had been driving for approximately 14 years. He had never come across such bad weather conditions.

32. In cross-examination, the third defendant stated that he had driven to Waterford city earlier that day and was on his return journey. The road conditions were treacherous. He knew the road in question. It had an incline leading down to a left-hand bend. He thought that travelling at 15mph coming into the bend was slow enough in the circumstances. He stated that he had control of his vehicle while going down the hill; he did not need to brake. He was in third or fourth gear. He was neither accelerating, nor braking. He did not pick up speed on the hill. He denied that he had a sightline of 100m to the Polo, as the Audi car, which was in front of him, obscured his view.

33. Under cross-examination by the plaintiff's counsel, he stated that he had been driving for 7 or 8 years at the time of the accident. It was put to him that he had not been exercising sufficient care at the time of the accident, so as to avoid the collision. He did not accept that he was driving without adequate care. He stated that it was the weather conditions and the condition of the road at the locus, that caused the accident. He stated that he thought that even with the utmost of care, one would still lose control of one's vehicle at the particular locus. He accepted that the Audi car had managed to negotiate the corner, without going into the ditch. He also accepted that there had been other people who had driven on the road that day, as there was impacted snow

on the road surface.

34. The third defendant stated that his skid had started, when he first saw the Polo, which was when he had gone over onto the far side of the road. He said that, ideally, if a person had been sent up the road, they could have warned him of the presence of the Polo at the side of the road at the foot of the hill. Even if a person had been placed at the chevron sign at the foot of the hill, as shown in photograph 6, he would have been alerted to the fact that there was some obstruction or some incident at the corner. He would have tried to bring his vehicle to a halt.

35. Finally, evidence was given by Ms. Sarah Whelan, a sister of the third defendant, who had been travelling as a front seat passenger in his car at the time of the accident. She stated that the weather conditions were treacherous. They had brought a dog to a vet in Waterford city. They had been travelling on main roads. She thought that the third defendant had been driving with great care. He was not going fast. In fact, he was crawling along and all the other road users were doing likewise. She stated that they knew the area well.

36. She stated that there had been a green Audi car in front of them, as they descended the hill. She saw it skidding as it rounded the bend. After their car had started skidding, they first saw the second defendant's car in the ditch. They continued sliding across the road and hit the rear of the second defendant's vehicle. It jumped forward.

37. In cross-examination, she stated that she had told the investigating garda that nobody had been placed at the side of the road to warn them of the previous accident. She accepted that perhaps, having regard to the weather conditions then prevailing, it would have been dangerous to put someone standing at the side of the road to warn oncoming traffic.

Legal Submissions

38. Counsel for the third defendant submitted that the engineer retained on behalf of the second defendant had conceded that it was foreseeable that if a person was sent up the road to act as a banksman to warn oncoming traffic, they would have been at risk of being injured by the oncoming traffic, having regard to the fact that it was a hill and the road surface thereon was particularly treacherous. Similarly, it was submitted that anyone helping to move the second defendant's vehicle was also in a position of danger. Counsel submitted that there was a continuum, which commenced with the second defendant losing control of her car and then in seeking help from the plaintiff and others at the locus. He conceded that if the second defendant was held negligent for allowing her car go into the ditch, then the court would probably find that the third defendant was also negligent in this regard.

39. However, counsel submitted that the court should not reach a conclusion that there was negligence on the part of both drivers. The evidence suggested that no matter how careful a driver had been, they were likely to lose control of the vehicle at the bend due to the extreme weather conditions. The evidence had shown that three cars had lost control at the bend. Two of them had ended up in the ditch and the third car, the Audi, had fishtailed, but managed to stay on the road and continue on its way. The garda witness had said that they had reached the view that an accident was inevitable, and for that reason they had not driven down the hill. In these circumstances, it was submitted that the court should find that there was no negligence on the part of any of the defendants.

40. In relation to the status of the plaintiff, counsel stated that it was clear that she had gone across the road to assist the second defendant and her husband to move the car out of the ditch. This was sufficient to render her a rescuer at law. Her position could be contrasted with that of her daughter, who remained on the far side of the road, beside her grandmother's cottage.

41. Counsel for the second defendant submitted that this accident was not an inevitable accident. While there may be little moral blame attaching to the third defendant, the simple fact was that he had lost control of his vehicle at the bend and he must bear legal responsibility for the consequences of his failure to control his vehicle.

42. Counsel conceded that the second defendant may have been negligent in failing to control her vehicle at the bend, and as a result it had gone into the ditch. However, this had not caused any injury to any of the parties. It was submitted that the second defendant did not act negligently after her car entered the ditch. On her evidence, she had put on the car lights, and in particular, activated the hazard lights. She had remained at the scene, as she was obliged to do. The plaintiff and members of her family had come to the assistance of the second defendant. What happened next was that the third defendant came down the hill, but was unable to take the corner and was caused to skid onto the far side of the road and onto the green verge, where he struck the second defendant's vehicle, which in turn struck the plaintiff. In these circumstances, the third defendant must bear responsibility for the plaintiff's injuries. There was no negligence on the part of the second defendant in relation to the plaintiff's injuries. She had not caused these injuries, as she had not been blocking the third defendant's carriageway.

43. Counsel submitted that the plaintiff was not in the legal position of a "rescuer" as she was not pushing the car out of the ditch. That was being done by the men. She was merely observing their efforts and had apparently suggested phoning a neighbour to see if he would come and give assistance with his tractor. In these circumstances, she was merely an observer rather than a rescuer in the legal sense.

44. In response, counsel for the plaintiff submitted that this was not a case of inevitable accident. While there were extreme weather conditions prevailing that day and for the preceding number of days, many vehicles had come down the hill during those days and had managed to negotiate the bend safely. However, due to the negligence of the second defendant in failing to control her vehicle adequately, she lost control of the vehicle at the bend and went into the ditch. The plaintiff had gone across the road, as requested by the second defendant, for the purpose of assisting with the removal of the vehicle from the ditch. In these circumstances, this was sufficient to put her in the category of a "rescuer" in the legal sense. The second defendant was responsible for putting the plaintiff in that position of danger.

45. It was further submitted that the second defendant was, in effect, in charge of the situation. She should have put a banksman further up the road to warn oncoming traffic of the presence of her vehicle in the ditch. The second defendant, or her husband, had been negligent for failing to take this precaution.

46. Counsel submitted that it was known for a fact that both the Audi and the ambulance had managed to descend the hill and negotiate the bend. The evidence of the plaintiff's engineer was that if a vehicle was driven too fast for the prevailing weather conditions or turned too sharply or braked too hard, this would cause the vehicle to go into a skid and travel across the far carriageway and onto the grass verge. Both the second defendant and the third defendant had lost control of their vehicles at the bend, causing their vehicles to go into a skid, cross the far carriageway and mount the grass verge. It was submitted that it was clear that they had not driven with sufficient care, having regard to the prevailing weather conditions, to allow them negotiate the bend on the correct side of their carriageway. The third defendant had conceded that he was travelling at approximately 15mph as he

came into the bend. The evidence of the plaintiff's engineer and of the engineer retained by the second defendant, was to the effect that this was too fast having regard to the contours of the road and the prevailing weather conditions.

47. It was submitted that the impact between the third defendant's vehicle and the second defendant's vehicle was caused by the negligence of the third defendant in failing to control his vehicle as he proceeded around the bend. Accordingly, it was submitted that he must bear the major portion of liability for the accident. However, counsel submitted that anyone who puts someone in a position of danger is responsible for them. In these circumstances, some liability should attach to the second defendant.

Conclusions on Liability

49. The first question which arises is whether the plaintiff was a "rescuer" in the legal sense, when she went across the road from her mother's cottage to assist the second defendant to get her car out of the ditch. The second defendant had driven down the hill, had lost control of her vehicle at the bend, and as a result, had travelled across the far carriageway and onto the grass verge and ditch. When she emerged from the vehicle, she saw the plaintiff in the yard of her mother's house which was across the road. The second defendant asked the plaintiff whether any of her brothers were in their mother's house and if so, whether they would be kind enough to help her get her car out of the ditch.

50. The plaintiff, having enlisted the help of her brother and her daughter's boyfriend, went with them across the road, where she stood at the side of the vehicle, while her brother tried, with the use of a shovel, to remove the snow from beneath the wheels of the vehicle. The plaintiff's brother, her daughter's boyfriend and the second defendant's husband, who had arrived on the scene, tried in vain to push the second defendant's vehicle out of the ditch. The plaintiff was standing to the side of the second defendant's vehicle and in the area of the front wing. It is common case that the third defendant's vehicle, on descending the hill, lost control at the bend and crashed into the rear of the second defendant's vehicle causing it to roll over the plaintiff's left ankle and foot. Just prior to the impact, the plaintiff had made the suggestion that she might go back indoors and phone a neighbour, who might have been able to assist with the use of his tractor. Was the plaintiff a "rescuer" in the legal sense in these circumstances?

51. It is recognised at common law that a person who goes to the assistance of another person who is injured or in a position of danger will be entitled to sue that other person if the rescuer is injured in the course of making the rescue attempt, as long as the initial situation in which the person being injured finds themselves, was caused by the negligence of that person. In the leading Irish textbook on the law of Tort, 'Law of Torts' 4th Ed. by McMahon & Binchy, the learned authors give the following general statement of principle at para. 20.91:-

> "It is easy to see why persons whose employment carries with it a legal or moral obligation to go to the assistance of others should be held entitled to sue; thus, the courts have had little difficulty in recognising the claim of police, doctors or even stationmasters, for example. But it is now clear that altruism unprompted by professional duty will suffice. Thus, a person who helps in rescue operations after a train wreck, car crash or fire, or who goes to the assistance of a friend in danger of drowning, may recover damages if injured in the attempt."

52. The circumstances of this case are very similar to those that arose in the case of *Tolley v. Carr* [2010] EWHC 2191. In that case, the plaintiff had been driving on a motorway in the midst of a severe hailstorm, when the vehicle in front of him spun out of control. The plaintiff managed to turn his vehicle onto the hard shoulder to avoid colliding with the other vehicle. That vehicle also came to rest on the hard shoulder. There was no impact between those vehicles. Having got out of his vehicle, the plaintiff noticed that a vehicle, driven by the first named defendant, had also spun and gone out of control in the fast lane on the far side of the motorway. The plaintiff and the driver of the other car, a Mr. Raywood, went across their side of the motorway and entered the central median. The plaintiff assisted the first defendant, a Mrs. Carr, from her vehicle. He brought her over to the median, where she confirmed that she had not been injured. The plaintiff, fearing that the presence of her vehicle in the fast lane of the motorway, would pose a serious risk to other road users on the motorway, determined to move the car from the motorway. To this end, he got into Mrs. Carr's vehicle and as he was about to drive off, a collision occurred between that vehicle and two other cars driven by the second and third named defendants. The plaintiff suffered serious injuries as a result of the accident.

53. In the plaintiff's action in negligence against the defendants, the defendants accepted primary liability, but sought to establish contributory negligence on the part of the plaintiff. In the course of his judgment, Hickinbottom J. set out the following general statements of principle at paras. 20 and 21 of his judgment:

> "20. Generally, members of the public are not under a duty to go to the aid of those who are in peril; whether that peril arises through their own fault, or through the fault of others, or indeed in circumstances in which no one maybe at fault at all. However, as I have said, in a phrase none the worse for having been borrowed from *Justice Cardozo in Wagner v. International Railway Company* [1921] 232 NY 167 at page 180, Mr Hunter accepted that 'danger invites rescue': or, in the words, of Morris LJ in *Baker .v T E Hopkins & Sons Ltd* [1959] 1WLR 966 at page 975, 'There is, happily, in all men of goodwill an urge to save those who are in peril'.
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> 21. The common law acknowledges the actions of such men, which often involve bravery as well as bare humanity, in two ways. First, it imposes upon those who create such a danger a duty of care owed to those who go to the aid of people put at risk thereby, whether those who act are members of the professional emergency services or members of the public. Second, although of course relatedly, the law is slow and cautious in finding negligence in those who imperil themselves to save persons from risks caused by the negligence of others. That is frankly and properly acknowledged by Mr Hunter, who expressly relied upon Morris LJ in *Baker v Hopkins* at page 977, when that learned judge indicated that it was possible for a rescuer to be negligent, but he did so in restrictive terms:-
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> > 'If a rescuer acts with a wanton disregard of his own safety it might be that in some circumstances it might be held that an injury to him was not the result of the negligence that caused the situation of danger'."

54. Hickinbottom J. went on to state that the law recognised that a rescuer may, in effecting or attempting to effect a reduction of risk to others, imperil his own life and limb, and the greater the risk to others that he is trying to avert, the greater the imperilment to his safety the law will accept as reasonable. He went on to state that the law would be slow to infer negligence on the part of the rescuer:-

> "23. The law appreciates that a rescuer may act – and may feel impelled to act – under the pressures of the moment, where delay may be considered vital to the safety of those he is considering protecting from risk. It is not appropriate to subject a rescuer's actions, or his subjective view of the risks involved to himself and/ or others, to fine scrutiny in the court room"

55. The learned judge went on to cite with approval the following *dictum* of Denning LJ in *Videan v. British Transport Commission* [1963] 2 QB 650 at 669 in relation to the issue of contributory negligence on the part of the rescuer:-

> "Whichever it is, so long as it is not wanton interference, if the rescuer is killed or injured in the attempt, he can recover damages from the one whose fault has been the cause of it."

56. In the *Tolley* case, the trail judge refused to make any finding of contributory negligence against the plaintiff. He did not go on to apportion liability between the defendants, as that had been agreed between them prior to the hearing.

57. The court has also had regard to the decision of the Supreme Court in *Philips v. Durgan* [1991] ILRM 321, where a husband and wife had been retained by the defendant to paint a number of rooms in the defendant's house, including his kitchen. The kitchen itself had been in very bad condition. In particular, there was a considerable amount of congealed grease on the surface of the cooker, on the walls and on the floor surface. While attempting to boil some water, a rag that the first plaintiff, Sadie Philips, had been using to clean the walls, came in contact with the naked flame on the cooker. As a result, the rag was set on fire; it was dropped by the first plaintiff and the fire quickly spread to engulf the kitchen. In an effort to save his wife, the second plaintiff came to her assistance and tried to put out the fire. Both plaintiffs were burnt badly.

58. When considering the issue of contributory negligence, Finlay C.J. considered that the position of the respective plaintiffs was different. While there was a finding of contributory negligence made against the wife for her failure to take adequate care when turning on the jets on the cooker, having regard to the amount of grease in the area generally, he found that different considerations applied to her husband, who had gone to her assistance. At p. 327 he stated as follows:-

> "The fact that the plaintiffs could see the condition of the kitchen as soon as they actually got into it is relevant on the issue of contributory negligence. Here it appears to me that the legal position of each of the plaintiffs is different. I do not consider that the plaintiff, Liam Phillips, could be found guilty of any negligence contributing to this accident. What he did after the fire had started was the natural and obvious thing to do, and could not be an act of contributory negligence, namely, an attempt to put out the fire and to save his wife."

59. In the course of a concurring judgment, Griffin J. also referred to dicta of Denning M.R. in *Videan v. British Transport Commission* at p. 385, which he thought succinctly stated the rescue principle at common law, in the following terms:-

> ". . . if a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others. The rescuer may act instinctively out of humanity or deliberately out of courage. But whichever it is, so long as it is not wanton interference, if the rescuer is killed or injured in the attempt, he can recover damages from the one whose fault has been the cause of it."

60. Applying those principles to the facts of this case, I am entirely satisfied that in responding to the plea for assistance made by the second defendant and in crossing the road with her brother and her daughter's boyfriend, for the purpose of assisting in the removal of the car from the ditch, the plaintiff was in the category of a "rescuer" in the legal sense. The fact that she was not actually pushing the car, as this was being done by the men, did not deprive her of the status of a rescuer. She was assisting in the overall operation by making the suggestion that perhaps further assistance could be obtained from a neighbour, who had the use of a tractor.

61. I do not accept the submission that the plaintiff was merely an "observer" at the time of the impact between the vehicles. She was part of the group of people who had gone to the assistance of the second defendant and her husband, with a view to assisting in removing the second defendant's car from the ditch. She was not acting with wanton disregard for her own safety. I am satisfied that she was indeed a rescuer in the legal sense and is entitled to the protections which the law provides for this category of persons.

62. There was some conflict as to how close the third defendant's car was to the Audi, which preceded him going around the bend. I do not find it necessary to resolve this conflict. Whether or not the third named defendant should have seen the second named defendant's car earlier, is not that relevant, because he should have controlled his car so as to avoid crossing the far carriageway and mounting the grass verge, whether or not he saw the second named defendant's car in the ditch.

63. The central question which arises, is who should bear responsibility for the plaintiff's injuries? I am satisfied that there was negligence on the part of both drivers, being the second defendant and the third defendant, in failing to keep adequate control of their respective vehicles, when descending the hill and attempting to negotiate the bend. I accept the evidence given by the two engineers that having regard to the extreme weather conditions pertaining at the time, it was probably a combination of excessive speed, excessive turning of the steering wheel and excessive braking, which caused both vehicles to go into a skid, cross over the far side of the carriageway and mount the grass verge. In particular I accept the evidence of the two engineers, that in travelling at 15 mph, the third named defendant was going too fast.

64. Counsel for the third named defendant argued that given the extreme weather conditions and the contours of the locus, being a bend at the foot of a hill, that even with the utmost care, it would not have been possible for the vehicles to have avoided skidding at the bottom of the hill and ending up in the ditch on the far side of the road. I do not think that that argument is well-founded for two reasons. Firstly, it was agreed by all parties that the Audi car, which had travelled down the hill prior to the third defendant doing so, had managed to negotiate the bend without losing complete control of the vehicle. While that car had wobbled or fishtailed, the driver had managed to keep the car on the road and proceed on in the Bunmahon direction. There was also uncontested evidence that the ambulance, which came to collect the plaintiff from her mother's house, had also travelled down the hill and negotiated the bend safely. In addition, I accept the evidence of the plaintiff and her brother that they had visited their mother in the previous two to three days during the bad weather. During that time, other vehicles had driven down the hill and negotiated the bend without mishap. The third defendant accepted that that was so, as there was evidence of compacted snow on the road surface of the hill, which had been caused by vehicular traffic. Thus, I do not accept that it was impossible for any driver, even when exercising the utmost skill and care, to avoid going into a skid and ending up in the ditch.

65. The second reason why I reject this submission is due to the fact that on this occasion, it is agreed by all parties that the road conditions were extremely treacherous. When a car owner elects to go out onto the roads in such bad weather conditions, they are making a choice and a decision that they can do so without causing a danger to other road users. The person could make a decision not to go out at all that day, or as the plaintiff's brother had done, they could plan their route so as to avoid descending steep hills.

66. On this occasion, the garda driver, on arriving at the top of the hill, made the decision that it was in fact too dangerous for him to

drive down the hill, and for this reason, he parked the patrol car and the two gardaí proceeded down the hill on foot. The second defendant and the third defendant did not do that. They both made the decision that they had sufficient skill in controlling their vehicle, that they could negotiate the hill and the bend at the foot of the hill in safety, without causing any danger to other road users. Once the third defendant elected to drive down the hill, he had to be satisfied that he would be able to do so without going into a skid and going onto the far side of the carriageway. Unfortunately, he either did not possess the necessary skill to do so, or did not exercise the necessary care to avoid going into a skid and as a result he crossed onto the far side of the road and onto the grass verge. Nobody forced either the second or the third defendant to drive down the hill. They both did so freely, and in such circumstances, they are liable if they could not control their vehicle due to the weather conditions, resulting in them proceeding onto the far side of the road and onto the grass verge.

67. I accept the evidence of the engineers that in all probability, the cause of the vehicles going into a skid was the negligence on the part of the respective drivers in either driving too fast, turning too sharply or braking too harshly, or a combination of all these factors, which caused their vehicles to go into a skid. I have already found that the third named defendant was going too fast. Accordingly, I find that it was due to the negligence of the second defendant that she ended up in the ditch in the first place, and it was due to the negligent driving on the part of the third defendant, that he also went into a skid and ended up in the ditch.

68. In considering the respective degrees of fault between the second and third defendants, the court must have regard to the fact that while the second defendant's car went into a skid and ended up in the ditch, no person was injured as a result of that event. The second defendant's car was not causing an obstruction, except for a fairly minor encroachment of approximately 0.5m onto the carriageway leading from the Bunmahon direction. She was not causing any obstruction or impediment to the third defendant, as long as he remained on his correct side of the road. In these circumstances, the vast proportion of liability must rest with the third defendant. I hold the second defendant as being 10% liable for the plaintiff's injuries and I find the third defendant 90% liable for those injuries. Even without allowing for the fairly wide margin of error that must be allowed when considering the conduct of a rescuer, I do not think that the plaintiff acted in any way negligently in relation to her own safety. She certainly did not act with wanton disregard for her safety. I decline to make any finding of contributory negligence against her.

69. The third named defendant made a separate allegation of negligence against the second named defendant, that she should have sent someone up the hill, to act as a banksman and warn oncoming motorists, including the third named defendant, of the presence of her car in the ditch on the far side of the road at the bend, I do not think that this allegation is sustainable. Firstly, I accept the evidence of Sergeant Sheehan that without protective footwear, a high visibility jacket and a strong torch and having regard to the treacherous surface of the road at the hill, such a person would have been in a position of considerable danger.

70. Secondly, insofar as the second named defendant's car was causing an obstruction at all, it was a minor one on the far side of the road. It only caused a minor obstruction to traffic coming from the Bunmahon direction. If her car had stopped just across the road, but on her correct side of the road, for example at the gate to the cottage, then a banksman may have been essential to warn the third defendant of the obstruction that he would meet an his side of the road, when he went around the bend. In this case he did not need any warning of the presence of the second named defendant's car in the ditch on the far side of the road, as he should not have been over on that side of the road in any case. For these reasons, I do not find that the second named defendant acted negligently in failing to send someone up the hill to warm oncoming traffic of her vehicle's presence in the ditch on the far side of the road.

71. Before leaving the issue of liability, it should be noted that in an amendment to the defence filed by the first and second defendants, it was alleged at para. 5 that in June 2013, the third named defendant's insurers, Setanta Insurance Company Ltd., which was a limited liability company then in liquidation, had agreed to provide a full indemnity to the first and second named defendants in respect of the plaintiff's claim. It was pleaded that the first and second named defendants would rely upon the full meaning and effect of that agreement at the trial of the action. However, no evidence was called on behalf of the first or second defendant in relation to any such agreement. Accordingly, I do not make any finding in this regard.

The Plaintiff's Injuries

72. The medical evidence in this case was agreed. A number of medical reports were handed in from the plaintiff's treating doctors and from the consultant orthopaedic surgeon retained on behalf of the defendants. It is not necessary to set out in *extenso*, these medical reports. A brief summary of her injuries, her treatment to date and her current symptoms will suffice.

73. The plaintiff suffered a tri malleolar fracture dislocation to her left ankle. The fracture site was severely comminuted. There was extensive damage to the overlying skin. On admission to the A&E Department of Waterford Regional Hospital, it was seen that she had a severely deformed fracture dislocation. A back slab was applied and under sedation her ankle was reduced. Her skin at the fracture site was extensively blistered, both medially and laterally, with blood filled haemorrhagic blisters. These were washed out and irrigated. The plaintiff's ankle had to be reduced three times and closed on 30th November, 2010, 2nd December, 2010 and 7th December, 2010. Operative treatment in the form of an open reduction and internal fixation was eventually carried out on 10th December, 2010.

74. The plaintiff's ankle was kept in a cast for six weeks. Thereafter, the plaintiff attended at the fracture clinic for follow up. She was gradually weaned off crutches over the following months. On 31st March, 2011, she was referred for intensive physiotherapy. In the ORIF operation, a fibular plate and two cancellus screws were inserted to fix the medial malleolus. While her fracture appeared to have gone on to heal satisfactorily, the ankle was showing signs of early arthritis. The plaintiff had symptoms of stiffness and reduced range of movement. She walked with a limp. When reviewed on 12th May, 2011, Mr. Kapoor, consultant orthopaedic surgeon, suspected that she was going into early arthritic stages in her ankle. He advised therapy and mobilisation of the ankle and the use of boots for support. He thought that she had a high risk of developing post traumatic arthritis.

75. The metal in the plaintiff's ankle was removed under general anaesthetic on 8th July, 2011. She attended for change of dressings and treatment in relation to a skin rash in the area of the fracture site in the weeks after that operation. She was reviewed by Mr. Kapoor in September 2011. At that time, she complained of pain and stiffness in her ankle. She was unable to walk long distances. She walked with a limp. She had difficulty coming down stairs. She was taking pain medication in the form of Brufen or Difene intermittently. Radiological review indicated that the fracture had healed satisfactorily, although there was evidence of reduction on the medial malleolar joint space. There were established early post traumatic osteoarthritic changes in the area.

76. At that time Mr. Kapoor was of opinion that the plaintiff's post traumatic arthritis was likely to progress further. He felt that if her symptoms did worsen, she might need an ankle fusion operation.

77. Due to ongoing severe pain and disability in relation to her ankle, the plaintiff was referred to Mr. Alan Laing, consultant orthopaedic surgeon in Aut Even Hospital, Kilkenny, who has a specialist interest in foot and ankle reconstruction. Due to the

progression of her post traumatic osteoarthritis, the plaintiff underwent a tibiotalar ankle fusion operation, which was performed on 7th October, 2012. This operation progressed to satisfactory union, however, the plaintiff continued to report significant symptoms. Of note, she reported pain and stiffness in the left ankle. She had been diagnosed with rheumatoid arthritis in November 2013 and was taking medication for that. When reviewed by Mr. Laing in April 2016, he noted that it was three and a half years post-ankle fusion and she reported residual pain and swelling, particularly after long periods of standing. She described her pain preoperatively as 9 out of 10. While it had improved, she reported occasions where the pain continued to be 6 out of 10. She localised the pain to the lateral hindfoot, radiating proximally to the perineal muscles.

78. Her predominant symptom was stiffness and limitation of function. She reported difficulty walking on uneven ground. She was able to walk approximately half a mile daily, but was unable to negotiate steep hills and uneven surfaces. She had difficulty kneeling in church. She also had difficulty gardening and had not returned to that activity. She occasionally used a crutch.

79. On examination, she had a plantigrade foot with healed surgical incisions anteriorly, laterally and medially. She had altered sensation over the dorsal aspect of the foot and ankle. She had limited movement at the subtalar and mid foot level. There was no movement at the ankle joint itself and there was no reaction on stressing it.

80. Mr. Laing noted that the plaintiff had sustained a complex open fracture of her left ankle, which initially required reconstructive surgery and subsequently ankle fusion for tibiotalar arthritis. While this had improved her pain profile, she still reported symptoms related to stiffness of the ankle fusion. There was also some stiffness in the subtalar and distal articulations. She was limited in terms of her day to day activities, gardening, walking and she was confined to custom footwear. She wore a rocker option at all times and will require further fittings in the future. Her stiffness was secondary to her ankle fusion.

81. In terms of a prognosis, Mr. Laing noted that the plaintiff was theoretically at risk of secondary arthritis in the distal articulations following her tibiotalar fusion. The statistics suggested that over a period of fifteen to twenty years following an ankle fusion, there would be degeneration in the distal articulations and the plaintiff may require further intervention.

82. Finally, the plaintiff was reviewed by her G.P., Dr. Finbar O'Leary in February 2017. He noted that the plaintiff reported that the injury and subsequent disability had impacted on many aspects of her life. Her basic mobility was dependant on wearing a specialised boot at all times. She reported being unable to walk due to pain in her ankle if the boot was not on. Simply walking to the bathroom during the night, would require her putting on the boot. Prior to the accident, she stated that she had walked six miles daily. She was now only able to walk approximately 0.25 miles due to pain and swelling of the ankle. She was only able to mobilise on the flat, due to the inflexibility of the ankle. She could only traverse slopes when walking sideways. She had a similar problem with stairs.

83. Regarding activities of daily living, she reported being unable to crouch or squat due to pain and ankle inflexibility. She could not reach low shelves or drawers as a result. She was unable to tolerate her full weight on the left ankle. She was unable to ascend a stool, or a ladder as a result. She had previously been adept at household maintenance and decorating. She could not work in the garden as she had done prior to the accident, due to ankle discomfort when digging. She had been unable to use a bath since the accident. She had a shower installed after the initial injury, due to her mobility restrictions and this disability remained. Prior to the injury she was very involved in the care of her grandchildren. Since the injury, she reported being unable to lift her grandchildren or get involved in many of their activities. This added to the emotional impact of the injury.

84. The plaintiff stated that she felt embarrassed by her infirmity. She walked with a limp. She was very aware of the effect it has had on her gait and appearance. She has significant scarring over her ankle and knee following the injury and subsequent operations. She still required regular pain killing medication for ankle pain. She reported applying ice packs daily to reduce the swelling in the area. She reported waking from sleep at night due to pain in her ankle.

85. In her evidence, the plaintiff came across as a straightforward and honest witness. She gave her evidence in a clear and direct manner. I am satisfied that she has not in any way tried to exaggerate her present symptoms or disability.

86. The plaintiff explained how she experienced severe pain in the weeks and months following the accident. This pain continued and eventually she had had to undergo the ankle fusion operation in October 2012. In that operation some bone had been taken from a donor site beneath her left knee. As a result of the various operations, she had been left with a scar below her knee and also three scars to either side of her ankle and at the front of her ankle. The court has viewed the scars and is of the view that they represent a significant cosmetic blemish for the plaintiff. A reasonably good representation of these scars is contained in the photographs appended to the first medical report from Mr. Michael O'Riordan dated 23rd March, 2013.

87. In relation to her present condition, the plaintiff stated that she still gets pain on a daily basis, especially at night. Some nights are worse than others. She requires pillows to be placed beneath her ankle. She still requires pain killers on a daily basis. The main effect of her injury is that it has left her substantially disabled. Prior to the accident she was a very keen walker, walking up to eight-ten miles per day. She would walk her grandchildren to school and back. She would also walk to her local village for messages. She also enjoyed walking with her daughter and with neighbours. She also used to walk over to visit her mother on a frequent basis. The plaintiff does not drive a car. She stated that since the accident she has only been able to walk approximately 0.25 miles on flat ground. She is not able to walk on uneven ground. She also has difficulty ascending and descending flights of stairs. She stated that walking was a central feature of her life prior to the accident and she misses it greatly.

88. The plaintiff stated that she was unable to walk on uneven ground, such as fields and as a result is unable to go to watch her grandchildren playing sports. She is not able to walk on soft ground, such as on a beach. She is unable to walk barefoot.

89. The plaintiff stated that due to the condition of her ankle, she was not able to play on the floor with her grandchildren, who are aged ten, two of them are aged five years and there is a three year old. She can only play board games with them. She misses not being able to play fully with them. In terms of her hobbies, she stated that prior to the accident she had done a lot of gardening, such as cutting the grass and tidying flower beds. Now she was unable to do much gardening, due to the fact that she could not kneel or crouch. She was unable to do certain D.I.Y. jobs, such as wallpapering, nor was she able to wash the floors on her hands and knees. She stated that her daughters and sons help her out in this regard. On occasion her mood gets low due to the fact that she has lost her independence.

90. The plaintiff stated that due to her injury, she is obliged to go to a specialist shop in Naas, which provides handmade shoes for her. These are very expensive, costing circa €900. She misses the fact that she is unable to wear nice shoes, when going out to family events and celebrations. She is obliged to wear boots and trousers. For her daughter's wedding, the only shoes that she could wear to go with her outfit were sandals.

91. The plaintiff stated that she was concerned by the prognosis given by Mr. Laing, that there was a risk of her developing secondary arthritis following the fusion operation in the next fifteen to twenty years, which may require further operative treatment. While this was a worry for her, she stated that she would deal with it when it arises. She would get on with her life in the meantime.

92. The plaintiff's account of her present level of disability, was corroborated by the evidence of her daughter, Catherine Cleary. During her evidence, Ms. Cleary became distressed when recounting the extent to which her mother had become disabled since the accident. I am satisfied that this was a genuine expression of her emotion, rather than any effort on her part to exaggerate her mother's symptoms, or level of disability. She stated that her mother was now quite disabled. She requires help to get into and out of the car. When they would drive her over to her grandmother's house, the plaintiff would need pillows under her ankle. She is not able to do any cooking or cleaning around the house.

93. Ms. Cleary stated that prior to the accident she used to go for walks with her mother, when she returned from work in the evening and also at weekends. They also went out socialising to family functions. Now the plaintiff does not go out much. She is very conscious of her foot and footwear. She has lost a lot of confidence. She stated that while the plaintiff did attend her wedding, she was not able to dance at the wedding, which she had loved to do before the accident. At present she was only able to manage walking over to her grandmother's house, or she could walk to her house, but the plaintiff was very scared of falling. She could only walk a maximum of 0.5 miles. They would go shopping in the shopping centre, where all the shops were close by.

94. Finally, the court was furnished with two medical reports from Mr. Michael O'Riordan, consultant orthopaedic surgeon. He largely confirmed the findings as had been made by Mr. Kapoor and Mr. Laing. When he saw her on 21st March, 2013, some two years and four months post accident, he anticipated that a lot of the plaintiff's symptoms, in particular the pain, would diminish as time progressed. The restriction of motion was permanent and the difficulty that she experienced e.g. climbing stairs, walking on rough ground, kneeling and squatting, would all be restricted on a permanent basis. He was satisfied that the plaintiff would have permanent long term restriction in the amount of activity that she could do as a result of the injury.

95. Mr. O'Riordan reviewed the plaintiff on 6th January, 2014, some three years and two months post accident. Her complaints at that time were the same as had been set out in her medical reports and in her evidence. He noted that she remained disabled in relation to her hobbies of D.I.Y. and gardening. She took painkillers in the form of Ixpram and Difene. Her sleep was often disturbed at night because of discomfort in her ankle. He was of opinion that the plaintiff had symptoms that were consistent with her injury and subsequent fusion. The only improvement one was likely to see, would be that the pain levels may diminish over the following twelve to eighteen months. However, the restriction that she described would persist indefinitely. In particular, her footwear was going to be a life long problem and she would need to renew her shoes much more frequently than the average person, as wear on the shoes would be significant.

Conclusions on Quantum

96. This 55 year old lady suffered a comminuted tri-malleolar fracture dislocation to her left ankle. This has required extensive operative treatment, culminating in a fusion of the ankle joint in October 2012.

97. As indicated earlier in the judgment, I accept that the plaintiff has given a fair and accurate account of both her injuries and her level of disability since the time of the accident, down to the present. She is a lady who never drove a car. Walking was not only her sole means of getting about, but was also a significant part of her recreational life. I accept that prior to the accident she walked upwards of six to eight miles a day. Living in a rural area, it was important for her to get out and about walking, leaving her grandchildren to school, visiting her daughter, going to the local village and visiting her mother. All of that is now gone as a result of the injury sustained in the accident. I accept that due to the ankle fusion operation, she is only able to walk a maximum of 0.5 miles per day. This represents a very significant disability for the plaintiff.

98. I accept the evidence given by the plaintiff that she continues to experience pain in her ankle. She is required to take painkilling medication on a frequent basis. Her sleep at night is disturbed due to pain. She is also disabled in the activities that she can do. She is unable to do gardening or D.I.Y. jobs, as she had done prior to the accident. She is unable to kneel or crouch and as a result is unable to play with her young grandchildren on the floor. She is not able to walk on uneven ground, such as on a field and as such, is unable to go to any matches in which her grandchildren are playing. I accept that she is unable to walk on soft ground, such as on a beach.

99. The plaintiff is also restricted in the footwear that she can wear. She is obliged to wear special handmade shoes, which are designed as boots, so as to give support to her ankle. I accept that she is unable to wear high heeled shoes, or other fashionable footwear. This is a significant loss to her, especially when attending family celebrations, or other such functions. It was particularly distressing for her that at her daughter's wedding, she was obliged to wear sandals. She was not able to dance at the wedding, which was an activity that she enjoyed prior to the accident.

100. In arriving at the quantum of damages applicable in this case, I have also had regard to the scaring to the ankle. There is also a scar at the donor site beneath the left knee. While the plaintiff did not make much of the cosmetic aspect of her injuries, which was unsurprising given the level of her physical injury and disability, I am nevertheless satisfied that the scars constitute a significant cosmetic blemish for this lady.

101. The various doctors are agreed that the plaintiff's level of disability will be permanent. Indeed, the question of further surgical intervention, which is a source of considerable worry to the plaintiff, is a factor to be taken into account when considering her future condition.

102. In arriving at the assessment of the quantum of damages in this case, the court has had regard to the provisions contained in the Book of Quantum (2nd Ed.), published in 2016. However, there does not appear to be any provision made therein for fractures of the severity of the fractures in this case, which have necessitated a subsequent ankle fusion operation. The court has, however, had regard to the decision of Ryan J. (as he then was) in *Meehan v. BKNS Curtain Walling Systems Limited* [2012] IEHC 441. In that case, the plaintiff was 48 years of age. He suffered a communited facture of the left calcaneus. He also damaged the subtaler joint quite severely. The judge noted that he had had considerable trouble with the injury and was likely to do so in the future. His surgeon was of the view that there was a 50/50 chance that he would have to have the ankle fused within the following ten years, or thereafter. The judge held that in the meantime, the plaintiff would have pain, discomfort and limitation of movement in the ankle joint. Medical opinion was that the plaintiff would be unfit to return to work as a glazier and would not be fit for any heavy manual work, or work that involved walking on rough or uneven surfaces. Ryan J. assessed damages at full value at €75,000 for past pain and suffering and €60,000 in respect of future pain and suffering. However, in the circumstances of that case, the judge dismissed the action pursuant to s. 26 of the Civil Liability and Courts Act 2004.

103. The injuries in this case are more severe than in the Meehan case because the plaintiff has undergone the fusion operation. Taking all of these matters into account, I award the plaintiff the sum of €90,000 for pain and suffering to date, together with the sum of €70,000 for pain and suffering into the future. To these sums will be added the sum of €29,000 for agreed special damages. This gives an overall award in favour of the plaintiff of €189,000.