

THE HIGH COURT

[2016 No. 1846 P.]

BETWEEN

GERALDINE MCHUGH

PLAINTIFF

AND

THE OFFICE OF THE REVENUE COMMISSIONERS,

THE MINISTER FOR SOCIAL PROTECTION,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

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

1. The plaintiff is a retired public servant and resides at Knocknahun in the County of Sligo. The plaintiff obtained PIAB authorisation on 5th day of February, 2016 reference numbers EL0309201575904.

2. This claim arises out of an incident on 1st September, 2014, when in the course of her employment as a clerical officer with the first named defendants at the defendant's property situate at or near Cranmore in the town and county of Sligo, the plaintiff was caused to trip and fall causing serious injuries including a significant injury to the left thumb and wrist, and her claim is that this arose by virtue of a dangerous and defective condition of the courtyard area at the said property and by virtue of what she says were dangerous and defective condition of the concrete pavers, as a result of which the plaintiff contends that she suffered severe personal injuries, loss, damage, inconvenience and expense.

3. A full defence is filed and contributory negligence is pleaded.

The Plaintiff's Evidence

4. By way of background to the case the plaintiff explained that she has three adult children, one male and two female, that both of the female adults suffer from a particular illness which involves both physical and mental difficulties and that on the occasion of the accident, she had been approved leave to attend a medical appointment at 3pm with one of her daughters at Markievicz House in Sligo and that it was necessary for her to be present for part of that appointment and for an update at the end of same. The plaintiff described how any break in routine causes extreme distress and difficulty for her daughters and she was anxious to meet the appointment.

5. Photograph 3 of the plaintiff's photographs shows by means of an arrow, the raised paving area where she believed she fell. The plaintiff confirmed that she always wore flat shoes and that she was wearing sandals on the occasion of this accident. She described the pavers as having no grouting between the tiles on this surface but that there was grass and dirt between them and there was a certain movement as a result. The plaintiff referred to an email sent to all staff by Mr. Swinburne, an employee of the defendants, in August, 2016 referring to the proposal to begin a complete renovation of the courtyard which she received. The plaintiff confirmed that the surface of the courtyard is completely concreted at this point. The email was dated 24th August, 2016.

6. The plaintiff's left foot was caught on a raised tile and she described how it pitched her forward and that she fell forward and suffered an injury to her left hand as well as grazing to her knees and toes and that her thumb and her left arm were also paining her following the fall.

7. This witness described how she had telephoned her daughter who had exited the building where she lived in secure accommodation and that her daughter was not able to re-enter as she didn't have the passwords and she herself was under pressure as she felt she couldn't tell her daughter that she had fallen because her daughter would then panic so she drove to the appointment, took her daughter back to her accommodation, and went back to work herself to finish a particular project, knowing that she would have to take time off work as a result of the said injuries.

8. The next morning, she had a briefing meeting and she had realised during the night that she was going to be off work and she had to hand over part of her work project to colleagues. At this point then one of the managers in her employment brought her to the accident and emergency department of Sligo General Hospital. She was diagnosed with a fracture to her left thumb and a splint was applied. This splint was replaced the following Thursday and a glove type support was applied to wrist sprain which she had also suffered. This witness described her left thumb which turns upwards and that she has suffered a loss of power and also a deformity of the nail of the thumb. The plaintiff described how she was given back injections for pain in the back and that she was given three of these injections in the area of pain in 2017. The plaintiff was treated by Mr. Regan Consultant Hand Surgeon regarding her injury to her thumb and she said injections were effective for the pain but that there was a loss of power or weakness. The plaintiff confirmed that she had an MRI scan and that there was herniation in L4/L5 of the disc.

9. The plaintiff finds difficulty with zips, with shoe laces and generally with her grip in the right hand, opening jars or milk cartons or the like. The plaintiff described to the court how she is obliged to use the lower part of her left thumb and that the nail is brittle and breaks at the nail bed and that this is sore and reddens when she is using the altered grip.

10. Describing the impact of this accident on her life, the plaintiff explained how her two daughters come out of residential care now for one night every fortnight whereas prior to that she had taken them every other weekend for two nights and that the reason for this is she is not able to help them shower or bathe and that the two daughters are aged 31 and 36 and they are physically big women and that this caused a lot of upset to them and to her as they do not have normal reasoning. The plaintiff described tenderness to the lower lumbar spine and limitation of movement.

11. Mr. Satish Kutty Consultant Orthopaedic Surgeon confirmed the plaintiff's description of her difficulties with such tasks as dressing, buttoning, putting on shoes due to the pain and lack of flexibility in her back and the lack of strength in her left thumb. The plaintiff has been having difficulty in picking up objects from the ground and would often use a picker and has difficulty getting in and

out of her car. This medical witness confirmed what the plaintiff said in her evidence that she has effectively a misshapen thumb with the nail brittle and growing very little and that she finds it difficult to use the thumb for gripping objects. The plaintiff indicated that this doctor considered her difficulty with her thumb to be chronic and long term.

12. The plaintiff described how she takes Difene and Nurofen and that while Difene is somewhat stronger in terms of treating her pain that she has stomach difficulties with it. Two weeks after the fall the plaintiff told the court that she also injured her right hand at home in a completely separate incident and that in February, 2017 she fractured her left wrist which was treated with the application of a back slab and a sling. The plaintiff was obliged to take early retirement in 2016 and received a disability allowance in respect of a finding that she was 30% disabled as a result of this injury.

13. The plaintiff believed that in winter the pain gets worse and that it was difficult for her to continue working because she was in front of a screen all day.

14. The plaintiff was out of work until February, 2015 but did not suffer any loss of earnings at that point. The plaintiff described how she is no longer able to enjoy the amenities of life in that she had taken part in a number of drama productions with a local drama group and that she misses that activity.

15. The plaintiff agreed under cross-examination that she had chronic back pain problems prior to this accident and her medical records show that she had wear and tear on the back but she said that this was not an everyday problem at that stage. She did have difficulties with her right hip but she says now that she has difficulties with her left side but agrees that she did have hip problems prior to the accident in October, 2012. The plaintiff gave evidence under cross-examination that her normal retirement date would have been January, 2019 but that she retired in September, 2016. She denied episodes of dizziness but she said that it can happen if a person is lying down and stands up quickly.

16. Looking at photograph 4 the plaintiff agreed that she thought she fell there where the arrow was pointing but that in fact she had fallen to the right of the photograph. The plaintiff said that a person in a red coat offered to get her a cup of tea and tried to help her. She said that her glasses flew from her face and her mobile telephone flew from her pocket and that her toes were bleeding and the skin was scratched and grazed. She said she was in shock after this accident and accepts that she fell to the right of the red line and she said that slabs from time to time would move and that she believed that it could have been somewhat raised.

17. It was put to the plaintiff that in fact there was no defect where she fell and that she claimed not to have been light headed on the day but does accept that she was on the telephone when she fell and that she was checking to see whether the phone was working. It was put to her that her right sandal came off her foot after she tried to get up and that her sandals could have been loose. This witness confirmed that she had had an x-ray of the lumbar spine for pain and had had a referral in relation to her hip difficulties on 30th September, 2016 and that the second accident occurred a few months after this accident and involved the wrist on her other hand. This witness clarified that she had a disablement benefit from 18th September, 2015 which was made a permanent benefit on 27th January, 2016 and that this was on foot of a determination that she had 30% disability and that as a result of this that payment amounted to a direct payment of €32.85 but that her salary was also increased by €32.85.

18. The plaintiff confirmed that she is seeking loss of earnings from the 30th September, 2016 to what would have been her normal retirement date on 4th January, 2019.

Dr. Mark Jordan, engineer, called on behalf of the plaintiff

19. Dr. Mark Jordan engineer gave evidence that he undertook a joint inspection with Mr. Tom O'Brien engineer and that that occurred on 15th July, 2015 and that there was a representative from the State Claims Agency present also. His evidence was that the plaintiff was doing her best on the day of the inspection to locate the actual place in which she tripped and that her appointment for which she left her place of work on the date of the accident had been a sanctioned one. This witness said that he always asks at such an inspection for the CCTV and his evidence was that Mr. O'Brien engineer told him that he himself had not been able to view the CCTV footage. Dr. Jordan made the point that this resolves differences if one could view the CCTV at the appropriate time and he said that this inspection lasted 30 minutes.

20. This witness described the locus as having concrete slabs which were less than two feet square and that they were to the British standards laid on earth with sloped drainage sub-layers which were supposed to set into mortar or a grit sand and that they were edge to edge slabbing with grouting absent. He said there ought not be more than two millimetres of an edge on a paver and that a rise above two millimetres is unacceptable and he said that the slab where the locus was identified was raised on three out of four edges but proud on the other edge and he said the fourth edge was below the level of the other three which were between 2 and 8.5 millimetres. This witness noted that there were several new slabs in the courtyard and he said such video evidence as he was shown was going at twice the normal speed and it was clipped before he could view the lady in the red coat who came to the assistance of the plaintiff and he said that the plaintiff's left foot snubbed the slabbing and that her right sandal came off, that it was a tripping accident where she was pitched forward and he described it as a classic trip. This witness then added that the email from Mr. Swinburne indicated that there was a major refurbishment being undertaken of the courtyard area.

21. This witness said that by way of explanation concerning the right sandal coming off that Velcro straps would be loosened by a sudden fall forward.

22. Under cross-examination this witness indicated that the plaintiff fell close to where she had told him she fell, that there was ongoing movement in the area and that the slabbing had a fluid sublayer that the sub-flow causes fluidity.

23. This witness agreed that the slabs were reasonably level and that he was surprised to find such a trip happening there near the locus. This witness contended that the footage was evidence that the plaintiff had tripped and that the footage showed a classic trip and it indicated to him that it was a classic trip at a raised edge and this witness said that in May, 2018, the plaintiff saw the footage and got a screen played back of the footage which was clipped but it did show that she tripped within one metre of where she said she tripped. This witness said that the quality of the footage was clear and that she had tripped between two slabs at the time and on the date in question. He could see no other reason why she tripped there and it was clear she had tripped on an edge. It was not a slip in his opinion and that a person trips if there is something to trip on and it was put to this witness that to the right of where she fell there was no lip at all but his opinion was that slabs such as these go up and down.

24. This witness said that it was reasonably foreseeable and that there was an immediate risk. Under re-examination this witness confirmed that the email of 24th August, 2016 from Mr. Benny Swinburne referred to renovation and to a new surface at the locus.

25. Mr. Jordan engineer for the plaintiff was recalled having viewed digital footage which was made available overnight to him on the

5th November, 2018. He said that a range of techniques had been used and that everything depended on the software interpretation that the images were slightly enlarged and darkened and that there were 50 frames per second and 16 cameras and that there were three shots of each scene but that there was a lot of detail missing and that that was a huge amount of data for each camera. He said that the background remained the same and was only updated after every ten frames. He said that the joints on the paving are not visible through all the frames, there can be interpellation between two frames and that it is the luck of the draw which frame it records. He said the sole of the left foot is visible in the camera of the actual tripping incident and that the left foot came off the ground and she hit her left side and rolled over onto her left side and that she was on all four limbs then and that can be seen on the frames but he said he couldn't say what the precise defect was but that her trip was consistent with all defects although the footage doesn't show any defect because of definition. He said he concentrated on the where the plaintiff said she fell and he argued that had one been shown the appropriate footage as requested at the time it would have assisted greatly. He cannot say what the defect was. He said the footage clearly shows her tripping and her left foot stopping suddenly but that the resolution of the recording is not clear. It doesn't show her fainting or falling over her sandals or her skirt.

26. Dr. M.F. Jordan engineer produced two reports, the first dated 17th July, 2015 and the second dated 8th May, 2018 by way of addendum to the main report. His opinion as borne out at para. 9 of his report and subsequent paragraphs, is that there is a significant trip hazard at the location shown in the photographs. He describes the pavement as surfaced in red tinted concrete paving slabs but that these are laid in an irregular manner and that there are 4.5 slabs laid across the landing at the fall locus. His initial report states that the particular slab which caught the plaintiff's toe was raised on three sides relative to the adjacent slabs and that there is a maximum edge projection of about 8.5 mm directly in line with the plaintiff's direction of walking. His opinion was that either the slab has become raised, has tilted, or the adjacent slabs have subsided. He noted that there was no available grouting space remaining at the meeting point of these particular slabs and he said that there has to be enough room for proper jointing to allow and accommodate expansion and contraction in the paving materials, otherwise unevenness arises in the paving slabs, as at this location. He also makes the point that lack of grouting space which is usually 10mm gap also eliminates the opportunity to properly seal the joint and surface water then enters the space and this ultimately results in uneven slabs and he found the grouting joints irregular throughout with some replacement pavers noted.

27. He noted that there were no visible warning signs on the date of the inspection and that this was an access route to and from the place of work which ought to be safe and free from hazards but contains a tripping hazard. In the opinion of this engineer, it is foreseeable that this edge projection – tripping hazard could cause an employee to trip and suffer injuries and that the hazard could easily be removed and the accident could have easily been prevented in the circumstances. This witness indicated that the edge projection was difficult to discern due to the growth of moss on the joints throughout the concourse as seen in photograph 2.

28. He makes the point that the CCTV camera covering the entire yard footage was unavailable at the date of the inspection.

29. In his second report he points that the defence engineer had the opportunity of reviewing footage available to him at the time of the compiling his original report and that although the plaintiff's engineer sought a copy of the footage almost three years ago when it was available to the defence, as of 4th May, 2018 this documentation in proper form was still awaited and this witness took the view that detail of that could be reviewed when available but that the plaintiff did suffer a fall at the location identified and at the time and on the date identified. He was not entirely in agreement with the defence engineer on the actual locus. He said the form of recording is relevant and whether it is interleaved recording or continuous and what the framing rate of the recording might be is also relevant. He said that there are other aspects of digital recording and compression methods which must also be accounted for. The plaintiff's fall and position appeared to be much further on than that to which Mr. O'Brien engineer contends. Both engineers accept that the plaintiff could be understandably mistaken as to the exact locus.

30. The strong point made by the plaintiff's engineer is that her left toe snagged consistent with a raised lip of a concrete paver.

Plaintiff's Medical Consultant's Evidence

31. The first medical report was prepared by Mr Satish Kutty, Consultant Orthopaedic Surgeon at Sligo General Hospital, following an examination of the plaintiff on the 27th April, 2016. Mr Kutty summarised the plaintiff's injuries as follows: (i) a fracture of the distal phalanx of the left thumb; (ii) soft tissue injury to the left wrist; (iii) soft tissue injury to the back. The plaintiff received treatment in the form of seven sessions of physiotherapy for her back and an injection over the dorsum of her left wrist. According to Dr Damian Tiernan, the plaintiff was taking the following medications once per day: Nuseals Aspirin 75mg, Aceryeal 5mg/5mg, Dalmane 30mg, Eltroxin 50mcg, Eltroxin 25mcg, and Lipitor 40mg.

32. Turning to the plaintiff's symptoms, Mr Kutty noted that she complained of soreness, pain and stiffness in her back and a lack of flexibility since the accident. She stated that she had great difficulty while turning in and getting out of bed. She also stated that she had difficulty in showering, and that bending forwards to reach her feet or the lower half of her body was painful. She said that she had difficulty in dressing, buttoning, put on her shoes, etc. due to pain and lack of flexibility in her back and due to the lack of strength in her left thumb. She has had difficulty in picking up objects from the ground and would often use a picker, and has had difficulty when getting in and out of her car. She has also had a mis-shapen thumb, noting that the nail was brittle and growing very little. This has led to difficulty in looking after her two daughters, who have special needs. She stated that her social activities have been restricted due to her back. She has had difficulty with steps and footpaths and has lost confidence since the fall. Finally, the plaintiff stated that she was considering and took early retirement in September 2016 (as opposed to December 2016) as she felt she would be unable to cope through another winter with her symptoms.

33. Mr Kutty Consultant, noted that the distal phalanx of the plaintiff's left thumb showed an extension deformity of the distal phalanx. The nail on this this thumb looked hypoplastic compared to the right thumb. Active flexion of the interphalangeal joint of the left thumb was 90°. The pinch grip was not possible due to the extension deformity of the distal phalanx of the left thumb. The left wrist showed minor tenderness overlying the second extensor compartment distal to the Lister's Tubercle. Mr Kutty listed the range of movements in her left wrist as follows: dorsiflexion 80°, palmar flexion 80°, radial deviation 20°, ulna deviation 30°, and pronation and supination at full range. The lumbar spine showed tenderness in the lower lumbar area. On forward flexion, she was only able to bring her hands up to her knees. Straight leg raising was 60° bilaterally but with no neurological changes in the lower limbs. Sacroiliac stress tests were negative. Mr Kutty stated that since the accident the plaintiff has had the following X-rays and scans: (i) X-rays of the left thumb revealing a fracture of the distal phalanx of the left thumb; (ii) X-rays of the left wrist, which did not reveal any bony injury; and (iii) MRI scans of the lumbar spine revealing multilevel disc degeneration and a disc prolapse at the L4/5 level to the right.

34. Mr Kutty was of the opinion that the fracture of the distal phalanx of the plaintiff's left thumb had healed, albeit with an extension deformity which is permanent. The lack of full function due to the injury would also be permanent. She initially rated the pain in her lower back on a visual analogue scale at ten out of ten and after the programme of physiotherapy, she rated the pain six out of ten. Mr Kutty stated that she has underlying changes of wear and tear in her back, and it is likely that the symptoms in her back may remain over the long term. Mr Kutty stated that the symptoms in her left wrist have improved since the injection.

35. Mr Kutty's ultimate conclusion in the first medical report was that the plaintiff suffered multiple soft tissue injuries and a bony injury to her left thumb. She continues to suffer from residual pain in her back, which is likely to remain in the long term as she has underlying changes of wear and tear in the lumbar spine. However, he did not anticipate any long term complications to develop from the injuries sustained to her back and left wrist.

36. The second medical report was prepared by Mr Satish Kutty, Consultant Orthopaedic Surgeon at Sligo General Hospital, following an examination of the plaintiff on the 23rd October, 2017. The plaintiff received treatment subsequent to the date of the first medical report. She attended the Pain Management Service in Sligo General Hospital and had seen Dr Therese O'Connor, under whose care she received multiple trigger point injections to her back on the 13th February, 2017. The plaintiff stated that she was due a further visit to the Pain Management Service, and that she had continued with the physiotherapy programme for her back. She was under the care of Mr Kutty for an undisplaced fracture of her left distal radius with dorsal comminution and a fracture of the ulnar styloid on 29th January, 2017.

37. At the time of the second medical report, the plaintiff stated that she continued to have difficulty with her lower back in spite of the treatment she received from the Pain Management Service. She stated that while she obtained some relief from the trigger point injections administered by Dr Therese O'Connor, this relief was short-lived (lasting for around three weeks). The plaintiff stated that while she always had some back pain on and off for several years, it was never as stiff then as it had been since the accident. If she was sitting or standing for more than five to eight minutes, her back pain increased. She needed cushions to support her back while sitting. The plaintiff had difficulty in bending her back while getting in or out of a car or out of her bed. She stated that she had to take Difene for back pain and that she had been taking one or two tablets as a day as and when she was in pain. Due to the symptoms, she retired early in September 2016.

38. Regarding the plaintiff's left thumb, she stated that due to the deformity of the distal phalanx she has had difficulty using her thumb for day-to-day activities, demonstrating to Mr Kutty how she was unable to grip things and needed to use her fingers to grip objects. She was unable to use her left thumb in a pinch grip, and stated that the nail on her left thumb was brittle and tended to break off easily. She stated that she had very little power in her left thumb and it would become sore at times. The skin over the inside of her left thumb was much thinner and would turn red and sore at times while she carried out day-to-day activities. The fact that she did not have full use of her left thumb meant that she was finding it difficult to look after her daughters, which was causing stress. The deformity and lack of power in her left thumb was leading to difficulty in dressing, such as buttoning or zipping garments. She stated that there was altered growth to the nail on her left thumb and that it was cosmetically unsightly. The plaintiff suffered the further injury in January 2017, and during the period of injury she had pain and limitations of movement but had since regained a fair range of movement in the wrist.

39. Mr Kutty observed tenderness in the lower lumbar area of the plaintiff's spine. On attempted forward flexion, she was only able to bring her hands up to her mid-thighs. Straight leg raising was 90° bilaterally, and there was some pain in her back while carrying out this movement on her right side. Mr Kutty noted that there were no obvious neurological changes in the lower limbs, and her reflexes were preserved. Her left thumb showed an extension deformity of the distal phalanx and the nail looked slightly hypoplastic as compared with the right thumb. Active flexion of the interphalangeal joint of her left thumb was 90°, and pinch grip with the left thumb was not possible.

40. The plaintiff did not have any further X-rays or scans of her back or left thumb after the first medical report. The only radiographs available were of her left wrist after the injury she suffered on the 29th January 2017, which are detailed above. X-rays carried out on the 10th March, 2017 showed a healed fracture of the left distal radius.

41. Mr Kutty reiterated his conclusion in the first medical report that the plaintiff sustained a fracture of the distal phalanx of the left thumb which had healed, albeit with an extension deformity. This deformity is permanent, as is the lack of full function of the left thumb. Since the first medical report, the plaintiff continued to suffer from pain in her lower back along with considerable stiffness. She rated her pain on a visual analogue scale around six out of ten, even with painkilling medication. Mr Kutty added that the plaintiff has signs of wear and tear on her MRI from 2014.

42. Mr Kutty concluded in the second medical report that the plaintiff was likely to remain with residual symptoms of pain and stiffness in her lower back in the long term, but he did not anticipate any long term complications to develop from the soft tissue injury sustained to her back.

43. Under cross-examination this witness agreed previous pains warranting x-rays of the back and hips and he felt that he had minor degenerative changes, he felt that an injury such as this can worsen symptoms of degeneration and that she hadn't mentioned these back in 2012 but that wear and tear issues had become aggravated and that there was no bony injury, purely soft tissue injury. Regarding his second report straight leg raising was 90% and there was mild to moderate changes but that as a clerical worker she needed the use of both hands and was not fit to work because of the thumb and the structure of the left hand that one needs both hands on a keyboard so that it was very important the effect of the function on the thumb caused by this accident. He agreed that dizziness can cause a person to fall. This witness felt that a person can have a trapped nerve but that is different to a loss of function and deformity and he said momentary dizziness could happen if a person had pooling of blood but here what we had was healed left wrist fracture and that the thumb disability was a relatively rare result from such an injury.

Evidence of Mr. Tom O'Brien, Engineer, on behalf of the defendant

44. The engineer's report was prepared by Tom O'Brien, consulting engineer of 11 Abbey Street, Roscommon Town County Roscommon. The report was accompanied by photographs of the site as well as of the plaintiff's footwear. The ground was described as slabs of synthetic concrete measuring 595mm x 595mm. The slabs were laid in patterns of rows and there was a lean mix of concrete grout in between the slabs, some of which was overgrown with moss or other vegetation. The engineer wrote that he had been informed that the surface had been occasionally cleaned and that there was an ongoing programme of maintenance and monitoring. Also, localised repairs were said to have been carried out from time to time. He maintained, however, that the main surface has remained largely unchanged.

45. Mr. O'Brien was critical of Dr. Jordan's evidence reports in that he had identified a lip, starting 440mm from the left-hand edge of the walkway, extending 1040mm from the left-hand edge of the walkway. The report identified that the lip is 8mm high at the 440mm point and gradually reduced to 2mm at the 1040mm point. Mr. O'Brien felt that there were no significant lips identified along the three slabs that flank the lip. He also found no other significant lips closer to the stairs. The report did not identify any other significant lips on the plaintiff's approach to the scene. No obvious defects were identified at the slab that lines the lip in question and no evidence of disturbance was found. The engineer attributes the lip to the differential settlement of the slab.

46. The report concludes from the plaintiff's testimony, (during the joint inspection of the site), that the plaintiff had been empty-

handed apart from a shoulder bag on her right shoulder. She told the engineer that she tripped with her left foot over a lip between two paving slabs and fell headlong to the ground. She then said that she was helped to her feet by an unidentified person and continued to meet her daughter who has special needs. She then sought medical attention later.

47. The report then turned to the CCTV footage. During the inspection, Mr. O'Brien inquired about CCTV and subsequently reviewed the footage. The camera recording the incident was wall-mounted and looked at the scene from behind the plaintiff. He identified that the plaintiff is holding a mobile phone to her left ear as she walked up the stairs and onto the concrete slabs. He also contended that the plaintiff was walking at a "brisk pace". He identified the plaintiff walking "along the centre of the walkway, slightly to the left of the centre but not at all close to the left-handed edge". He described the plaintiff taking three steps from the top of the landing of the stairs, subsequently tripping and falling. The report reads that the plaintiff got up "immediately" continuing to hold her phone to her ear. The engineer further recognises that the plaintiff had not been helped up as indicated to them during the inspection.

48. The report continued, setting out the typical stride lengths for males and females. The typical male stride length is between 750mm and 900mm, whereas the typical female stride length is between 600mm and 750mm long. Three female paces would therefore average at around 1.8m - 2.25m. Thus, the report reasons that the plaintiff must have tripped approximately three rows of concrete slabs from the top landing, rather than the distance of 3.5m the plaintiff allegedly identified. Thus, Mr. O'Brien concludes that it is evident from the CCTV footage, that the plaintiff tripped and fell approximately 1.5m closer to the top landing than the plaintiff thought and fell closer to the centre of the walkway.

49. The report asserts that, after having reviewed the footage, the engineer went back to the site of the accident to assess the site where he thought the accident took place. He could not find any significant lips at that location.

50. The report concludes that the plaintiff gave an account of the accident that was "reasonably accurate in some respects but significantly inaccurate in others". The plaintiff had indicated the correct direction of travel and the manner in which she fell. However, the report asserts that the plaintiff was incorrect with regard to the precise location of the accident, that being 1.5m further on and 600mm to the left of the location identified. Had the accident taken place at the location identified by the plaintiff, the lip at the interface between the two slabs in question was only in the order of 2mm or 3mm high. This was not enough to constitute an "identifiable and recognisable trip hazard".

51. The engineer admits that the details of the CCTV footage are "a bit blurred". However, he maintains that the approximate position of the site of the accident may still be ascertained.

52. The engineer emphasised that the footage established that the plaintiff tripped and fell forward on the ground. However, the report asserts that the absence of a significant lip or trip hazard at the accident locus raised the question as to what caused the plaintiff to lose footing. The report indicates that it was evident from the footage that the plaintiff's sandals came off. It is reasoned that this offered a plausible explanation for the fall. The report theorises that if the plaintiff's sandal were loose or if the plaintiff had walked in "some unorthodox way", the sandal might have come off which may have caused the plaintiff's fall. The engineer concludes that on the balance of probabilities, this is the most likely explanation for the fall. No one was present at the site that could otherwise indicate the plaintiff's accident.

53. The report then reiterates that the plaintiff had alleged that she was empty-handed apart from a shoulder bag on her right shoulder. The report said that the plaintiff was incorrect at that statement. The footage "clearly" identified that the plaintiff had "something resembling a mobile phone" in her left hand, held to her left ear when she fell. The report reasons that this might be a source of distraction for the plaintiff, that might also account for the plaintiff's fall, either in full or in part. The report contended that one might easily be distracted when one is talking on the phone in this fashion as one moves along, particular if one is "in a hurry to keep an appointment". The report further argued that, "as a matter of probability", the fact that the plaintiff continued walking whilst on the phone was a "significant contributory factor" in the cause the accident.

54. The report observed that the plaintiff did not use the handrail and this this gives an indication as to the plaintiff's "safety consciousness" as she approached the scene. The report deduced that the plaintiff was occupied either by the phone call, the appointment or by some other matter.

55. The report contends that the plaintiff was obliged to take all reasonable care for her own safety. Such duty of care extended to concentrating upon the task in hand, keeping a proper lookout and wearing appropriate footwear, appropriately tied or latched or held in place. The engineer suggests that the plaintiff did not absolve her duty of care in that regard, as her sandal came off during the incident and that the plaintiff was "the author of her own misfortune". The report also reiterates that the CCTV footage does not corroborate the plaintiff's alleged account that someone helped her up after the accident.

Summary Actuarial Report on Behalf of the Plaintiff

56. As a result of the injuries sustained on the 1st of September, the plaintiff has not worked. She retired on the 1st of October 2016 and was paid a gratuity of €61,884 and her pension was calculated to be €20,628 gross per annum. If she had worked to age 65 she would have been entitled to a gratuity of €63,695 on retirement and a pension of €21,232 gross per annum. Mr. Ger Counihan, Pension Administration, Department of Public Expenditure and Reform, has indicated that had the plaintiff remained in employment she would have earned €42,463 gross for each year left in employment. She receives Disablement Benefit of approximately €33 per week from the Department of Social Protection.

57. The report is based on four assumptions. Firstly, that the plaintiff will suffer a loss of income for a period (Irish Life Mortality Table No. 16 applicable to female lives applied). Thirdly, that the plaintiff will be able to invest the capital value of her financial loss at an average rate of interest of 1.5% per annum in excess of the future annual rate of increase that would have occurred in her income had she not been injured. The report cites that this rate is the anticipated future real rate of investment return. Fourthly, the report assumes that the plaintiff will have the normal tax free allowance of a single person paying class "D" P.R.S.I.

58. The loss of future earnings was capitalised by multiplying the future net loss per week by the appropriate multiplier. If the plaintiff had remained in employment, she would have earned €42,463 gross per annum, or approximately €601 per week. If she cannot obtain gainful employment in the future due to her injury, her net loss of future earnings would be €601 per week.

59. The report presented calculations as to the plaintiff's loss of pension. It noted that the plaintiff's annual pension entitlement of €21,232 has been reduced to €20,628 gross per annum. This constituted a loss of approximately €604 gross per year or €9 net per week. The present capital value of this loss from the age of 65 for the remainder of life is €9 x 924 weeks = €8,316.

60. The report further purports that the plaintiff's retirement benefits would appear to be non-deductible under s. 2 Civil Liability

(Amendment) Act 1964 as benefits that have arisen as a direct result of her injuries.

61. The calculations agreed were amended and the following findings noted. The plaintiff sustained a potential net earnings loss from the 1st September, 2016 to the 6th November, 2018 of €65,534, future loss of earnings to the age 65 of €4,848, loss of pension capitalised at €8,505 and a loss of gratuity of €4,100. This gives a total loss of €82,987 less €7,124 Disability Benefit.

Findings of fact

62. This Court notes the difficulties encountered in particular those encountered by the plaintiff's engineer, Dr. Jordan, in attempting to compile reports in relation to this accident. During the trial Dr. Jordan was afforded an opportunity overnight to examine the original digital recording. It is clear from his evidence that the form of recording of CCTV material is relevant as to whether it is interleaved recording or continuous recording and what the framing rate of the recording might be is also relevant. There are other aspects of digital recording and compression methods which must be accounted for. Both engineers accept that the plaintiff could be understandably mistaken as to the exact locus. Neither of them agree as to the exact locus and Dr. Jordan contends that her fall and her position appear to be must further on that which Mr. O'Brien, defendant's engineer contends. Dr. Jordan found that the footage showed a classic trip at a raised edge and I accept his evidence that when in May, 2018 when it was viewed, the footage was clipped but it did show that the plaintiff tripped within one metre of where she said she tripped. She tripped between two slabs at the time and on the date in question. I accept his evidence when he distinguishes a trip as this plaintiff had from a slipping accident and he makes the point that a person trips if there is something to trip on. In the opinion of Dr. Jordan the particular type of slabs at the site of this accident are ones which move up and down. He noted the original digital footage which was made available to him overnight on 5th November, 2018. In his opinion a range of techniques had been used and everything depended on the software interpretation, that the images were slightly enlarged and darkened and that there were 50 frames per second and sixteen cameras and that there were three shots of each scene but that there was a lot of detail missing and that that was a huge amount of data for each camera. He said that the background remained the same and was only updated after every ten frames. He said that the joints on the paving were not visible through all the frames that there can be interpellation between two frames and that it is the luck of the draw which frame it records. He noted the sole of the left foot visible in the camera of the actual tripping incident and that the left foot came off the ground and he describes the plaintiff as hitting her left side and rolling over to her left side and that she was on all four limbs then and can be seen on the frames but he said he wouldn't say what the precise defect was but that her trip was consistent with all defects although the footage doesn't show any defects because of definition. Dr. Jordan in his second report dated 8th May, 2018 gave his opinion at para. 9 where he said that there is a significant trip hazard at the location shown in the photographs. He described red tinted concrete slabs laid in an irregular manner and that there are 4.5mm slabs laid across the landing at the fall locus. In his opinion either the slab has become raised, has tilted or the adjacent slabs have subsided and he noted no available grouting space remaining at the meeting point of these particulars slabs and that there has to be enough room for proper jointing to allow and accommodate expansion and contraction in the paving materials, otherwise unevenness arises in the paving slabs as at this location. This engineer noted that the lack of grouting space which is usually a 10mm gap also eliminates the opportunity to properly seal the joint and surface water then enters the space and this ultimately results in uneven slabs and he found the grouting joints irregular throughout with some replacement pavers noted. In his opinion it is foreseeable that the edge projection – tripping hazard could cause an employee to trip and suffer injuries and that the hazard could easily be removed and the accident could have easily been prevented in the circumstances. He describes the edge projection as difficult to discern due to the growth of moss on the joints throughout the concourse as seen in photograph 2. He noted that the CCTV camera covering the entire yard footage was unavailable at the date of inspection.

63. This Court accepts his evidence on these points and also on the point that the defence engineer had the opportunity of reviewing footage available to him at the time of compiling his original report and that the plaintiff's engineer sought a copy of the footage almost three years ago when it was available to the defence but that as of 4th May, 2018 this documentation in proper form was still awaited. He found that the plaintiff did suffer a fall at the location identified and at the time and on the date identified. This engineer's finding was that the plaintiff's left toe snagged consistent with a raised lip of a concrete paver.

64. On the balance of probabilities this Court finds that in accepting the above evidence, and the plaintiff's evidence although she is incorrect about the exact locus of her fall, she did fall on slabs which had a moveable quality and were not even as set out above, that the plaintiff's left foot snubbed the slabbing, her right sandal came off and she was then pitched forward in a classic tripping accident.

65. The court accepts Dr. Jordan's evidence that the right sandal would be loosened and would come off through a sudden fall forward. The court notes that the sandals were flat and secured with Velcro straps.

66. The court accepts as significant his opinion that while he found it surprising that such a trip happened, given that the slabs were reasonable level and that there was ongoing movement in the area and that the slabbing had a fluid sub-layer and that the sub-flow causes fluidity.

67. It is also worthy of note and the court accepts his findings that he noted several new slabs in the courtyard on inspection and noted the video evidence to be going at twice the normal speed and also noted that it was clipped before he could view the lady in the red coat whom the plaintiff says came to her assistance.

68. Notwithstanding that there is a dispute about the exact slab on which the plaintiff tripped and although the plaintiff may not have correctly identified the particular slab, this witness was very sure that the plaintiff tripped on this paving of particular relevance is his finding that the joints on the paving were not visible through all the frames he viewed and his opinion is that the footage does not show any defect because of definition. His findings were of a significant trip hazard at the location of the photographs. His finding on viewing the original digital footage was that a range of techniques had been used and that the images were slightly enlarged and darkened and that there were 50 frames per second, sixteen cameras that a lot of detail was missing. On the balance of probabilities, the plaintiff's toe snagged consistent with a raised lip of a concrete paver. This was reasonably foreseeable in all the circumstances.

69. The court notes that the defendant's engineer accepts overgrown moss or other vegetation as being present between the slabs. The court does not accept his suggestion that the plaintiff's very flat sandals tied with Velcro contributed to the accident. While the defendant's engineer Mr. O'Brien notes that the plaintiff had a mobile phone and/or a shoulder bag and/or was walking at a brisk pace it seems to this Court that these are not crucial as to whether she was going to trip or not. The type of paving is relevant and the type of video evidence is relevant. The court finds that the accident happened as described by the plaintiff, even though she may not have pinpointed the exact slab and is explained her engineer.

70. This Court therefore finds that the plaintiff was exposed to a risk of damage or injury of which the defendants were clearly aware. They also failed to take any or any adequate measures to ensure that the place where the plaintiff had access to and egress from her work station, was safe. The defendants are in breach of the Safety Health and Welfare at Work Act, 2005 and s. 8 thereof, in

particular the design provision and maintenance of the locus of the accident ought to have been kept in a condition which was safe and without risk to health.

71. The plaintiff suffered significant injuries of loss and damage over a four-year period and has a permanent difficulty with her thumb and it is distinctly mis-shapen. She has suffered a loss of the amenities of life as described by herself in her evidence to the court which will continue.

Liability

72. The defendants are liable for the said accident which befell the plaintiff in that same was reasonable foreseeable and on the balance of probabilities occurred as described by the plaintiff and explained by her engineer. The particular hazard lay in the failure to have a design provision and maintenance of a safe means of access to and egress from the plaintiff's place of work and also the failure to ensure the design provision and maintenance of the particular paving concerning was in a condition which was safe and without risk to health. The court noted the letter sent by Mr. Swinburne indicating to the plaintiff that there would be a change in the particular paving which indicates an intention to correct the situation going forward.

73. The particular paving caused allowed and are permitted the said area to remain in an unsafe condition, thereby causing a source of danger and/or a trap to persons lawfully present thereon and in particular the plaintiff. The defendants caused, allowed or permitted slabs to be raised relative to adjacent slabs thereby creating a trip hazard. By nature of the type of slabbing used there was movement in the said slabs which caused the said accident.

Quantum

74. The plaintiff suffered a fracture of the distal phalanx of the left thumb, a soft tissue injury to the left wrist and a soft tissue injury to the back. This Court notes in assessing damages that the plaintiff suffered a fracture to her thumb on her non dominant hand which left her with a severely deformed thumb which sits pointing upwards at the nail portion of the thumb and she is unable to use same for a great range of tasks. In addition, there is a nail deformity. Four years on following physiotherapy, and injection the plaintiff has suffered and continues to suffer as a result of this accident. The plaintiff was obliged to give up her employment somewhat earlier than she would otherwise liked, due to this injury. The medical evidence was to the effect that the extension deformity of the thumb is permanent. The lack of function due to the injury is also permanent. The plaintiff agreed that she had had low back pain in the past. The plaintiff has suffered and continues to suffer from a lack of power in the left thumb leading to difficulties in dressing and tasks such as buttoning or zipping garments. The court accepts the findings of Mr. Kutty Orthopaedic Surgeon and accepts that he does not anticipate any long term complications to develop from the soft tissue injury sustained to her back. He found that she was not fit to work because as a clerical worker she needed the use of both hands in particular on a keyboard and he said it was very important to note the effect of the function on the thumb caused by this accident. In all the circumstances the court has noted the contents of the book of quantum, the court considers that the appropriate level of damages in particular in the light of the unusual presentation of the thumb permanently turned upwards with an unsightly nail deformity that the measure of damages appropriate taking into account the loss of the amenities of life as described by the plaintiff and her consultant Orthopaedic Surgeon, to be €80,000 for general damages, divided as €65,000 by way of general damages for pain and suffering to date and €15,000 damages for pain and suffering into the future.

75. In relation to loss of earnings and the net loss from 1st September, 2016 to the 6th November, 2018 the sum of €65,534 is awarded. Future loss of earnings to age 65 of €4,848 is awarded, loss of pension capitalised at €8,505 and a loss of gratuity of €4,100 gives a total loss of €82,987 less €7,123 given a total sum of €75,864 for the aforesaid categories. Additional special damages in the sum of €3,000 are agreed. The total award therefore is in the sum of €158,864.