THE HIGH COURT

[2018 No. 3852 P.]

BETWEEN

WARREN BALDWIN

PLAINTIFF

AND

NATIONAL MUSEUM OF IRELAND

DEFENDANT

JUDGMENT of Ms. Justice O'Hanlon delivered on the 26th day of July, 2019

1. The plaintiff is a retired man having been born on 30th March, 1949 who resides at 9 Iluka Street, Revesby, New South Wales, Australia NSW 2212.

2. The defendant is a museum building with its registered office at Kildare Street, Dublin 2 and sued in its capacity as the owner, occupier and or controller of the said premises at all material times.

3. The plaintiff issued a personal injuries summons dated 1st day of May, 2018 having first received PIAB authorisation pursuant to s. 14 of the Personal Injuries Assessment Board Acts, 2003 and 2007, to bring the proceedings herein within a period of six months from the 4th day of April, 2018, authorisation no. PL0222201875969.

4. The plaintiff claimed to have been descending the main balcony stairway in the defendant's premises, on or about the 5th day of June, 2016, and that as he reached the second or third last stair, his foot was caused to slip from underneath him, whereby he sustained severed personal injuries loss, damage, inconvenience and expense and this is claim based on the alleged negligence, breach of duty, including breach of statutory duty, nuisance and/or misfeasance of the defendant's their servants and/or agents or their employees in and about the design, construction , upkeep, maintenance, management, care, supervision and inspection and control of the said premises and in particular of the main balcony stairway thereto.

5. A full defence is filed on the 21st November, 2018 and Particulars of contributory negligence were pleaded in the defence filed.

Evidence of Warren Baldwin

6. Mr. Baldwin gave evidence confirming his date of birth as the 30th March, 1949 and that he lived near Sydney Airport, Sydney, Australia. His evidence was that on 5th June, 2016 he was on holidays with his wife Tanya and they flew to Dublin from Rome, Italy during a bank holiday weekend. They were going to another level when the incident occurred.

7. With reference to photograph 1 the plaintiff identified the locus as being exactly where they arrow on the photograph was and he said he put his foot right on the edge of the step and that his wife was in front. He thought that he probably put his foot on the bottom step and that his wife was two to three steps ahead of him and that he put his foot on the nosing of the stairs. He said that he went on his right side and he hit the step and he was crawling onto the landing and that he thought that he had broken his leg, that the top of the thigh between the knee and the hip part was injured.

8. Ms. Deirdre Horgan from the defendant's premises came to his assistance with some security people and he was in great pain at the time. She was very helpful and called an ambulance for him. He spent all night on a trolley in hospital for over fifteen hours and he was administered painkilling medication. He was seen by a doctor at 2am the following morning and was given more pain relief and then was seen by an Orthopaedic Surgeon at 8 o'clock the following morning. The plaintiff was diagnosed with a retraction of the rectus ligamentous muscle, consistent with a partial tear of the right quadriceps tendon and was diagnosed with a quadriceps rupture and the MRI, on his return home to New South Wales, confirmed a full thickness tear of more than 50% of the (right knee) quadriceps tendon. The plaintiff was advised that surgical repair was required and that that operation could not be left longer than two weeks. He was fitted with a brace and crutches and he couldn't move his leg himself nor could he put any weight on it.

9. The plaintiff obtained a flight from Dublin to Dubai and then onto Sydney and was treated with aspirin and Panadol until he was seen by his own general practitioner in Sydney. Dr. Kirsh ensured that an MRI scan was conducted the same day. The plaintiff noted that he had a heart bypass in 2014 and he had to wait until the Thursday in the week of his return before he could be operated on, to allow blood thinning medication to leave his system sufficiently to enable such an operation. The plaintiff has undergone physiotherapy but found same expensive and found that he was not able to stretch his leg as far as he used to. His evidence was that prior to the accident he had a seven handicap in golf and that handicap is now eleven. He contends that he cannot swing his golf club as well as he used to and he doesn't play as much as before.

10. The plaintiff's main complaint about this accident was that there was nothing to hold onto going down the steps. He denies missing the last step but he remembers rolling down the last couple of steps. He confirmed that he was wearing Adidas trainers at the time of the accident. Under cross-examination the plaintiff confirmed that he fell on the third last step as far as he could. This witness denied that he had indicated at the time that he had missed the step. He believed that he fell from the third step down rolling down to the landing. He said he was rolled down the second and first step specifically.

11. The plaintiff confirmed his signature on the PIAB claim form dated 14th February, 2018 and the answer to the statement he had made "I was walking down the middle of the stairs when my foot slipped forward …". This witness said that his foot slipped out and caused him to temporarily fall back and then onto his side and he said when he fell on his back he threw himself to his side and that his body hit the steps on the right hand side and that he heard a crack on his leg as he went to the right side but he denied that he had given different descriptions of what had happened and he said he is aware that one has to take care going down steps. He said that there was shininess on the steps around the second and third steps and he agreed that the two of them looked the same.

Evidence of Tanya Ellen Baldwin

12. This witness confirmed that she was 39 years married to the plaintiff and that she lived in New South Wales, Australia. She described arriving in Ireland on 3rd June, 2016 and that the accident occurred on the 5th June, 2016. Her recollection was that she was a few feet in front of her husband and that she believed that when she found him he was on his left side his right side facing up in a curved position and she said he was above and to the left of the lavender blue triangle design in the centre of the floor. This

witness said that she heard a thud and that she was in front and that she didn't know which step her husband fell on but she pointed to an approximation as to where she believed he fell. She said she ran straight to him and that he had a dint in his knee cap and that other people came rushing to give assistance, including tour members.

13. The parties finally returned to Australia and arrived there on 14th June, 2016, having left Ireland on 12th June, 2016 travelling business class and she described her husband as being drugged up during the flight and that he had slept a lot. That morning on arrival his general practitioner organised a MRI scan and they attended then with the general practitioner with those results. In terms of describing the effect on her husband this witness said that they used to power walk every morning and that her husband cannot do that now as he cannot keep up with her and that he cannot undertake such household tasks as cleaning the shower. She described his confidence as diminished and that he is really weary on stairs. She described him as more fatigued and while he is retired she still works.

14. This witness revisited the stairs in the National Museum on her return to Dublin and described how there are railings now on both sides. She described the accident as slowing her husband down by about 50% but she said walking for him becomes painful after a while and she described observing shiny steps on her revisit to the museum. She thought that she had received an email from Deirdre Horgan, an employee of the museum, and she believes that she may have replied in thanks.

15. Under cross-examination this witness agreed that she had been in the museum for between one and one and half hours prior to the accident, and that they had started at the bottom of the steps and that they hadn't gone down the stairs but that they had done a circle. She confirmed further that her husband's right knee was visible when she got as far as him after the fall and that he was on his left side with his right knee visible and that she didn't see him move because again she confirmed she had been a couple of steps ahead.

Evidence of Barry Tennyson engineer called on behalf of the plaintiff

16. This witness confirmed that there was a joint inspection with Mr. Romeril, engineer for the defence and Mr. Mark Doolin of the State Claims Agency, on 26th October, 2017. This witness agreed, in advance of the inspection he had been in receipt of photograph where the plaintiff had marked the locus of the fall. He noted in his evidence that the front two thirds of the step in question was worn compared to the third portion at the back of the step and he said also that there was rounded nosing which was polished and that the rear one third of the step was less trodden than the front two thirds. He referred to a pitted surface with a slight micro texture depression, pit filled with dirt and that there was no dirt collecting where the step was worn.

17. With reference to photograph 1 he confirmed that this was looking back at the locus and he identified the marble and he said photograph 5 shows that the bannisters stop before one get as far as the floor. He noted a grey box sign diagonally between the box and column in photograph 7 and he agreed that they didn't form part of the structure. Both engineers later agreed that the steps were made of Portland stone.

18. Mr. Tennyson's evidence was to effect that the sign beside the bottom of the stairway would cause people to move away from the handrail and that there was no invitation or configuration to use the rail/balustrade. He said on the left wall there was no rail as one descended the stairs and that he said photograph 8 showed that there was a reflection of light on the marble and he said photograph 9 showed a different area with handrails and he commented on the visual aspect as continuous and aesthetically pleasing. This witness said that if this were a new building with a width of 4.3 metres wide that four rails would be needed and three channels but that because this is an old building one would not expect that here and he referred to the regulations with regard to new buildings. He did say however at least one might expect here to have a handrail in the middle. This witness further added that in old hotels there are designers who specialise with this type of installation and that to prevent the risk of people falling, they adjust the design to correct this problem and that there was no reason why that could not have been done here. With reference to photograph 10 he referred to the outside steps at the museum and he said that there was adhesive of anti-slip strip type double strips on the nosings at that point.

19. This witness took the view that this showed than an assessment had been made to install anti-slip strips and he went on to say that the area was deficient in that there was no handrail, no strips and no strips on the nosings and he said that the balustrade could not be readily gripped and that foot placement was the most common cause of trips and falls or slips and falls but that he had no quarrel with the dimensions given. An ideal grip was cited at two inches of 50 millimetre diameter and he said three and half inches was quite large. This witness made the point that a handrail affords the opportunity for a person to save themselves while descending the stairway and that if there is a handrail a person will use same. He described worn shiny nosings and poor lighting and he said it was unacceptable risk and that this was a public place and he referred then to the British standard BRE document from the 1970s for non-domestic stairs and how one can reduce risk and he said it would be available to anyone doing a safety assessment. This witness indicated that there ought to have been a risk assessment for the safety of employees and visitors. He cited the purposes of rails as firstly to assist and give pulling support for weak people going upstairs and secondly to encourage the use of the rail to prevent a fall or mishap. And he also added that people ought to be verbally instructed to hold onto the handrail while descending that this can reduce injuries which might result and there should be a positive grip 50 millimetres in diameter available. He referred to retrofits where no nosings are on the marble where there is an assessment and cutting of groves and resin is used. He described adhesive strips somewhat like sandpaper giving a very high positive grip and he referred the possibility of grooves being cut into marble in that context.

20. Under cross-examination this witness indicated that if one holds the handrail continuously a fall or slip is unlikely and that it saves a person in the possibility of a fall. He did agree that the building regulations referred to don't have retrospective effect and that new builds and building renovation and construction affords a legal obligation in that regard but it does not apply retrospectively. This witness referred to good codes of practice which predate the regulations to reference to 1970s. He refers to the standards as being British standards but affording guidance and that they are more comprehensive than the Irish standards for stairs and that the regulations here are based on the British standard regulations.

21. There was an indication from this witness that he believed attendance being relied on by the defence that figures given to the court ought to be reduced in terms of the number of entries to the museum building because he said there are a number of entries and they don't all necessarily use the flight of stairs where the accident happened. He also presumed that half of the people going up the stairs will go on the left and the other half will go on the right hand side and that it would be mirrored on the opposite staircase as they are identical and he said that was assuming that all visitors go upstairs and he said that it was not surprising that there were a half a million people a year using the area. He said there was one in a million who would slip and fall.

22. The adhesive strips were referred to as being necessary if the nosings are smooth or in a case of wet moisture and if they wished to provide extra grip and he said they accepted that they provide safety in both scenarios and to provide safety for persons using the stairs and he said there was no reason why the handrail can't be installed on the upper stairs that it doesn't take away from the

situation aesthetically. This witness said that if you take an example of the national library which has the stripping on all the steps it is there for safety and that that building is identical to that building but he is not saying that they are legally bound to do it but it doesn't take away from the aesthetic of the building. This witness gave his professional opinion that a risk assessment would have recommended a handrail with anti-slip nosings strip and better lighting none of which is required by the building regulations. He added that the purpose of the handrail would have been that it might have prevented such an accident and he had no complaint about the dimensions of the steps.

23. The building standards referred to were as 5395/1/10 concerning slip resistance. This witness did not dispute Mr. Romeril's figure of 305 in that regard and his own was 300. This witness relies on his contention that there was no handrail, no strips and no lighting all three cumulatively are relied upon.

24. This witness was cross-examined on the benefits of having a handrail and he said that if a person held onto a handrail, continuously, one would be unlikely to trip and fall and that it can save people from a potential fall.

25. With reference to the museum and figures given by the defence of those visiting this building, this witness said that those figures should be reduced simply for the reason that there are a number of entries and not all entrants to the museum use that particular flight of stairs at the locus of the accident and he presumed it was fair to say that half of the people who entered the main entrance go to the left staircase and half to the right. He said that where the accident happened has a mirror image flight of stairs opposite, exactly the same in dimensions. He described it as identical and with respect to that contention this witness said that that's assuming that all visitors actually go upstairs. He didn't think it was surprising that a half a million people visit every year.

26. With reference to photograph 10 showing adhesive strips this witness said that one of the reasons for that was that the nosings were smooth and that they were shown as in photograph 10 on a particular set of steps at the exterior of the building because the defendants wanted to provide extra grip and he accepted that they provided safety in either wet or dry conditions and that they were there to provide safety for persons using the stairs. He said that there was no reason why a handrail can't be installed on the upper stairs that it doesn't take away from the building aesthetically.

27. In the professional opinion of this witness a risk assessment would have recommended a handrail and or an anti-slip nosing strip and better lighting none of which was required by the building regulations. He said that the use of a handrail might have prevented the accident. This witness further added that he had no further complaint regarding the dimensions given for the steps. Both engineers agreed regarding the slip resistance figures.

28. This witness referred to the proprietary nosings for non-domestic stairs and he said that if smooth or if wet if the nosing shape is round and poor lighting that that would increase the likelihood of a trip or overstep and he said the safest way is shoe heel to floor on the flat but up or down the sole makes first contact. He referred to slip resistance and worn rounded nosings as being normal and he talked about normal walking conditions being less likely on stairs than on the level in terms of a trip and he qualified this and he said that with stairs the sole is the first contact of the foot. This witness also made the point that speed is different when one is on the level and that different dimensions affect different speed and that this is not a minimal overstep this is likely an overstep due to shiny nosings. He said that the 300mm includes the rounded worn nosing and he said likely oversteps will occur when the lighting is so poor.

29. It was put to this witness that the composition of the stone was Portland stone and not marble as he had suggested. This witness said that he did have with him the plaintiff's written statement and the plaintiff had said that it was the second or third step from the bottom in accordance with his statement and it was put to him that this was a contradiction because the photograph marked by the plaintiff had marked the third step from the bottom and he said he didn't think so that he didn't see this as a contradiction that he placed credence on the photograph with the X and he said that he would place less credence on the written statement. This witness said that marking the photograph on the spot is more precise than the statement. He said this included the third step and they had measured the steps above and below and that steps 2, 3 and 4 were pretty much identical but that the bottom step riser has different dimensions.

30. This witness pointed out that the accident report was not signed by the plaintiff and it could be discounted because the photograph had been marked by the plaintiff and the report had nothing to do with the marked photograph. He said that when he went to the inspection he had the information from the claimant and he focussed on that information but he again noted that the plaintiff's signature was not on it and he considered that to be a communications error and he says there is no better evidence than the photograph with the X marking the spot with the claimant's writing. This witness said that he considered the steps/building dangerous because there was no handrail and it shouldn't be closed down but it is a dangerous stairway and he said that in terms of occupier's liability there was the necessity to take reasonable care.

31. This witness said that just because there were no reports of the accident doesn't mean that it didn't happen. It could be that things are not reported on oversteps and near misses and that common sense has to be applied. Under re-examination and non-compliance in old buildings in terms of regulatory requirements, this witness said that if there were substantial renovations then there would be an obligation to comply with building regulations. He said that if there was a safety audit or a fire audit there would be a recommendation to change the stairs for safety reasons and he said that would happen in line with British standards and regulations and that then they would have to be brought up to standard or otherwise the defendants would be liable and that it was careless not to address safety issues.

32. A picture of another staircase, picture 9 was shown to this witness and he said that in recent times access had been changed. In his opinion this building is similar to courthouses and old hotels and that they have to be upgraded for safety reasons. This witness said that one cannot measure slip resistance on a stair on rounded nosings and that he was satisfied that it was smooth and slippery to the fingertip.

Evidence of Mr. Paul Romeril, Engineer

33. This witness said that Mr. Tennyson placed a bag on the same step and that the issue of the bottom step was not addressed and that he had a full accident report form and that Mr. Tennyson had his version but that Mr. Tennyson did not say that the plaintiff had missed the last step. This witness described the steps as late Victorian Portland stone almost certainly. He described a balcony around the entire building and two flights up with a landing and another flight of steps. He said that the standard appeared to be very high. He said that there were seven risers and that one often sees external steps with this ratio. The thread was graded at 305 or he said about 350 and he said you always look at going upstairs and that there was a 30% gradient but that the main issue here was the overstep that there was no issue on the dimensions. This witness said that to the right-hand side of the balustrade there was a rail 1.1m high which can be used as a handrail and he said one would not feel at risk descending.

34. This witness said that it was essential to have a guardrail which ends two steps from the bottom which was traditionally the spot

for the handrail. He referred to the cast iron black columns. He didn't form the view that that was a slip risk but he said that you can't use a pendulum you can use another implement. He said that it isn't polished marble, it is Portland stone and it has got small indentations in it. He referred to photograph 8 and he said it was quite clear that they were easy stairs to descent and that they were not badly worn and he accepted the Government codes of practice and the technical guidance documents. He said that the English were bound by codes of practice and the British standard. He said that the Irish building regulations have guidance, in other words they say that it is up to you that you do not have to comply. This witness said that in England the evidence is based on the stairs and how steep the stair was. He said that the overstep caused a slip and that that is rare on a threading of 305 that if you do not overstep on the stairs you are less likely to slip than on the level but that normally you do fall forward and that if the plaintiff did not overstep he didn't slip. This witness said that this set of stairs would not be suitable for disabled people he accepted that the locus wasn't up to the present code of practice. This witness said that there was a question of user choice to use support when ascending and descending but that rails reduces the chance of serious incident on stairs and he said he did look going downstairs. He said Europe had different rules. In order to keep balance on steep stairs it was essential to have rules and that it was then very secure. He said the steeper the stair the more necessary it would be but that it would not be suitable for disabled people. He said further that there was no such thing as a completely safe stair, that things can happen but that it doesn't comply with the British standard but that the Irish version of the Irish Regulations recognises that standard and he agreed that it is the gold standard.

35. With reference to photograph 9 showing an alternative staircase he said it was higher than the instant staircase and that the British standard only applies to modified or change of use building where they must then comply with the Regulations. He didn't agree that the old British Regulations don't apply he said that if one modified one set of stairs it would not mean that one had to go around the whole building and that the building has been modified materially. He said that the plaintiff's engineer ought to have done the slip resistance test but that he himself did not consider it slippy because it was not polished marble. This witness agreed that this set of steps would not be suitable for disabled people and he accepted that the locus was not up to the standard of the British code of practice.

Evidence of Mr. James Gray Consultant in Emergency medicine Tallaght Hospital, Co. Dublin

36. He said that he had seen the plaintiff very recently and that he had filed a medical report regarding his injuries in 2016 regarding a stepping fall in a Dublin museum. He said he had seen correspondence from George Kirsh GP and that the plaintiff had attended St. James' Hospital and had an MRI and x-rays at the time. He said the plaintiff had had both an MRI and an ultra-sound back in Australia. He consulted the plaintiff using the records and hospital records and took details of the accident and incident. He said that in the hospital he was treated as a triage category 3, the most urgent would be 1, where it has to be seen immediately or if it were category 3, within one hour. The plaintiff had severe pain to the right quadriceps area and he felt that while he was given a brace there was a joint on the brace to keep it rigid. He was admitted at 6:30am and he had right knee pain and it was swelling and he was able to a straight leg raise. He said there were pre-existing findings that there was horizontal tearing but he can't say whether that was there to begin with or whether it was made worse by the accident. He said that the rupture to the tendon is an acute injury, a tear, and he said the rupture was to the right side to the lateral side and that that would cause damage in fact that the lateral aspect was damaged and if not repaired it would lead to a mismatch where you would have strength less on the right knee so even if a good repair it will never be the same. He said he found fluid in the joint subsequent to the trauma and he referred to patellar ligament tendinopathy to the right side of the right knee with prepatellar bursitis and that if it is inflamed it swells and he said there was significant trauma where the lower part of the limb is mobilised as the way the plaintiff fell caused that to rupture.

37. He also found a baker's cyst and that would have pre-existed the trauma but that the trauma, although it could cause a rupture, it didn't in this case as it swelled but settled. And he said that the lining of the knee joint at the back of the knee was causing symptoms. The surgery was carried out in Australia and the tendon was fixed to the patella it would be pinned down by means of sutures and that the surgery was confined to the lateral portion and to a significant degree to the median portion inside the knee. He said there was degenerative wear and tear which would have pre-dated the trauma which would have been aggravated by the trauma. It was torn laterally. This witness said that calcification sometimes occurs after trauma and that the tendinopathy was 2019 on the trauma in 2016 and he said that most of the degeneration was in the medial sphere with some lateral as well and that there was delayed evidence of healing and that the diagnostic imaging showed a grade 4 cartilage worn down to the bone and the degree of that is not what determines pain most of the time but despite rest and painkillers that that is one part of the picture.

38. He said there was a lot of pain on movement of the right knee. Again he examined this patient on 9th May, 2019 and he said that he believes this curtails the plaintiff seriously playing golf, walking, and particularly regarding gardening and that psychologically he is much slower and he is anxious in the shower and very aware of this. He said there was a 15cm tear over the anterior knee and that there was no obvious joint swelling although there was some tenderness to the medial joint with mild bone grating.

39. This witness said that although there was patellar apprehension it is not unstable and he applied pressure because of the previous trauma and he said it was abnormal due to pain that there is a direct injury to the tendon with both physical and psychological trauma.

40. The tear to the medial meniscus may accelerate a knee replacement but they weren't too many symptoms prior to the trauma. He said the baker's cyst was not due to the trauma but that the joint had suffered significantly. Under cross-examination this witness confirmed that there was a severe trauma to the outside of the knee which affected the plaintiff's quality of life whereby he had pain most of the time. He said that there are patients out there who would get a knee replacement with these symptoms. He says this plaintiff's symptoms are worse. He confirmed that there was a partial rupture to the tendon approaching 50% of same and he said that to some extent although the fibres on one side are frayed as it was described to him but to some extent the "rope" is not at its best longitudinally it was wider and narrower, and that it is a partial tear of the inner half and that the operation seems to have been a success and he said it was an emergency case where almost half of the tendon tore. He said that it is not that simple to say that once it is fixed a person is back to normal. He said almost 50% of the tendon ruptured and that the plaintiff still has ongoing problems with weakness more than before. He said that the fact that the operation was a success doesn't mean he doesn't have symptoms. Subjectively he did speak to the plaintiff and examined him on the 9th May, 2019 as well. He said it was a very simplistic view to say that he's feeling better, he said 70% are never admitted to any form of speciality from A & E but that the Orthopaedic Surgeon sees the tip of the iceberg and this came on top of pre-existing changes. He confirmed again that the baker's cyst did not rupture but that it was 4.5 cm wide.

41. He said that as of 26th February, 2019 there was a 2.6mm scar and an existing weakness in accordance with the MRI picture. He said that that the lateral part of the tendon was ruptured and that the lower part pulled towards the mid line.

42. He referred to Dr. Kirsh's report of 1st May, 2019 amended on 2nd May, 2019 and he said he hadn't seen that it wouldn't do much to change his view. He said there is a mild weakness in the knee as he found it and accepted that the amendment to Dr. Kirsh's report said that the knee was fine but that there was some pain. Under cross-examination this witness said that he didn't see both of Dr. Kirsch's reports as of May, 2019 and as to whether this patient might need further surgery on the knee/knee replacement he said

it was impossible to be definitive regarding the future but that he could only give a likely prognosis and he said it is in the face of a lot of pre-existing change and with his clinical findings it may be a possibility that he will need a knee operation and that he did compare the left and right knees and he said there was degeneration of the left knee. He felt that he and Mr. Fenlon, are experts on trauma but he said the Orthopaedic Surgeon sees the upper end of the wedge and he said himself was well placed to comment on this case given his expertise and he can agree that there are number of problems with the acute tendon rupture on top of pre-existing changes and he said that his knee is now worse than the left knee.

Evidence of Mr. Gary Fenlon

43. Mr. Gary Fenlon Orthopaedic Surgeon said that he had forty years' experience and that he took a history from the plaintiff as to what happened and that was to the effect that he wasn't clear whether he slipped or tripped or whether the leg gave way and he said there was a partial rupture of the tendon and that the muscle contracts over a number of days, is better to operate sooner and the sooner the better. He said the lower part was quite wide and it depends where the tear is. He felt that the plaintiff had function in one knee as good as in the other with no crepitus in either joint and he could move the patella sideways and he said that any difficulties are age related and he said that on the basis of a fall you might flare up and that there was pre-existing arthritis but it should calm down to where it was before. He was of the view that the plaintiff fell forwards on the top of the tibia not the patella tendon but that he had never seen a tendinopathy before and he also said that far too much was written into MRI scans and they were reported as showing to many things and he said the fact that the plaintiff had a baker's cyst was not a sign of further trauma and that while there was swelling at the back of the knee there was a sign of increased activity.

44. Dr. Fenlon ruled out a number of complications and he said what was here was a slight swelling or slight knee infusion with a little fluid on the knee and he said it was nothing to do with the injury suffered by the plaintiff in 2016. He added that a front view of the x-rays showed mild degeneration and that the MRI showed a small cyst, nothing to do with this fall, most likely attributable to degenerative change and that such a cyst was nearly always at the back of the knee. He noted a scar, some tiny wasting of the muscles at the side of the injury and he said that for a man of age 70 his knee joints were very good, that he had very good strength in his legs.

45. Under re-examination he was asked what information he had prior to meeting the plaintiff and he said he could not remember that, that he saw him in Limerick six days previously and that he agreed with his Australian colleague in relation to his assessment. He said he did get statements of claim but they were not on his computer.

46. He was asked did the solicitor for the defence give him a good history and he said he takes his own history and he does not rely on other people. He said there was a one centimetre scar above the cap of the knee and he said the injury has not accelerated arthritis in the knee that it is quite a stable knee joint and he does not agree that it will aggravate arthritic change. And he said that any problems the plaintiff has are age related at this stage.

47. This witness disagreed with Mr. Gray's analysis of significant trauma as a result of the accident and that the right knee was worse than the left and he disagreed with both of these contentions and he said the injury will cause some fibrosis. There may be an ache but it would be as a result of the rupture. He did not accept the wife's evidence that her husband had considerably slowed down since this accident and he said that doesn't happen from a fall per se. He said that the knee infusion is not related to the accident and he said he has one centimetre reduced girth and that it is of minimal significance and it can mean that some fibres are not fully repaired but he said you do not always get 100% repair of a tendon and he said in terms of wasting that the problem was not due to 100% tear.

48. This witness found the plaintiff to have an equal degree of arthritis in both knees and that front x-ray showed both knees and that he does not have an x-ray box he holds the scans up to the light on screen. He found mild degenerative change in the right knee. And he said it was a grade 4 chondropathy. This witness also said that if a person receives an injury such as the plaintiff received, the sooner the operation i.e. the following day, the better the repair and he said that if the operation is carried out over two or three weeks after the accident, one may not achieve a situation where all the muscle is attached. He said that after four weeks with the biceps tendon it would never be possible to get it back fully.

Evidence of Deirdre Horgan

49. Deirdre Horgan confirmed that she works in the National Museum at 1 Kildare Street and that she is an archaeology facilities officer. Her evidence to this court was that she found the plaintiff sitting on the balcony steps and she had been notified by mobile of an incident one to two minutes prior to that when she was in her office and that she found the plaintiff in a considerable amount of pain.

50. This witness said that she went to assist the plaintiff and that his wife was present and that there was wheelchair at the bottom of the stairs and an ambulance at the rear of the premises and at that stage it was approximately five o'clock in the evening. She said it was less than three metres to the back door and that she herself was there at all times. His wife told her of a cracking noise and that he had missed the last step. This witness clarified that she is an executive officer in the public service and that there is a building maintenance centre and that there is one person above her in terms of running the organisation but that she looks after staff and maintenance. Her evidence was that there had been planned maintenance in 2001, 2002 on site and quite a lot of nosings were needed.

51. S.I. 497 of 1997 was referred to and this witness said that photograph 9 showed a picture of a different staircase entirely and that any structural change required a conservation architect and the OPW on board and that their role would be to make suggestions and to discuss matters and that that had been done one and a half years ago and that the railings had always been there since she began working there. This witness was shown the photographs and photograph 10 in particular showing the rotunda area and 30 metres from the entrance there was a distance to the steps in front which were flat with mosaic tiles and that the floor was at the bottom of the rotunda. There were mats at the entrance.

52. This witness could not remember who telephoned her to inform her of this incident but she said a member of the team would have done so. She said she was there within two minutes. It was a bank holiday weekend and the following Tuesday morning she completed an accident report form saying that there was an accident on the Sunday and that she said first of all she takes details, makes small notes, doesn't keep them and that she would shred such documents and she said an online report form was used that she carries a notebook and she keeps an accident report form and that she agreed that the evidence of the wife was that she heard a cracking noise and she said her husband missed the last step.

53. In terms of a procedure for investigating accidents she said she would email her manager and that he would keep files and records and that her job was to do everything to accommodate the injured person. She said that the head of her department was Mr. Greg Kelly and that they take different days off work. This witness agreed that CCTV would have shown the incident but she said she was

not asked about CCTV that she checked to see was it available and that they realised that they should have had CCTV. But she said that a 24-day cycle for it and it de-codifies itself and she cannot say when she checked its availability. She was asked about the fact that there was no claim letter requesting CCTV to be kept and she said that it was six months later they went to look for it but she said it was probably best practice to keep it and it would be appropriate but that that was the role of another person.

Evidence of Mr. Fergal Leahy
54. Mr. Fergal Leahy gave evidence as an employee of the museum as a security and visitor's officer. He said that he was on duty in the upper gallery when he got a radio call and that he was that floor patrolling.

55. He said that the plaintiff said that he missed a step and that the wife had said that her husband was slightly after her and he said the man was sitting when he found him and he stood him up on his good leg and he said that they cleared the building at 5pm.

56. This witness said he wasn't sure whether he learned verbally or by radio contact about the accident but that Deirdre Horgan prepared a written report/statement and that he agreed with that statement and he said he didn't do a written statement himself that it was written rather than being typed and it was a draft report, blank with handwriting. He said Ms. Horgan arrived just after him. And he said that the plaintiff said that he heard or felt a snap in his knee and that he had clear memory of the accident that the plaintiff had a depression in his leg at the site of his pain and that he had pain in both the knee and the leg and that he could take partial lifting so he brought him down the stairs

57. This witness was shown photograph 9 which showed the other side of the balcony and had identical stairs and he said he brought him down on the right side and he said that there were railings there as shown in photograph 9 since he began working there and he said that it would be twice the length of this room to the entrance. He referred to anti-slip nosing and he said that the plaintiff clearly missed a step. He said that he himself is working in the building since 2001 and this incident happened in 2016. He said his focus was on the gentleman who was injured.

58. It was put to this witness that the plaintiff was not quite certain how he fell and he said he said he missed the step. And he said had he been there himself he would have used a notebook but that Ms. Horgan came and there is an accident report which doesn't say he missed a step.

Legal submissions on behalf of the plaintiff
59. The court is asked to consider issues of negligence of the defendants, their servants and/or agents as well as breach of duty and breach of the Occupiers Liability Act, 1995 and the defendants are sued as occupiers of the said museum building.

60. Reference is made to the plaintiff's claim that he lost his footing on the third last step going onto his right side and falling onto the landing below. The plaintiff's claim was that he suffered a full thickness tear of more than 50% of the quadriceps tendon which was operated on his return to Australia. He was 67 years of age at the time of the accident and was a keen golfer and was very active generally.

61. The party's engineers finally agreed that the stone steps were made of Portland stone having been constructed during the construction of the building in 1890. There is no dispute but that the goings and risings of the step are roughly within appropriate and safe dimensions and are not in issue. Neither consultant engineer carried out a slip resistant test on the goings/nosings. It is common case that the stairway is made up of seven steps bounded on the left as one descends by a wall and on the right by a wrought iron bannister topped by a wooden rail. The bannister terminates at the third last step from the bottom were it joins a stone balustrade which protrudes into the last two steps. To the left of the balustrade on the landing at the bottom of the stairway is a sign and beyond that there is a display case extending into the landing. The plaintiff's case is that the close up photographs of the outer two thirds of the stone goings show that the stone is smooth and shiny.

62. The width of the stairway is 4.32 metres wide down to the third last step which was 3.32 metres and the width of the last two steps was 4.06 metres.

63. Credibility and liability were hugely an issue in this case. The defendants relied heavily on the accident report form prepared by the facilities officer in the defendant's premises which recorded that the plaintiff missed the last step and fell. The defendant sought to make the case that the plaintiff's fall was entirely his own fault.

64. The plaintiff's recollection of the cause and mechanics of his fall while it is inconsistent with the said accident report form it is argued that it not inconsistent with the description of his fall as contained in the admission records from St. James' Hospital which contains four descriptions of the cause of his injury:

> … "was walking down the steps, fell onto his right side"
>
> "fell down two steps, landed on right knee heard a cracking sound …"
>
> "fell on right side coming downstairs … mechanical fall"
>
> "tripped on steps"

65. Another employee of the defendant Mr. Leahy first came to the assistance of the plaintiff after his fall and his evidence was that the plaintiff told him he has missed a step, but his evidence was that the plaintiff did not say that he missed the last step as appears in the report.

66. Although D.H. for the defence gave evidence that the stairway and fall were covered by CCTV and that another employee of the defendant, had viewed this CCTV although he was not called as a witness and in those circumstances counsel argues that it is not open to the defendant to assert that the plaintiff was the sole author of his own misfortune in those circumstances.

67. The plaintiff relies on the *maxim omnia praesumuntur contra spoliatorem* all things are presumed against the party that has destroyed evidence. In this case this maxim can be applied against the defendant disallowing it from challenging the recall and credibility of the plaintiff as to where on the stairs he fell and how he fell.

68. The plaintiff relies on s. 3 of the Occupiers Liability Act, 1995 which owes a common duty of care to a visitor on its premises i.e. the duty to take such care as is reasonable in all the circumstances to ensure that the visitor does not suffer injury or damage by reason of any danger existing on the premises and the standard of care it is argued is essentially the same standard as in negligence.

69. The plaintiff specifically claims that the defendants failed to provide adequate and safe handrails on the steps and failed to install anti-slip strips on the nosings of the steps. They argue that had there been an adequate and safe handrail system on the steps in question, the plaintiff would not have suffered the injury he did.

70. It is argued on behalf of the plaintiff that the features of the handrail the dimensions of which were argued were not easily possible to grab by a hand and also the fact that it terminated the third last step and that by reasons of the sign and display on the landing at the bottom of the stairway and the width of the stairway persons were encouraged to descend the middle of same and that these features made it inadequate. The defendants did not adduce evidence of a similar assessment being carried out on the stairway in question in this case as had been carried out on an alternative stairway as shown in photograph 9 and if any such assessment was carried out by them the defendants did not adduce any evidence of same. The plaintiff's case however is that they were obliged to assess the safety of the stairway at the locus and had they done so they would have considered the construction of the stairway given that it was Portland stone and given that the surface had become worn and somewhat shiny and they would have considered the absence of a non slip surface on the nosings which would have highlighted nosings as well as guarding against a loss of traction and they would have considered the absence of and requirement to have handrails. The plaintiff's engineer provided detailed and uncontroverted evidence of the requirement for handrails to be placed on this stairway. Interestingly the defendant did not adduce evidence which controverted the plaintiff's evidence. Indeed, the defendant's engineer does not address the handrail issue at all although Mr. Romeril for the defence accepted on cross-examination that the stairway in question was dangerous or defective by reasons of the absence of handrails thereon.

71. The plaintiff submits that the court saw adverse inferences from the defence's failure to call any evidence as to any assessment or decision not to assess the stairway where the plaintiff fell and also from the fact that the defendant did not address the handrail issue in its defence.

72. Reference is made to *Wiszniewski v. Central Manchester Health Authority* [1998] PIQR P324 and subsequently applied in this jurisdiction in *Walsh v. Sligo County Council* (unreported High Court 20th December, 2010) McMahon J. and *Smart Mobile Limited v. the Commission for Commission Regulation* [2006] IEHC 338. Reference is made to McCracken J. in *Crofter Properties Limited v. Genport limited* [2002] 2 I.R. 73 at 85:

> "In our legal system generally, the silence of one party in the face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified.
>
> I certainly accept this is a correct statement of the law …".

73. It was foreseeable that in the absence of a handrail on these steps could result in a person having a bad fall resulting in injuries and it is argued that the defendants their servants and/or agents failed in their duty to take reasonable care to ensure the safety of the plaintiff while in the museum in not having a proper and adequate handrail system on the stairway in question.

74. It is argued by the plaintiffs that the defendants can't excuse their failure to take reasonable care to ensure the safety of the plaintiff by claiming that the building regulations and the British standards do not apply retrospectively to the stairway constructed in 1890.

75. The plaintiffs argue that there was no contributory negligence issue in terms of evidence as against the plaintiff for failing to take due care for his own safety simply put the plaintiff claims that the defendant failed in its duty of care to him and his injuries were as a result of such failure.

Legal submissions on behalf of the defendant

76. The defendants argue that the risk of injury the less the likelihood is that the defendant will be guilty of negligence with reference to *O'Gorman v. Ritz (Clonmel Limited)* it is argued in this case by the defence that the plaintiff was only one of several million visitors to allege a mishap.

77. The plaintiff's claim was dismissed in *Heaves v. Westmeath County Council* where the judge held that reasonable precautions had been taken by the owners where the evidence was that the plaintiff had slipped on an uneven outdoor second step partially covered in lichen and moss and his engineer had argued that a handrail might have been constructed.

78. In *Coffey v. Moffit (trading as Moffit Shoes)* the plaintiff was a two and half year-old girl who suffered a fractured thumb when she pulled a glass shelf from a display case in a shoe shop and the case was dismissed the relevant consideration in the decision was that "there had been no previous incident or complaint regarding the glassing shelving to alert a reasonable occupier to any danger they might present.

79. Reference is made to *Louise Byrne v. Ardenheath Company Limited and Ardenheath Management Company Limited* a decision of the Court of Appeal of the 9th November, 2017 where the evidence of the expert witness was frequently compromised by the fact that their opinions all too often appeared to correspond to favourably with the interests of the parties who retain them in the view of the appeal court. The court said that the trial judge must bring ordinary common sense to bear on their assessment of what would amount to reasonable care and that the duty of care of the occupier for the safety of a visitor in one area of its premises is not to be judged by the standard of facilities which it provides for visitors in any other area of the premises. It is submitted that the probability of an accident occurring is relevant and in this case it is argued that of any history of accidents at the particular locus. Reference is made to *Thomas Moore v. Mary Carroll,* Twomey J. of 1st December, 2017 echoing the comments of the Court of Appeal in relation to the caution to be applied to relying on experts who have been retained by one of the parties to the litigation particularly were the opinion may be based on information provided by the plaintiff and it is argued that the plaintiff's engineer in this case simply had a photograph marked with an X from the third from the bottom step and she brought to a joint engineering meeting and it is argued that he went looking to find some explanation for why the plaintiff may have fallen without any account whatever from the plaintiff to show how he fell.

80. Keane J. in *Vincent O'Mahony v. Nicola McCarthy Hanlon and Waterford and Wexford Education and Training Board* 23rd November, 2018 where he stresses the necessity for the real or proximate cause of the accident and it is argued that in the instant case the plaintiff's engineer indulged in mere speculation as to whether an additional handrail would have made any difference and that this does not amount to proof.

81. The defence argued that the plaintiff suffered no more than a moderate injury and argued that the tendons in the knee are both vaguely rope like soft tissue structures, the only difference being that a ligament connects bone with bone and a tendon connects bone with muscle and that there range of the quantum is between €16,900 to €23,400 and they say that may as used by Dr. Gray regarding future possible complications doesn't reach the level "on the balance of probabilities" and they argue that possible complications ought to be discounted and the matter dealt with as per the Book of Quantum.

82. It is argued that there is an unreliability in the recollection of both the plaintiff and his wife and that he has failed to prove on the balance of probabilities that he was caused to fall by any defect in the building which houses the National Museum of Ireland in Kildare Street. They say the most likely cause for his fall is that he simply overstepped by placing his foot too far forward on the step which would cause him to overbalance and fall forward when his weight was transferred to the foot which had overstepped or overhung the edge of the step.

83. In their submissions on behalf of the defendant the various wordings given by the plaintiff to third parties or the view of third parties as to how he fell are recited. The assertion is made that while the plaintiff presented to court that he fell on the third from the bottom step this has not always been his claim. He gave various versions of the fall to various different people and these are all set out in the submissions and they vary from missing a step to asserting that as he was walking down the middle of the stairs his foot slipped forward causing him to fall backwards and then onto his right side as he set out in the PIAB application form and then that he tripped on steps as he noted by the Orthopaedic Registrar hospital note and given in evidence by Dr. James Gray and a further note recorded by Dr. Gray that "he lost his footing and fell and this is recorded on examination on the 9th May, 2019 and then his history to Dr. Fennell on 10th May, 2019 when he allegedly said that his leg went from under him.

84. He agreed that his wife told Deirdre Horgan that he missed the last step and she agreed under cross-examination that she may have said this.

85. The defence claim that neither the plaintiff nor his wife were reliable with regards to the recollection of what happened. The plaintiff claimed in his PIAB application form that his foot slipped forward causing him to fall backwards and then onto his right side and it is argued in the defence submissions that with such a slip while descending the stairs the plaintiff would be more likely to have fallen forward.

86. Much reference is made in the defence submissions to the Building Regulations 1997 (S.I. No. 497/1997) and it is argued that they do not apply to the building in question which dates from 1890 and s. 2 of the Regulations point out that they come into operation on the 1st July, 1998. Section 3 covers works which took place in terms of a material change of use, on or after 1st July, 1998. The defence contend that there is no requirement to comply with Part K which deals with stairways in the Regulations.

87. They also point out that the plaintiff did not comply with s. 8 of the Civil Liability and Courts Act, 2004 in that no letter of claim was written within two months from the date of the cause of action alleged. There was CCTV footage request in early 2017 and the section provides for the drawing of such inference as appears proper from the failure to write a letter of claim and the inference can be drawn here according to the defence that the plaintiff could not give an account of why he fell and was fishing for information which he hoped might be provided by the CCTV footage.

88. The defence also make the point that Mr. Tennyson who is the plaintiff's engineer wrongly described the steps as polished marble and in his view they were slippy although he agreed he did not carry out any slip resistance test and he then agreed that the steps were not polished marble but in fact were Portland stone.

89. There is no issue but that the attendant's figures for 2016, 2017 and 2018 in those eight years 3,558,144 visitors entered the premises and there was one other unspecified incident on the stairs in question in April, 2017 about which nothing further was heard and no claim was made and it is seen as significant that the incident alleged by the plaintiff was the only incident in the previous five and half years. Relevant to this they say is the case of *O'Gorman v. Ritz (Clonmel) Limited* [1947] Irish Jurist Report, p. 35 where the plaintiff was sitting on a row of seats in the defendant's cinema and when the person in the seat in front of her stood to allow other patrons to pass in tilting the seating part of his seat the back moved downward into contact with the plaintiff's legs which caused injury to her left shin. Relevant in that case was the fact that one million people had used these seats in the last seven years prior to the accident and no complaints regarding same had been received by management and Mr. Justice Geoghegan dismissed the plaintiff's claim and it is argued that the absence of previous injuries is extremely relevant to the issue of foreseeability and Mr. Justice Geoghegan held that "the defendants are not insurers and it seems to me that the plaintiff seeks a degree of diligence, foresight and precaution to which an ordinary theatre goer is not entitled. I am satisfied on the particular facts, that to guard against a remote contingency such as this which led to the injuries here would need precautions of a well-nigh fantastic nature which could not reasonable be expected in the construction or management of the theatre". Full reference is made to *Louise Byrne v. Ardenheath Company Limited and Ardenheath Management Company Limited*, Court of Appeal 9th November, 2017 where the Court of Appeal with reference to the Occupiers Liability Act, 1995, noted that the evidence of expert witnesses was frequently compromised by the fact that their opinions all too often appeared to correspond too favourably with the interests of the parties who retained them. The court also stressed that in a case where the court is not dealing with complex specialist fields of activity, the trial judge must bring ordinary common sense to bear on the assessment of what would amount to reasonable care and that this is not a specialist case for example compared with the practice of obstetrics or the operation of a nuclear power plant were evidence would be required from persons with specialised skill.

90. Paragraph 43 of that judgment deals with the duty of care of the occupier and relevant to that argument is whether the occupier has complied with its obligation to provide reasonable care for a visitor to its premises, the probability of an accident occurring is relevant and in the case in question it is relevant that there was no evidence of any history of accidents on the particular slope.

91. Twomey J. in *Seamus Comerford v. Carlow County Council* (2nd November, 2017) followed *Byrne v. Ardenheath* laying emphasis on the inconsistencies in the plaintiff's evidence and the same judge in *Thomas Moore v. Mary Carroll* 1st December, 2017 also followed that judgment on the basis that one has to be cautious with regard to expert evidence retained by one party to the litigation particularly where the expert's opinion may be based on information provided by the plaintiff. It is argued in this case that Mr. Tennyson simply went looking for some explanation as to why the plaintiff might have fallen based on a photograph which had an X marked on the third from bottom step rather than having an account from the plaintiff himself as to how he fell.

92. *Vincent O'Mahony v. Nicola McCarthy Hanlon and Waterford and Wexford Education and Training Board* is another case cited by the defendants, a decision of Keane J. of 23rd November, 2018 who followed again *Byrne v. Ardenheath* and he stressed that one must also consider the expert evidence but bring ordinary common sense to bear on the assessment of what would amount to reasonable care. It is argued in this case that Mr. Tennyson indulged in mere speculation as to whether an additional handrail would have made any difference and that speculation does not amount to proof.

Findings of fact
93. A number of matters are clearly not in issue as follows. Firstly, counsel on behalf of the plaintiff clearly indicated in opening the case, that both sides were agreed that there was no issue being made in terms of inadequate or poor lighting at the locus of the accident.

94. Secondly, both party's engineers agreed that the stone steps in question at the locus were made of Portland stone having been constructed during the construction of the building in 1890. There was no dispute but that the goings and risings of the steps in question are roughly within appropriate and safe dimensions and this was not in issue. Neither consultant engineer carried out a slip resistant test on the goings/nosings. They were both agreed that the stairway is made up of seven steps bounded on the left as one descends by a wall and on the right by a wrought iron bannister topped by a wooden rail. Both agreed that the bannister terminates at the third last step from the bottom where it joins a stone balustrade which protrudes into the last two steps and to the left of the balustrade on the landing at the bottom of the stairway is a sign and beyond that there is a display case extending into the landing. The width of the stairway is 4.32 metres wide down to the third last step which is 3.32 metres and the width of the last two steps was 4.06 metres. The court also accepts the submissions made by the defendants that the Building Regulations, 1997 S.I. No. 497/1997 were they argue that they do not apply to the building in question which dates from 1890 and s. 2 of the Regulations point out that they came into operation on 1st July, 1998. Section 3 covers works which took place in terms of a material change of use, on or after the 1st July, 1998. The defence contend that there is no requirement to comply with Part K which deals with the stairways in the Regulation. Where the court differs from the defence submissions in this regard is that it doesn't necessarily excuse their failure to take reasonable care to ensure the safety of the plaintiff in making that claim.

95. In terms of the plaintiff's presentation to court, it is the view of this Court and finding that he was a very credible witness who came to court in good faith and travelled from Australia to bring his case to trial. He was here on holiday when the accident occurred and gave his evidence in a very candid normal way without embellishing matters in any shape or form. The court found him to be a very credible witness therefore and had no doubt but that he was doing his best to give a true and fair recollection of matters as he perceived them. The defence case with regard to the plaintiff's fall is to assert that it was entirely his own fault. This case was a difficult one for the court to the extent that the plaintiff's recollection of the cause and mechanics of his fall, while inconsistent with the accident report form he filled in, was not inconsistent with the description of his fall as contained in the admission records from St. James' Hospital which gives four descriptions of the cause of his injury: -

> "… was walking down the steps, fell on to his right side"
>
> "fell down two steps, landed on right knee heard a crackling sound"
>
> "fell on right side coming downstairs … mechanical fall …"
>
> "tripped on steps".

96. The court has also had to take into account that there was evidence given by Ms. Horgan for the defendants that the stairway and fall were covered by CCTV footage and that another employee of the defendants had actually viewed the CCTV although he was not called as a witness nor was the CCTV made available and in those circumstances the question arises as to whether the defence can assert that the plaintiff was the sole author of his misfortune in circumstances where the plaintiff is entitled and relies on the *maxim omnia praesumuntur contra spoliat*orem where all things are presumed against the party that has destroyed evidence. In this case this maxim can be applied against the defendant disallowing him from challenging the recall and credibility of the plaintiff as to where on the stairs he fell and how he fell. In this case the defendants ought to have preserved the video evidence, which they had viewed. They ought to have made the employee who had viewed the video evidence available.

97. Balancing against this the court notes the submission made by the defendants the plaintiff himself did not comply with s. 8 of the Civil Liability and Courts Act, 2004 in that no letter of claim was written within two months from the date of the cause of action alleged and also that there was CCTV footage requested in early 2017 and that the section provides for the drawing of such inference as appears proper from the failure to write a letter of claim and the inference can be drawn here according to the defence that the plaintiff could not give an account of why he fell and was fishing for information which he hoped might have been provided by the CCTV footage. Balancing again against that the court notes that a Mr. O'Reilly an employee of the defendant and in a more senior position to Ms. Horgan, neither came to court although he had viewed the actual CCTV nor was he proffered as a witness and Ms. Horgan fairly indicated to the court what the position was in that regard. She was left to try and deal with defending the matter with Mr. Leahy. It seems to this Court that that is an inappropriate approach where there is CCTV where an accident was rare in the defendant's premises and the court is very much inclined to the view that they ought to have preserved and retained the one piece of evidence which would have truly clarified the situation and the court draws an inference from the fact that they chose not to either have that witness give evidence who had seen the CCTV nor did they chose to produce the CCTV themselves.

98. On the balance of probabilities, the plaintiff lost his footing on the third last step going to his right side and falling into the landing below the result of which he suffered a severe personal injuries loss and damage.

99. On his own evidence to the left of the balustrade on the landing at the bottom of the stairways is a sign and beyond that there is a display case extending into the landing and the plaintiff's case is that the close up photographs of the two outer thirds of the stone goings show that the stone is smooth and shiny. There was further confusion in the evidence of Mr. Leahy who came to the assistance of the plaintiff and while he gave evidence that the plaintiff told him he had missed a step but his evidence was that the plaintiff did not say that he missed the last step as appears in the report.

100. The court has come to the conclusion that there was inadequate and unsafe system in that the handrails on the steps did not have anti-slip strips on the nosings of the steps and that had there been an adequate and safe handrail system on the steps in question the plaintiff would not have suffered the injury he did. The court accepts the evidence of the plaintiff's engineer that because of how the railings end prematurely before the bottom step there is a tendency then for that to cause people to move towards the centre in descending and that does commend itself as logical to the court. The plaintiff's engineer provided detailed and uncontroverted evidence of the requirement for handrails to be placed on this stairway the defendant did not adduce evidence to contradict the plaintiff's evidence and indeed the defendant's engineer does not address the handrail issue at all although Mr. Romeril accepted on cross-examination that the stairway in question by reason of the absence of handrails thereon was not up to the present code of practice. The court is entitled to draw an adverse inference from the defendant's failure to call any evidence as to any assessment or decision not to assess the stairway where the plaintiff fell and also from the fact that the defendant did not address the handrail issue in its defence. This Court believes that it was reasonably foreseeable that in the absence of a handrail on these steps as the plaintiff reached the bottom showed that the defendants their servants and/or agent failed in their duty to take reasonable care to ensure the safety of the plaintiff because there was no proper and adequate handrail system on the stairway in

question. The fact that the Building Regulations and Building Standards do not apply retrospectively to the stairway constructed in 1890 is somewhat beside the point.

101. With regard to photograph 9 referring to an alternative stairway now fitted with a safety railing, in applying ordinary common sense to bear on the assessment of what would amount to reasonable care and that the duty of care of the occupier for the safety of a visitor in one area of its premises is not to be judged by the standard of facilities which it provides for visitors in any other area of the premises.

102. The point is made by the defendants and the actual figures were accepted in evidence as to the number of persons who visited the defendant's premises over the last number of years and that there had only been one other query issue or incident. On behalf of the plaintiff it is pointed out in this regard that there are many exits/entrances and that this staircase was not the only one which would have had the configuration of numbers as suggested by the statistics. This Court accepts the evidence of Mr. Tennyson in this regard.

103. In relation to the plaintiff's wife's evidence this Court takes the view that she was in front of him and she did not see the fall and her evidence as to the actual circumstances of the fall differ somewhat to his own and this Court prefers the evidence of the plaintiff as described by him with various wordings as representing more accurately what occurred. The court notes the decision cited in the defendant's submissions with regard to caution in placing too much store by the engineers who were acting on behalf of their respective clients but the court believes that Mr. Tennyson was quite accurate when he noted that the front two thirds of the step in question was worn compared to the third portion at the back of the step and this was the step marked X in the photograph which Mr. Tennyson had brought marked by the plaintiff to the inspection and he noted that there was rounded nosing polished and that the rear third was less trodden than the front two thirds and that there was no dirt collecting were the step was worn. The court accepts Mr. Tennyson's evidence that the purpose of rails would firstly be to give pulling support for weak people going upstairs and secondly to encourage the use of the rail to prevent a fall or mishap. It is reasonable to suggest as he has done that there ought to be some form of verbal instruction to hold on to the hand rail when descending as this can reduce injuries and that there should be a positive (end of tape) and he made reference to retrofits were no nosings are on the marble and where there is an assessment and cutting of groves and where resin is used.

104. Mr. Tennyson also made the point that some people go up to the left of the balustrade and others to the right hand side and he said that it wasn't surprising that there were a half million people a year using the area and that a coefficient of friction 0.4 was agreed. Although a great number of people have used the building and there have been an almost perfect record in terms of lack of accidents it is not however conclusive in the view of this Court that the defendants could not be liable ever in such circumstances.

105. Mr. Romeril said that the thread was graded at 305 or about 350, there was no dispute or issue on that. Mr. Romeril took the view that the steps were not badly worn and he did accept that the government code of practices and technical guidance documents were there and that the English were bound by their codes of practice and the British standard and that the Irish Building Regulations have guidance and that it is up to the institution as to whether they comply but these are there for their guidance. This witness said that these set of stairs would not be suitable for disabled people and he accepted that the locus was not up to the present code of practice. He also added that there was a question of user choice to use support when ascending and descending but that rails reduce the chances of serious incidents on stairs. He pointed out that the British standard only applies to modified or change of use buildings where they must then comply with the Regulations.

106. The findings of this Court in relation to the medical evidence indicate that quite clearly the plaintiff suffered significant trauma, discomfort, inconvenience, expense, and upset. The plaintiff had to have surgery and the plaintiff's consultant gave extensive evidence which this Court accepts. He found that on 26th February, 2019 there was a 2.6mm scar and an existing weakness in accordance with the MRI picture and that the lateral part of the tendon was ruptured and that the lower part was pulled towards the mid line and he referred to the reports of Dr. Kirsch of the 1st May, 2019 amended on the 2nd May, 2019 but he said it was impossible to be definitive regarding the future but he could only give a likely prognosis and he said that in the face of a lot of pre-existing change and with his own clinical findings it may be a possibility that the plaintiff will need a knee operation and he felt that there was degeneration in the left knee. He said he found fluid in the joints subsequent to the trauma and he referred to patellar ligament tendinopathy to the right side of the right knee with pre-patellar bursitis and that if it is inflamed it swells and he said there was significant trauma where the lower part of the limb is mobilised on the way the plaintiff fell which caused that to rupture. He also found a baker's cyst which would have pre-existed the trauma but it didn't rupture and settled. He said that the lining of the knee joint at the back of the knee was causing symptoms and the tendon was fixed to the patella and surgery was confined to the lateral portion and to a significant degree to the median portion inside the knee.

107. The court accepts this witness's evidence that there was a rupture to the tendon which is an acute injury a tear to the right side of the lateral side and had severe pain on admission to the right quadriceps areas of the right knee where he was given a brace to keep it rigid. This witness found fluid in the joint subsequent to the trauma and he referred to the patellar ligament tendinopathy to the right side of the right knee with pre-patellar bursitis and he said there was significant trauma were the lower part of the limb is mobilised as to the way plaintiff fell caused that to rupture. He found a lot of pain on movement of the right knee and he later examined the patient again on 9th May, 2019 and he gave his opinion that this injury curtails seriously the plaintiff in his pursuits of playing golf, walking and gardening in particular and that psychologically he is much slower and he is anxious in the shower and is very aware of his injury. He said there is now a fifteen centimetre tear over the anterior knee and there is no obvious joint swelling although there is some tenderness to the medial joint with mild bone grating. He confirmed that there was a partial rupture to the tendon approaching 50% of same and he said although the fibres on one side are frayed as it was described to him but to some extent "rope is not at its best longitudinally as it wider and narrower and that it is a partial tear of the inner half and noted that the operation seems to have been a success and that it was an emergency case were almost half of the tendon was torn.

108. This witness gave his opinion that it is not as simple as fixing the matter by operation and assuming that the person is back to normal he noted in this case that the plaintiff has ongoing problems with weakness and more so than before. Subjectively this witness gave his opinion and he noted that 70% of those with this type of injury are never admitted to any form of speciality from A&E but that the Orthopaedic Surgeon sees the tip of the iceberg and this came on top of pre-existing changes. He noted that on 26th February, 2019 there was a 2.6mm scar and an existing weakness in accordance with MRI picture and he said that the lateral part of the tendon was ruptured and that the lower part pulled towards the mid line. He said it was a possibility that the plaintiff will need a knee operation in the future and he said there was degeneration also in the left knee. His conclusion was that this man had pre-existing changes in the knee and that the right knee is now worse than the left knee.

The evidence of Mr. Gary Fenlon Orthopaedic Surgeon

109. Mr. Fenlon agreed that although he ruled out a number of complications he said that there has been a slight swelling or slight knee infusion with a little fluid on the knee but he said this had nothing to do with the injury suffered by the plaintiff in 2016. The x-

rays showed mild degeneration and the MRI showed a small cyst nothing to do with the fall. His conclusion was that any problems the plaintiff has are age related at this stage. He disagreed with Mr. Grey's analysis of significant trauma as a result of the accident and that the right knee was worse than the left. He said there was mild degenerative change in the right knee and there was an equal degree of arthritis in both knees and he did agree however that the sooner the operation for example if it were the following day, the better the repair would be and he said if an operation is carried out over two or three weeks after the accident one may not achieve a situation where all the muscle is attached and he said after four weeks with a biceps tendon it would never be possible to get it back fully. This Court prefers the evidence of Mr. Grey to that of Mr. Fenlon, as Mr. Grey gives a really comprehensive picture of the trauma and sequelae and treatment given to the plaintiff.

110. In all the circumstances the conclusion of this Court is balancing all the features of the case on the balance of probability that the plaintiff suffered the injury as a result of the fall in the defendant's premises and that it was reasonably foreseeable that a person could suffer such a fall even though it was a rare occurrence that is not conclusive in ruling out the possibility completely and this Court finds that there was a shininess on the portion of the steps as marked by the plaintiff as to where he fell, and the plaintiff came across as pretty credible and reasonably consistent in his evidence. The steps in question were shiny and slippy and as a result of that the plaintiff suffered the injury described by him. The said accident was caused by the negligence of the defendant in failing to provide a safe system in particular a railing for a person such as the plaintiff to hold onto the entire way down the said staircase. This Court accepts the contention that because the railing stopped before the end of the staircase there was a tendency for people to move towards the centre portion and that the plaintiff suffered severe inconvenience pain and suffering loss and damage as a result of the negligence of the defendants in all the circumstances.

111. Items of special damage are agreed at €1,989.59. Taking into account that the fact that this has been massively inconvenient and painful for the plaintiff and it has required him to travel home from holiday, business class to Australia to be treated by his own doctors in respect of this injury and given his present difficulties taking into account the fact that the scar doesn't particularly bother him but it is there and it is 2.6mm in length that the plaintiff suffered and continues to suffer as a result of this injury and it is appropriate that the general damages awarded are in the sum of €65,000 plus items of special damages as agreed at €1,989.59 giving a total of €66,989.59. This Court has had regard to the Book of Quantum. This Court finds that the injury was quite extensive and taking into account that the plaintiff is three years older than he was at the date of this accident, this Court notes that the plaintiff suffered and continues to suffer considerably as a result of this accident, as described by Dr. Gray.

112. The court found no basis for a finding of contributory negligence.