[2019] IEHC 931

THE HIGH COURT

[2016 /1144P]

BETWEEN

MARY O'REGAN

PLAINTIFF

AND

DOUG MCGUINNESS AND ANITA MCGUINNESS

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 25th day of October, 2019

1. These proceedings are brought in negligence and for breach of statutory duty and arise as a result of an accident which occurred on the 20th March, 2014 when the plaintiff claims she was knocked down by the defendants horse as it bolted from a stable on the defendant's premises at Reacasla, Brosna, Co. Kerry (the "Reacasla" premises).

2. The case for breach of statutory duty is grounded on the Occupier's Liability Act, 1995 (the 1995 Act). Having considered all the evidence, it may be stated at the outset I am satisfied the static condition of the premises was not the proximate cause of the accident. Accordingly, the provisions of the 1995 Act have no application to the accident circumstances and the Court so finds.

3. A full defence, incorporating a plea of contributory negligence on the part of the plaintiff was delivered thereby putting the plaintiff on full proof of her claim. The plea of contributory negligence included an allegation of trespass; for the reasons which follow the Court finds that the plaintiff was not a trespasser.

Background

4. The parties were neighbours and are well known to one another. The second defendant had befriended the plaintiff following a hip replacement operation she had had in or about 2010. The Reacasla premises consist of an old farmhouse and approximately 12 acres of land which the defendants bought in two transactions. The first in 1998 consisting of the farmhouse and a small amount of land on which it stood and the second in or about 2000/2001 making up the balance of the lands.

5. Subsequently, the defendants purchased another property, in which they now reside at Meenkilly, Abbeyvale, Co. Limerick (the Meenkilly premises). The plaintiff and her partner's home is located nearby. The defendants were instrumental in this acquisition. Finally, the Meenkilly premises are located approximately nine miles distant from the Reascasla property.

Knowledge of Horses

6. The plaintiff grew up with and kept horses all of her life. In the 1990s the defendants came from England to live in Ireland. For a number of years, immediately before they emigrated, the first defendant was employed by a well-known estate agent. Prior to that he had worked with horses and like the plaintiff had been brought up with them from a very young age. Before taking up employment with the estate agency he had worked all his life in the equine industry occupying various positions including that of stud manager.

7. The case advanced by the plaintiff questioned the extent of the first defendant's knowledge of horses, however; I am satisfied and the Court finds that the first defendant was very knowledgeable and experienced in the nature and behaviour of horses, nor was the second defendant a stranger to matters equine. A finding which has a significant bearing on the outcome of the case.

Stabling and Maintenance Arrangement

8. In or about 2012, an arrangement was entered into whereby the plaintiff's miniature ponies were to be stabled in the Reacasla property as a *quid pro quo* for the feeding and mucking out of a yearling and a Clydesdale cob owned by the first defendant. However, among the many matters of fact upon which there was a complete conflict of evidence; there was controversy as to precisely with whom the arrangement had been made. The plaintiff claimed she was a party (an assertion disputed by the first defendant) who insisted the arrangement had been made with Mr. O'Brien alone.

Injuries

9. As a result of the accident, the plaintiff suffered a serious back injury and advanced the case that this has had devastating consequences. The medical reports prepared on behalf of the parties, together with the plaintiff's relevant pre-accident medical notes and records, were admitted in evidence and have been considered by the court.

10. Given the case made and their pre-accident relationship, it is perhaps unsurprising that the parties have very different recollections of and attitudes towards the events which have given rise to the proceedings. This no doubt explains, at least in part, the conflict in the evidence that emerged in the course of the trial, a conflict which falls to be resolved by the court. I have had an opportunity to assess the witnesses as they gave their evidence and having viewed their demeanour I am satisfied that the witnesses were trying to do their best and that no one was trying to mislead the court, indeed; there was no such suggestion nor is there any suggestion that this was in any way a fraudulent or exaggerated claim. It emerged in the course of the evidence that the witnesses have become entrenched in their recollection and view of the circumstances and what occurred not only in relation to the arrangement but also with regard to the events which arose from its subsequent implementation. An assessment which presents a problem with regard to the resolution of the resulting evidentiary conflict. I am satisfied that the solution best lies in having regard to objective circumstantial evidence and inferences from facts which might properly be drawn and which, as a matter of probability, tend to support one proposition over another.

The Accident Location.

11. Mr. Paul O'Dowd, Consulting Engineer, was called as a witness by the plaintiff to give expert evidence. He carried out an inspection of the Reacasla property in April 2009 several years after the events giving rise to these proceedings. During this inspection he took photographs and subsequently prepared a report which was made available to the Court in the course of the trial.

Stables

12. The structures on the Reacasla property consist of an old farmhouse together with a number of stables. The plaintiff kept three miniature ponies owned by her in one of the stables. A separate stable block, consisting of two stables, each measuring 3 metres by 3.2 metres with conventional half doors, was located nearby. One stable was occupied a yearling and the other by a Clydesdale cob; both horses were unbroken. The cob had been gelded and was described by the first defendant as docile. The stables led directly out onto grass covered ground rather than a yard and from there led to a nearby paddock for exercising horses.

Accident circumstances

13. The plaintiff's evidence was that around lunchtime on the day of the accident she went to the Reacasla property to feed and water the horses on foot of the arrangement entered into between the parties. It was common case that in order to gain access to the stables and yard area of the farmhouse it was necessary to unlock a number of gates. The plaintiff said that she had been given a set of keys for this purpose by the first defendant as well as a key for the house which had been given to her by the second defendant, assertions disputed by the defendants.

14. The plaintiff gave evidence that she went to the stable in which the cob was kept in order to feed him and that when she opened the door he bolted out knocking her to the ground in the process. As a result of the fall she found herself unable to get up. She phoned her partner, who was at home, and he came to her assistance; he was the first to arrive at the scene. When he arrived the plaintiff was still on the ground and unable to move. He phoned for emergency assistance. Thereafter, the Listowel ambulance was dispatched. On arrival the crew attended the plaintiff and removed her from the scene to Kerry General Hospital where she was examined and admitted. It is of some significance to the resolution of the controversy between the parties that when Mr O' Brien arrived at the premises he noticed the cob was in the exercise paddock.

15. The plaintiff had fallen at home some weeks previously and on that occasion had been found near the bottom of the stairs. The second defendant gave evidence that she received a call from the plaintiff on the day of the accident telling her she had fallen over. She did not ask the plaintiff what had caused the fall or where the fall had occurred. Instead she assumed that she had fallen at home (as had happened some weeks previously) and she went there to investigate.

16. On arrival she found Mr. O'Brien alone. There was no sign of the plaintiff. On her account, Mr. O'Brien told her that he had received a call from the plaintiff and knew where she was; at which point the conversation appears to have more or less come to an end. The second defendant neither asked Mr O'Brien where the plaintiff had fallen nor did she enquire about the circumstances of the fall. In answer to a question from the Court "did you not ask Mr. O'Brien where the plaintiff was?" the second defendant very fairly accepted she did not. Her explanation for not doing so was that Mr. O'Brien had said he knew where she was at this point in time. In response to this her evidence was "well you had better go to her assistance".

17. On the second defendant's evidence when a telephone call was received from the plaintiff she made no enquiry as to her whereabouts or what had happened. In the ordinary way such evidence might be considered of little significance, however; in light of the controversy in this case it carries greater significance because the second defendant hinted, suggested or implied that the accident may not have happened at the Reacasla property at all and indeed may have happened somewhere else. In relation to this particular matter the second defendant's evidence was that the plaintiff and her partner had horses everywhere and that the plaintiff could have fallen anywhere.

18. I took this to be if not an absolutely express, then certainly an implicit, suggestion that the plaintiff fell other than where she said she had fallen. Given the nature of the issues raised the Court is required to approach the case on the basis that the plaintiff has to establish on the balance of probabilities that the case she has brought to court which is to prove not only that it occurred in the way, manner and circumstances claimed but that it occurred at Reacasla premises.

19. I consider it pertinent at this juncture to observe that at the time of the accident the defendants had moved to the Meenkilly property long before the date of the accident. Indeed, the plaintiff's evidence was that herself and her partner had moved into their house nearby some two years previously. Neither defendant was on the Reacasla property on the day of the accident. The first defendant said that he used to go between both properties staying in one or the other; this evidence was corroborated by the second named defendant. Although it was not his evidence, the second defendant said that he kept pigeons at the Reacasla property and had to go there to keep an eye on them; he was a creature of habit.

20. I have already referred to Mr. O'Brien's evidence that when he arrived at the Reacasla premises he noticed the cob in the exercise paddock; he was not the only person to do so. When the first defendant arrived there later the same day he also noticed the cob in the paddock, which begs the question as to how he got there. The first defendant gave evidence that the cob and the yearling were let out for exercise in the exercise paddock together. They were fed, watered and mucked out. The plaintiff's evidence was that in or about January of the year of the accident she had been told not to let the horses out of the stables because they were 'cutting up' the ground of the paddock. She also gave evidence that the horses were not to be mucked out, a contention totally refuted by the first defendant. I shall return to discuss these matters later.

Accident Circumstances; Conclusion

21. On the question of the accident circumstances and the issue of whether or not an accident occurred on the Reacasla premises; I accept the plaintiff's evidence and find that when she opened the stable door the cob rushed out knocking her to the ground in the process and as a result of which she was unable to get up. I also accept the evidence of Mr. O'Brien with regard to the immediate post-accident circumstances and make the following additional findings of fact that:

    (i) he was the first to arrive on the scene;

(ii) on arrival he found the plaintiff lying on the ground and unable to move;

(iii) he called the emergency services;

(iv) the plaintiff was attended to at the scene by the Listowel ambulance crew; and

(v) the plaintiff was removed from there by ambulance and taken to Kerry General Hospital.

These findings are corroborated by the hospital records admitted in evidence and in which an account of the accident is also recorded; findings which the defendants are not individually in a position to contest by way of primary evidence since neither were present on the premises at the material time. As mentioned earlier, although the second defendant questioned the locus and circumstances of the accident as well as whether the injuries were consistent with being knocked over by a horse, it follows from the findings made and conclusions reached that the Court is satisfied on the balance of probabilities that the accident occurred at the location and in the way, manner and circumstances described by the plaintiff in her evidence.

22. Apart from the content of the hospital records, I am fortified in reaching this conclusion by a salient fact which is common to the evidence of Mr. O'Brien and the first defendant; both noticed the cob in the paddock on arrival at the premises after the accident. It is worth recalling that at the relevant time the second defendant had been and was residing permanently in the Meenkilly premises. Her husband, though a regular visitor to the Reacasla property, was absent on the day and only arrived there some time later after the plaintiff had been removed to hospital. There was neither any evidence to suggest that anyone else visited the property prior to the accident for the purpose of feeding, watering or exercising the horse nor was there any suggestion that the cob had been let out of its stable by the first defendant or by Mr O'Brien. Absent a plausible explanation to the contrary it follows that the only other person who could have done so was the plaintiff.

23. Moreover, there was no evidence that the yearling was found in the paddock with the cob, a fact which would have been consistent with the first defendant's evidence that it was he who ordinarily let the horses out of their stables together in order to exercise. On my view of the evidence the most likely explanation for the presence of the cob on his own in the paddock is that he got out of his stable when the plaintiff opened the stable door. This conclusion calls for an explanation as to why the cob would have wanted to get out of his stable when he did.

Explanation for the Occurrence of the Accident

24. In the interests of completeness and in light of the conflict of evidence on the matters in controversy between the parties the Court considers it appropriate and desirable that the reasons and most likely or probable explanation for the accident should be examined in some detail. It was common case that it would be most unusual for a horse to attempt to leave its stable in circumstances where he just about to be watered and fed, as was the

plaintiff's purpose. As mentioned earlier, the case made on behalf of the plaintiff was that she and her partner had been told not to let the horses out of their stables, the reason given being that they were 'cutting up' the ground of the paddock. Furthermore, they had been told not to muck out but just to water and feed the horses, giving two scoops of feed per day with a ration of hay.

25. Mr. Billy O'Riordan, Veterinary Surgeon, was called as witness on behalf of the plaintiff to give expert veterinary evidence. He prepared a report which was made available for the assistance of the Court in the course of the trial. He gave evidence that the stables were wholly inadequate for horses as they were too cramped, being four to five feet short of the minimum required. In this regard, I understood the evidence of Mr. O'Dowd to be that the minimum stable size recommended by the British Horse Society was 3.6 by 3.6 metres. Given the actual stable dimensions Mr. O'Riordan was recalled. He gave evidence about the positioning of the cob having regard to the dimensions of the stable in situ. In his opinion even if the cob was standing with his back legs close to the rear of the stable his head would only have been a few feet from the stable door and he would have had difficulty turning around.

26. It has to be said, however; that Mr. O'Riordan's evidence was based on the assumption that the horse was fifteen 'hands' high, a measurement taken from the withers (base of the neck) to the ground. On the evidence of the second defendant the cob was only 14.4 hands high, a difference which in her view was significant since the cob would be classed as a pony. As a 'hand' approximates to four inches the difference between this evidence and that of Mr. O'Riordan with regard to the proximity of the horse's head to the stable door is four inches.

27. In relation to the instruction not to let the horses out of the stables Mr O'Riordan's evidence was that if it had been locked up in its stable since January and had been fed even one scoop of feed a day, the horse would have "hotted up" and would have been desperate to get out and exercise to let off energy, a consequence about which there was no real dispute. Indeed, the first defendant gave evidence that if the horse had not been mucked out, as suggested by the plaintiff and Mr. O'Brien, he would have been "in the rafters" and as a result would also have been desperate to get out of his stable.

28. It was also common case that feeding a horse oats in addition to hay will increase the animal's energy levels with the consequence of needing to "let off steam"; put another way the horse would need get out for exercise. On the plaintiff's evidence she was instructed to give the horses two 2 kilo scoops of feed, whereas; on the first defendant's evidence it was one 3.5 kilo scoop. Although they disagreed on the quantity and number of scoops, the difference in the overall quantity results in a difference of half a kilo. The other difference between them on this question concerned the nature of the feed. Mr. O'Riordan's opinion was based on the premise that the horses were fed oats, whereas; the second defendant's evidence was that they were to be fed a low energy feed called "Simply Natural"; in either case the horses were getting feed in addition to hay and as a result would need to exercise.

Other Circumstances

29. Mr. O'Riordan was critical of the paddock, which he considered to be wholly insufficient for the purposes of enabling horses gallop since the area was too small for this purpose. Moreover, the farm in general was unsuitable for horses, an opinion he had previously shared with the defendants. They questioned the number of times he had previously visited the Reacasla premises in his capacity as a veterinary surgeon and challenged the assertion he had advised them that the land was unsuitable for keeping horses. On the evidence, it would appear that he had visited once or at most twice some considerable period of time prior to the date of the accident. In fairness, I understood Mr. O'Brien's evidence to be that he understood this was Mr. O'Riordan's opinion; rather than that he had also conveyed it to the defendants.

30. With regard to the question of exercise the first defendant's evidence was that the horses were always let out for exercise. He said there was absolutely no basis for the assertion by Mr. O'Brien, with whom he had made the arrangement, a fact in which he was supported by the second defendant, that the horses were not to be mucked out or let out for exercise or that the reason for this was that the horses were to be kept in their stables was because they were cutting up the paddock.

Conclusion: Nature of the Accident

31. I am unable to accept the evidence of the plaintiff or Mr. O'Brien that they were instructed not to muck out the stables or let the horses out for exercise. On this aspect, I consider that they are both mistaken. However, subject to the resolution of the dispute with regard to the identity of the parties to the arrangement, it was accepted by the defendants that the service to be provided in return for the stabling of the plaintiff's ponies was the feeding, watering and mucking out of the defendant's horses. While I am satisfied there was no prohibition on letting the horses out of their stables it was not suggested the stabling and maintenance arrangement included responsibility for exercising the horses rather on the first defendant's account the plaintiff's ponies were to be stabled on the Reacasla premises in return for mucking out, feeding and watering the defendants' horses. In these circumstances it seems highly unlikely that the first defendant would have wanted to do the mucking out himself; mucking out was an element of this arrangement.

32. It was not suggested by any of the witnesses that the plaintiff's ponies were to be kept in their stable to protect the paddock or for any other reason. In my judgment if the paddock was not to be cut up by the ponies any instruction, if given, not to let the horses out for exercise would also have had to apply to the ponies. Giving an instruction that the horses were not be let out because they were cutting up the paddock while at the same time permitting the plaintiff's ponies to do so by exercising there would have been irrational.

33. There was some conflict between the plaintiff and Mr. O'Brien in relation to this alleged instruction. Mr. O'Brien's account in this respect differed from the plaintiff and from the account recorded in the report of Mr. O'Riordan. I was concerned when he gave his answers, especially to questions put to him by senior counsel for the defendants, Mr.

Johnson, that Mr. O'Brien did not understand the questions fully due to a hearing impediment which may explain, at least to some extent, the difference in the accounts. However, irrespective of which account one takes the net result is the same save for the period involved.

34. The consequence is that the horse was: (a) kept locked up (b) overfed and (c) the stable was not mucked out. I understood this to be a scenario advanced to explain why the cob burst out of his stable knocking the plaintiff down in the process, a foreseeable consequence of overfeeding, lack of exercise and confinement. In reaching its conclusion, the Court had to have regard to the evidence of Mr. Riordan's that to keep a horse locked up for lengthy periods without mucking out, the situation suggested by the plaintiff, would amount to reportable misbehaviour. Evidence which I took to refer to a potential prosecution for cruelty to animals and with it the risk of conviction. I cannot see any reason why the first defendant would issue an instruction which was contrary to the terms of the arrangement, to his own interest and which would have exposed him to the potential of a criminal sanction.

35. The question remains, therefore, as to why the horse bolted or burst out of his stable in circumstances where he was about to be fed. The first defendant's evidence, which I accept, was that a docile horse in this case the cob, which is about to be fed and watered would in the ordinary way remain in his stable for that reason; it was not suggested otherwise. This is relevant to the knowledge and experience of horses possessed by the plaintiff and the first defendant who gave evidence that he had never known a horse to leave or attempt to leave a stable when it was about to be fed; if it did so there had to be some sort of explanation. As to that senior counsel for the plaintiff, Mr. Kiely, put a proposition to the first defendant, namely, that if a horse would not leave its stable when about to be fed it followed did it not if he did in such circumstances that there had to be a good reason for such behaviour. In response, while not accepting that the horse had been overfed, the first defendant did accept that the lack of sufficient exercise could explain such behaviour.

36. The first defendant has had serious medical health issues associated with diabetes which had affected him in a number of ways, particularly with regard to mobility prior to and at the time of the accident, about which he was very frank in evidence. So serious was his condition and its consequences that he was facing a foot amputation; on his own admission he was not at all a well man.

37. The Court has already found that the cob had not been let out for exercise on the day of the accident before the plaintiff came to the stable. Moreover, there is no evidence he had been exercised the previous day but even if he had been let out the previous day by the first defendant, as was his habit, and on previous days the uncontroverted veterinary evidence of Mr. O'Riordan is that the paddock was too small to enable a horse to exercise properly. I accept his evidence and find that the cob would not have been able to gallop and burn off excess energy. It follows that even if the first defendant was correct in saying that the cob was only getting one scoop of low energy feed together with a ration

of hay it would still have been too much for a young unbroken horse if he could not exercise properly.

38. On my view of the evidence, the most likely explanation for the cob wanting to leave the stable just before he was about to be watered and fed is that he had had insufficient exercise and needed or wanted to get out in order to burn off excess energy and the Court so finds. In the interest of completeness although there was other land in the vicinity of the stables there was no evidence this was utilised or that the horses and ponies were exercised elsewhere than in the paddock the area of which, on Mr. O'Riordan's evidence which the Court has accepted, was simply insufficient for exercise purposes.

39. Accepting the first defendant's evidence that the cob had been gelded and was docile the fact that he pushed past the plaintiff when she opened the stable door knocking her down in the process is indicative that the cob had "hotted up", most likely due to the lack of exercise or lack of sufficient exercise and/or a combination of this and overfeeding; in the event he would have been desperate to get out of the stable. If two scoops of feed with a ration of hay per day were given, as was the evidence of the plaintiff, the situation would have been further exacerbated and about which, given her knowledge and experience, she would have or ought to have been aware.

40. However, I do not consider it necessary to decide whether or not the horse was getting one scoop or two scoops of oats or one scoop of low energy feed since if he had been getting sufficient exercise whatever his feed regime it is highly unlikely he would have left his stable when he was about to be fed, quite the contrary he would have been content to stay put and have his feed. On his evidence, it was the first defendant who was responsible for exercising his horses, accordingly, it was reasonably foreseeable that if the horse did not get sufficient exercise the time would have had to come when he would attempt to break out of the stable when the door was opened irrespective of who opened it and which as the Court has already found most likely explains what occurred on the day of the accident. The Court makes these findings on the balance of probability for the reasons given.

The Arrangement

41. There is a plea in the defence that the plaintiff was a trespasser. She was certainly pressed on the issue as to the identity of the parties to the arrangement, it being suggested that she was not a party. The case advanced on behalf of the defendants is that she had no right to be on the premises and that they did not know that she was there. In this context, it has to be remembered that the parties are neighbours and to be fair to senior counsel for the defendants, Mr. Johnson, I think quite properly, he did not press the question of trespass as such in the course of the trial. In circumstances where the parties were neighbours and friends it seems to me to be highly unlikely that one of them would not have been permitted to visit the Reacasla property.

42. I do not accept that this is what happened at all. Indeed, it is an untenable proposition, especially in circumstances where the plaintiff's ponies were being stabled there. Given

the terms of the arrangement and that access to the stables where the horses and ponies were kept was trough locked gates, it is clear that to gain access, if only to visit/ look after her own ponies, not to mention the defendants horses, the plaintiff would have had to have been given the keys to the locks by either Mr. O'Brien or one or other of the defendants. On my view of the evidence I consider it highly unlikely the plaintiff was not a party or privy to the arrangement.

43. Having regard to their proximity as neighbours and the nature of the relationships between them there is, in my judgment, an air of fantasy to the suggestion that the plaintiff was excluded from the ambit of an arrangement which included her ponies because its terms had been agreed between the first defendant and the plaintiff's partner, Mr. O'Brien, particularly when it is common case that in order to reach, feed and exercise the ponies and/ or the horses keys to unlock the farm gates would be needed. While I accept that the second defendant did not see the plaintiff attending to her ponies it seems to me the most likely explanation for this is because she had long since moved out of the Reacasla property and was living nine miles away in her new home at Meenkilly.

44. An issue also arose in the course of the trial concerning possession of the keys to the farmhouse on the Reacasla property. The plaintiff's evidence was that not only had she been given the keys but she had been involved in and had been asked by the second defendant to help clean out the house. If the plaintiff is correct in that assertion there can be no realistic basis for the proposition advanced by the defendants that the arrangement did not extend to include the plaintiff or that they did not know she was on the property nor had any reason to believe she would become involved by going there to feed her ponies.

45. As to whether there was any evidence to corroborate the case advanced on behalf of the plaintiff it happens certain evidence given by the second defendant comes close enough. While she disputed having agreed to give the plaintiff the key and did not agree that the plaintiff had actually carried out work in the farmhouse, she did concede having visited the house in the company of the plaintiff and having enquired whether she would be interested in helping clean out the house out. So there is some basis to the suggestion that the plaintiff was involved albeit that the second defendant was not prepared to concede that the plaintiff had carried out such work on foot of the discussion. This was no doubt because to do so would have contradicted other evidence and would have run contrary to the proposition that the plaintiff was not a party to the agreement and had not been given a key.

The Arrangement: Conclusion

46. To conclude on this issue the arrangement was informal and less identity specific than has been suggested. The plaintiff, Mr. O'Brien and the defendants were neighbours and friends. On my assessment of the evidence it is more consistent with their relationship that the arrangement extended to and was for the benefit of all. There was no suggestion that the arrangement was for the sole benefit of the first defendant, nor could there have been, the defendants owned the Reacasla property and the horses jointly. Similarly, it is

quite clear that the arrangement would involve either the plaintiff and/or Mr. O'Brien looking after the defendant's horses when visiting the premises to look after the ponies.

47. Accordingly, the Court finds that the plaintiff was a party to the arrangement in this sense and was not therefore at any time a trespasser on the Reacasla property. Moreover, I am quite satisfied that neither defendant would have been one bit surprised to discover the plaintiff had attended at the Reacasla property on foot of the arrangement to look after the horses while attending to her ponies. Nor, if it was a surprise to either of them would there have been an objection.

Liability: Conclusion

48. In light of the foregoing, the next task for the Court is to determine where liability for the accident should fall. In this regard the knowledge of horses and their nature by the parties is material. While the plaintiff accepted that the first defendant had an interest in horses her opinion as to his knowledge and experience of horses was that he hardly knew anything at all, an opinion which for reasons discussed earlier is wholly wrong. The Court has already found that the parties were very knowledgeable and experienced in equine matters.

49. As a consequence and having due regard to the findings made, it was reasonably foreseeable on the part of the defendants as owners that if the cob was insufficiently exercised and/or overfed he would eventually want to get out of his stable. It follows that the consequential occurrence of such an event which causes injury and/or loss amounts to common law negligence. Simply put it is a breach of the 'neighbour principle' exemplified in the judgement of Lord Atkin in *Donohue v. Stephenson* [1932] A.C 562 at 580, namely to take reasonable care to avoid acts or omissions which can reasonably be foreseen would be likely to injure one's neighbour who, in this instance, is the plaintiff. Accordingly, the Court finds that the cause of the accident is attributable to the negligence of the defendants. This, however; is not the end of the matter.

Contributory Negligence

50. Contributory negligence alleged in the Defence was pursued in the course of the case, accordingly, the next task for the Court is to determine whether there was any breach of the common law duty or care which the plaintiff owed to herself. In this regard there would certainly have been very significant contributory negligence if there was any basis to the suggestion, on her own evidence, that she had been instructed not to muck out the horse and/ or not to let the horse out for exercise. As it is the Court has found that it was no part of the arrangement that the plaintiff and/or Mr. O'Brien were responsible for letting the horses out to exercise. While the Court has also found that no instruction of the nature suggested was given it does not necessarily follow that the plaintiff cannot be found guilty of contributory negligence. In my judgment the old adage that what is sauce for the goose is good for the gander is apposite and in this instance the plaintiff, on her own evidence, was every bit as knowledgeable of and experienced with horses as the first defendant. The question of contributory negligence falls to be determined on the findings of fact and conclusions reached by the Court.

51. Although responsibility for exercising the defendants' horses was not part of the arrangement which had been entered into; the plaintiff knew that the only place available for exercise was the paddock where her own ponies were turned out. Given her very considerable knowledge and experience of horses it was reasonably foreseeable in the circumstances that on opening the stable door the cob might try to get out and injure her in the process, a risk to which she exposed herself. Whereas someone with no knowledge or very little knowledge or experience of horses might be excused, the plaintiff is not such a person. In determining contributory negligence the courts apply an objective test to the facts which in this case involves consideration of subjective elements material to the outcome, such as the plaintiff's equine knowledge and experience which was every bit as comprehensive as that of the first defendant. Accordingly, I am satisfied and the Court finds the plaintiff guilty of contributory negligence.

Apportionment of Fault

52. The next matter with which the Court is tasked concerns the apportionment of liability. Section 34 (1) of the Civil Liability Act, 1961 requires the apportionment of damages to be made having regard to the degrees of fault of the plaintiff and the defendant. In this regard the law in this regard is well settled. In approaching this aspect of the case an important distinction is made between causation and fault which may be summarised as follows. The degrees of fault between the parties are apportioned not on the basis of the relative causative potency of the respective causative contributions to the damage but rather on the basis of the blameworthiness of the respective causative contributions by reference to what a reasonable man or woman would have done in the circumstances.

53. Put another way, fault or blame is to be measured against the standard of conduct required of the ordinary reasonable man or woman in the class or category to which the party whose fault is to be measured belongs. In this instance the creator of the state of affairs which led to the accident was the defendants. Applying these principles to the findings reached the defendants should bear the greater degree of fault, however, having regard to the particular circumstances of the case in my judgment the degree of fault to be borne by the plaintiff should not be insignificant, consequently, in all the circumstances the Court considers the fairest apportionment of fault should be 30 % to the plaintiff and 70% to the defendants.

Quantum

54. The plaintiff was born on the 3rd December, 1953. She has a pre and post-accident medical history that has been the subject of Discovery and on foot of which relevant medical notes and records were obtained and subsequently admitted in evidence. Apart from the plaintiff's own account of the injuries and of the consequences for her, the medical evidence is to be found in a number of medical reports which were also admitted. Following her admission to Kerry General Hospital (KGH) she was discharged into the care of her GP Dr O'Dowd who examined and treated her by several physicians from some of whom reports have been obtained, namely, Dr. Tony O'Dowd, the plaintiff's GP and Mr. Dermot O'Farrell, Consultant Orthopaedic Surgeon. Dr. O'Dowd's reports are dated June 30th, 2014 and the 1st April 2019 and Mr. O'Farrell's are dated the 28th June 2017 and 5th June 2019. The plaintiff was also medically examined on behalf of the defendants by

Prof. Eric Masterson, Consultant Orthopaedic Surgeon, who reported on the 1st March 2018 and by Dr. Brian J. Spillane, Sports and Consultant Physician, who reported on the 16th May 2016.

55. The plaintiff gave evidence that she suffered severe soft tissue injuries, principally affecting her neck and back as a consequence of which she developed and continues to suffer from a chronic pain syndrome. Her mobility has been severely compromised; she has particular difficulty with sitting and walking and requires crutches to ambulate. Following discharge from hospital the day after the accident the plaintiff attended her GP on approximately 7 occasions in the first few months post-accident with ongoing complaints of constant pain, particularly in her lower back, which he described as significant and secondary to the accident. On examination the plaintiff had very restricted back movement accompanied by tenderness in the soft tissues.

56. Over the intervening years Dr O'Dowd has prescribed physiotherapy, anti-spasmodic, anti-inflammatory and analgesic medication to help control her ongoing symptoms including Paracetamol, Tramadol, Celecoxib, Etoflam, topical gel, Diclofenac, Meloxicam, and Amitriptyline. The plaintiff was also seen by Mr Din, Consultant Orthopaedic Surgeon and Dr Hassan, locum Rheumatology Consultant attached to KGH. She was continued on pain relief medication by them and subsequently referred to their hospital colleague Dr Zaheer, specialising in pain management. He administered an epidural injection and prescribed Palexia and Pregabalin a treatment from which the plaintiff initially derived good symptomatic relief for approximately 8 or 9 weeks before her symptoms returned.

57. Mr. O'Farrell noted complaints of severe pain affecting all daily activities which also interfered with her sleep. He expressed the view that the plaintiff was suffering from severe spinal pain since the accident and was very disabled by her symptoms and had developed a chronic pain syndrome although there was no objective evidence of any pathology to explain the degree of disability. Although neurological examination carried out by him had disclosed no neurological abnormality he recommended a neurological review together with ongoing medication, physiotherapy and a home exercise programme and, if possible, swimming. With regard to prognosis his view was guarded but suggested the plaintiff would benefit from ongoing treatment and advice from a consultant pain specialist, a physiotherapist and occupational therapist.

58. Professor Masterson's assessment and opinion of the plaintiff's situation was that she had developed an entrenched pattern of illness behaviour which was more than what he would have expected from purely organic pathology. With regard to prognosis this behaviour was unlikely to improve in the short term but might be expected to improve gradually after the resolution of the litigation. However, it appears from the report of Dr Spillane, a well-known Sports and Orthopaedic Physician that he was very sympathetic to her and expressed the opinion the plaintiff is unlikely to make a full recovery from her injuries; she presented to him as being very disabled on examination and he was satisfied that her complaints were genuine. On the face of it, the medical notes, records and reports, which the parties have admitted into evidence without condition, raise a number of matters

about which there are differences which, as a result of the admission, the Court is called upon to resolve.

Admission of Medical Reports: Conflict of Evidence

59. In circumstances where a difference of opinion between experts retained by the parties to any proceedings results in a conflict between them. The unconditional admission of the reports as evidence of the content may depending on the nature of the conflict arising, pose a potentially intractable problem for a court in determining, for the purpose of resolving the conflict, which evidence is to be accepted as more probably correct and how that question is to be approached.

60. The foregoing is not intended by me nor is it be taken as impugning the practice which has evolved, particularly in personal injuries litigation, of agreeing the admission in evidence of medical notes, records and reports, a practice which is, generally speaking, to be encouraged, assisting as it does in contributing to the effective and efficient disposal and reduction in the cost of litigation. Nevertheless, where a significant conflict of opinion arises on the face of the documents or reports in respect of which no *viva voce* evidence from the experts concerned is intended to be adduced, practitioners should give careful consideration as to whether the unconditional admission in evidence thereof is appropriate, particularly in circumstances where, as a consequence, the court may be unable to reach a satisfactory conclusion.

Admission of the plaintiff's Medical Notes and Records; Pre-Accident History; Admission of the Experts Reports:

61. The plaintiff's injuries are soft tissue in nature and now predominantly affect her lower back. It is apparent from the medical reports as, indeed, it is from the medical notes and records, that the plaintiff experienced intermittent episodes of back pain prior to the accident, something which was only fully acknowledged and accepted when her attention was drawn thereto under cross examination. Similarly, she had no recollection of an accident which befell her in 2009 until she was reminded of it by counsel for the defendants, albeit a perusal of the medical notes and records shows that the plaintiff had it seems contemplated the bringing of proceedings at the time.

62. While I don't consider there was anything deliberate or malevolent about the deficiencies in the plaintiff's recall about these matters, she appears to be on what seems to me to be a mind-numbing cocktail of medication, it also seems some of the medical reports appear to have been prepared without the benefit of a full medical history or access to the pre-accident medical notes and records and must therefore be read with this caveat. Nevertheless, as is their right, the parties have agreed the unconditional admission of the discovered medical notes and records together with the medical reports furnished as evidence without also arranging or inviting further medical examination or opinion. Given the plaintiff's pre and post-accident medical history, including two hip replacements for which the defendants quite clearly bear no responsibility, the Court is tasked with untangling from this background the injuries and consequences of the accident for which there is a liability.

Decision on Quantum

63. The Court has already found that the plaintiff suffered a heavy fall to the ground when she was knocked over by the horse as it bolted from its stable and that as a result she was unable to get up. From the outset the plaintiff complained of pain from the back of her neck to her lower lumbar spine. X-Rays and MRI scanning have disclosed multiple degenerative disc and facet joint disease in the spine and elsewhere which predated the accident, but which was relatively quiescent when compared to post the accident history. The plaintiff requires sleeping tablets to help her sleep and has been prescribed pain relieving and analgesic medication since the accident which she is required to take on an almost daily basis to help her cope with the symptoms.

64. Mr. Johnson made the point on behalf of the defendants that the plaintiff was also taking a number of relevant medicines prior to the accident. In this regard, I have carefully considered in some considerable detail the pre-accident medical history and note the plaintiff's evidence that although advised to take these she did not do so. Her evidence in this respect and the explanation offered for noncompliance was that she was unable to tolerate the medication; that she was noncompliant is corroborated by her GP's notes.

65. Some six weeks before the subject accident the plaintiff was found collapsed on the ground at the foot of the stairs in her home. She has no memory of what caused the fall. She had no history of seizure and her medical notes refer to her attributing the collapse to tiredness. She had developed pain in her right knee following the accident in 2009 and she had also developed intermittent joint pain in her elbow as well as in her hips for which she subsequently required hip replacements one before, and one after the accident.

66. To use a colloquial phrase the plaintiff is "riddled with rust". As already mentioned, X-ray and MRI scanning disclosed generalised osteoarthritis throughout her spine and in her joints. She was, however; relatively active pre-accident whereas subsequently she has become quite disabled and has become quite dependant on her partner to assist in her mobility; she is unable to carry out household chores leaving this aside she isotherwise relatively independent in living. As mentioned earlier, the plaintiff underwent a spinal epidural injection. This procedure was carried out in 2015 at the Bon Secours Hospital, Tralee. She derived relief from the treatment, but it did not last.

67. Based on the medical reports of her treating physicians and of Dr. Spillane she would benefit from further pain management advice and treatment as well as from physiotherapy and occupational therapy although previously it seems she was unable to tolerate the former. Professor Masterson believes that the plaintiff was suffering from what he described as "an entrenched pattern of illness behaviour" which appears to me to be a psychological diagnosis even though he is not a psychiatrist or psychologist.

68. That said, all of the physicians have found the plaintiff to be greatly compromised in terms of her mobility, indeed, she is so compromised that some of them could not carry out a full medical examination. This presentation could, of course, be relied on to call into question the veracity of her complaints, especially when considered in the context of the comments made by Prof. Masterson, the question being whether there is any basis for her disabilities or whether such are a figment of her imagination.

69. The person who probably knows the plaintiff best is her GP, Dr. O'Dowd, who is clearly quite supportive. As mentioned earlier, he is supported by Dr Spillane in his opinion that the accident caused soft tissue injuries which aggravated an underlying degenerative condition from which she is unlikely to make a full recovery, evidence which I accept, moreover; in so far as there may be any question concerning the veracity of the plaintiff's complaints I also accept the evidence of Dr Spillane that he was satisfied she was entirely genuine.

Conclusion

70. Accordingly, and having regard to the medical notes, records and reports which have been admitted and to the evidence of the plaintiff with regard to her injuries, which I also accept, the Court finds that as a result of the accident she suffered significant soft tissue injuries, principally involving her neck and lower back, superimposed on pre-existing but intermittently symptomatic degenerative changes throughout her spine. In reaching this conclusion, the Court is mindful that the plaintiff had other degenerative changes in her joints, particularly in her hips for which she has had hip replacements, and for which the defendants are not responsible.

71. She also complained in May 2016 of a right wrist injury which she attributed to the accident at that time, however; there is no contemporary reporting of a wrist injury in 2014. The Court is also conscious of other medical problems, referred to in the medical notes, records and reports, both pre and post-accident for which the plaintiff has had to seek medical attention. However, so far as her pre-accident status is concerned it also appears from perusal of the medical notes and records, as was her evidence, that the plaintiff was well able to get around and mobilise in a way which she was not able to do post-accident. She was able to travel by car to go and feed her ponies and did not need a stick or crutches. All that has changed. She is now very significantly compromised in her mobility. I am satisfied and the Court finds that she is in a very different state in terms of physical abilities than she was prior to the accident.

72. While it was very fairly accepted on behalf of the defendants that the accident probably accelerated or brought forward degenerative changes in her spine albeit that it was not possible to say by how much, the Court also finds as a matter of probability that the plaintiff was likely to have experienced progression in her generalised pre-existing degenerative condition as a result of which she was going to experience progressive symptomology, this notwithstanding the occurrence of the accident although the period of time or degree of symptomology involved is unknown. There is no doubt that throughout 2011, 2012, 2013, indeed, right up to the time of the accident that the plaintiff had complained of intermittent backache referred to variously in the medical notes as "back pain" but also in one entry as "severe back pain" for which she was medicated.

73. It is also noted by the plaintiff's GP that if these complaints did not resolve she should be referred for specialist attention. Significantly in the present context, there was no referral, a fact consistent with the plaintiff's evidence that she was relatively active and that any problems she had in this respect were intermittent from all of which I consider it reasonable to infer that her intermittent pre accident back complaints were attributable to

an underlying degenerative condition which was waxing and waning. There were periods when she experienced symptomology and periods when she did not. Indeed, when one considers the content of all of the attendances recorded in the medical notes and records there are many attendances for other matters where there is no mention of problems with her neck or her back pre-accident. However, she is now experiencing constant back pain for which she has to take medication on a daily basis. In follows her current presentation has a mixed aetiology.

74. There is fairly broad acceptance on the part of the reporting physicians that the plaintiff would benefit from further treatment, including pain management advice from which it seems reasonable to conclude she may experience some improvement in symptomology, something which Professor Masterson thought might occur in due course following the conclusion of the litigation, accordingly, the Court will approach the assessment of damages on the basis that the plaintiff will undertake the medical treatment and advice which she has received in mitigation of her loss, that this will have a positive impact in helping her to cope with the chronic pain syndrome and the undoubtedly significant situation in which she finds herself involving as it does daily pain and severely restricted ability to mobilise independently.

75. Finally, the Court is also mindful in carrying out the assessment of general damages that the defendants are only liable for the injuries and loss suffered by the plaintiff as a consequence of the defendants' negligence and not for the consequences which would or might likely have occurred in any event as a result of pre-existing medical conditions. In this regard, the law and the approach which the Court is required to take on the assessment of general damages is well settled. The award must be just and to be just it must be fair to both parties, it must be reasonable and that means it must be proportionate to and commensurate with the injuries and loss sustained as a consequence of the accident.

76. In carrying out its assessment the Court invited the parties to make submissions in relation to the ranges of damages set out in the Book of Quantum into which the injuries properly fall. In this regard I accept Mr. Kiely's submission, bearing in mind that not all of the plaintiff's problems and presentation are attributable to the accident, that this is a case which comes within the severe rather than the moderate / moderate to severe range of damages.

77. Applying the legal principles to which I have referred and making allowance for those matters in respect of which the defendants have no liability the Court considers that a fair and reasonable sum to compensate the plaintiff for pain and suffering to date is €50,000 and for future pain and suffering is the sum of €25,000 making in aggregate a total of €75,000 from which, having regard to the apportionment fault herein, the amount of €30,000 must be deducted leaving a net amount by way of damages of €52,500. And the court will so order. There are no special damages.