THE HIGH COURT

[2016 No. 95 C.A.]

CIRCUIT APPEAL

DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

BETWEEN

TERESA WALL

PLAINTIFF/RESPONDENT

AND

NATIONAL PARKS AND WILDLIFE SERVICE

DEFENDANTS/APPELLANT.

JUDGMENT of Mr. Justice White delivered on the 17th day of February, 2017

1. This is an appeal from a judgment of the Circuit Court delivered on 15th April, 2016. The court found the Defendant negligent arising from injuries suffered by the Plaintiff while hiking on the Wicklow Way on 6th August, 2013, when she tripped and fell on a boardwalk made up of railway sleepers joined together.

2. The Honourable Judge of the Circuit Court found that:-

> "The plaintiff was a recreational user, she was directed to use the boardwalk which was made up of second hand wooden railway sleepers, a structure placed on the land by the defendant. It is clear from the photographs that the timbers were badly rotten with staples protruding and chicken wire loose and reasonable care was not taken to maintain same in a safe condition resulting in the injuries suffered by the plaintiff. There was not contributory negligence on her part."
>
> She was awarded €40,000 in general damages.

3. The appeal was heard in this Court on 23rd, 24th, 25th November, 6th and 7th December, 2016 and judgment was reserved.

4. The negligence alleged against the defendant in the personal injury summons issued in the Circuit Court on 25th June, 2014, was as follows:-

> (a) causing or allowing or permitting a defect to be present in a wooden boardwalk in the form of a hole (measuring approximately 20 inches long by 4 inches wide x 1 inch deep) where the timber had rotted away;
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> (b) causing, allowing or permitting a designated walkway to be in a defective and dangerous condition;
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> (c) creating or maintaining a tripping hazard at the accident site;
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> (d) failing to ensure that the wooden boardwalk was in good condition at the accident site;
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> (e) failing to replace the section of timber of the walkway which contained the tripping hazard;
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> (f) failing to thoroughly treat the timber of the walkway with preservative to prevent rotting;
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> (g) failing to repair the original wire mesh covering the walkway;
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> (h) failing to institute and/or ensure the operation of a system of inspection in repair of the walkway;
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> (i) leaving the boardwalk in a condition which was unsafe;
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> (j) failing to warn the plaintiff that the boardwalk was unsafe;
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> (k) failing to have any or any adequate regard for the safety of walker;
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> (l) failing to anticipate the danger which the accident site posed;
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> (m) creating or maintaining a public nuisance at the accident site;
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> (n) exposing the plaintiff to a risk of injury which the defendant knew or ought to have known;
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> (o) breaching the duty of care which was owed to the plaintiff by the defendant by virtue of the provisions of the Occupier's Liability Act 1995; and
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> (p) the plaintiff will rely on the doctrine of res ipsa loquitur.

5. It was alleged that the plaintiff's foot snagged on a hole in the timber of the boardwalk and she tripped and fell forward on her right knee.

6. The defendant, in it's defence delivered on 28th November 2014 denied any breach of duty of care or any negligence or breach of statutory duty and alleged that the incident which the plaintiff complained of on 6th August, 2013, occurred in a manner in which the defendant was not liable or not wholly liable to the plaintiff on the grounds that the plaintiff was negligent and/or contributory negligent in that she:-

> (a) failed to exercise reasonable caution in all the circumstances;

(b) failed to keep any or any proper lookout as to where she was going or how she was proceeding;

(c) failed to avoid the danger of which she now complains;

(d) was the author of her own misfortune;

(e) failed to apply her skill and expertise and/or training; and

(f) failed to apply her knowledge of the area and/or locus.

Brief History of the Accident

7. The plaintiff is a married woman with two grown up daughters and at the date of the accident was 56 years of age. She is an experienced hill walker having been walking with her husband regularly since they were in their 20s, both in Ireland and abroad. They mostly hiked in the Wicklow mountains. The plaintiff was also a marathon runner. Unfortunately, she suffered a nasty injury to her right knee on 6th August, 2013, when hill walking on the Wicklow Way in Co. Wicklow near the J.B. Malone Memorial. The injury had serious consequences for her active lifestyle.

8. The undisputed evidence is that the plaintiff and her husband, Damien, on the morning of 6th August, 2013, drove to Roundwood in Co. Wicklow to commence a hill walk to Djouce and return to Roundwood. They had prepared for the walk the evening before and had the appropriate equipment. The plaintiff was wearing Miendl walking boots and also had the assistance of two walking poles. The boots were100mm wide at their widest point. They started their walk from Roundwood and stayed on the road for approximately two miles and then went on to the Wicklow Way The initial part of the trail from the Sally Gap road was on a rough path The plaintiff then emerged onto a wooden boardwalk.

9. The boardwalk was constructed with used railway timber sleepers laid slightly suspended from the ground with steps where the slopes were too steep. The sleepers are about 2,700mm x 260m x 5mm thick. The sleepers were covered with u-shaped nails hammered into the wood but left proud of the timber to prevent walkers slipping when the railway sleepers were wet. In parts, the sleepers were covered in chicken mesh wire, which had disappeared in other places.

10. The Wicklow Way is a national way marked route of approximately 130km stretching from Marley Park, Dublin to Clonegal in Co. Carlow. A substantial portion of the route goes through the Wicklow National Park which is controlled and managed by the defendant. The location of the accident near White Hill is ecologically sensitive and had come under pressure from erosion or from trampling where the walk tracks became substantially widened. In or around 1997, these railway sleepers were laid to preserve the habitat and to encourage walkers to use same. This particular area is about 600m above sea level. When the railway sleepers were originally laid down, the practice was to lay half inch mesh chicken wire on the sleepers and staple them. Because of the very high foot fall and the weather conditions, the wire began to deteriorate and in or around 2006/2007, the sleepers were retrofitted with u-shaped nails for grip. Any chicken wire that was still in tact was left in situ because it was hard to get off and any areas that were obviously torn were removed.

11. The Wicklow Way is inspected by the National Trails Office which involves a trail inspection every second year and a report is issued outlining any corrective action needed. It is run by a number of bodies called the Wicklow Partnership. While most of the land is in public ownership, some of the Wicklow Way goes through private land.

12. The plaintiff has accepted that she was a very experienced hill walker and agreed it was a demanding pursuit, necessitating vigilance. The plaintiff completed her walk to the summit of Djouce Mountain successfully and was on the return journey when she fell. She accepts that she traversed the boardwalk area where she fell on the way to Djouce.

13. Along this section of the boardwalk, there are very obvious indentations where the wood has become worn. Some areas of the sleepers are more vulnerable than others where due to previous use on the railways, the rails had been secured onto the sleepers by base plates known as chairs. Water tended to collect under the base plates and it was not unusual to have a small hole under the base plate of a used sleeper. In the mountain environment, water entered the hole and once there is freezing conditions and then thaw, the ice gets into the wood and splits it and softens it.

14. The plaintiff was walking from south to north to Djouce and on the way back was heading south again retracing her route. Evidence is disputed as to the exact location of the accident on the boardwalk, how the plaintiff fell, where she landed and what she said afterwards to various parties.

15. The plaintiff's evidence was that as she was descending from Djouce and had just passed the JB Malone monument on the way back the toe of her foot got caught in a hole in the sleeper which caused her to go down on her right knee. She stated that she had a pole in each hand and was using them on the boardwalk itself. When she fell on her right knee her walking trousers got ripped and her knee was cut by one of the nails embedded in the boardwalk. The plaintiff stated that there were some loose nails on the boardwalk but after clarification she stated that she got injured on the upturned nails hammered into the boardwalk which were part of the boardwalk itself. She stated that when her foot went down on the boardwalk she tried to lift it but it got caught in the wood and that this all happened in a split second. The plaintiff identified photograph 4 in the engineering report of Mr. Pat Culleton as the location where her foot got caught in the hole. She stated it was a perfect day for walking. She said the fall caused a severe impact and the right hand side of her body was bruised.

16. The plaintiff was treated that day at the VHI Clinic in Swords having been driven there by her husband directly from the scene of the accident. She got seven stitches in her knee. She returned to the clinic on 19th September and the wound was still infected and she was treated with antibiotics and further dressing. The plaintiff is still complaining of her injury. She stated that it has impacted on her hugely because she could not go back running as the knee would go from under her and she has not walked in the mountains since then but only now walks on the flat. She stated the scar has healed well but that the knee has not healed well. She stated that she had intended to run the Dublin Marathon that autumn on 31st October and after that to go on a walking holiday in Slovakia.

17. The plaintiff made contact with the defendant at its local office in Wicklow by telephone. She spoke to Monica Byrne who worked in an administrative role in the office. Ms. Byrne took a note of the conversation, some of which is disputed by the plaintiff.

18. The written contemporaneous note that Ms. Byrne noted from the telephone conversation states:-

> "Message taken at 11am on Wednesday, 14th August.
>
> Tuesday, 6th August, 4pm experienced walker reporting an accident bad condition of boardwalk at Djouce Teresa Wall 0863088683.
>
> Fell on boardwalk from Djouce towards JB Malone wire loose and broken. Five stitches on knee. Supposed to go to Slovakia today but now can't go."

19. Ms. Byrne noted that the plaintiff was very upset on the phone and was crying and referred to the fact that she was making the telephone call from her bed. Ms. Byrne was of the opinion that she wrote the note as she was talking to the plaintiff on the telephone.

20. The plaintiff spoke to another employee of the defendant on the afternoon of 14th August, Ms. Enda Mullen. Ms. Mullen completed an accident report form which noted that the plaintiff had described the accident as:-

> "fell on boardwalk (sleeper). Cut knee on wire staple. Needed five stitches in hospital. On antibiotics and painkillers. Should have been going to Slovakia on a walking holiday today. Very upset. A lovely day/dry and clear so weather was not a cause as the boardwalk was in bad condition with torn wire."

21. It was indicated to Ms. Mullen that she was going to make a claim for compensation and Ms. Mullen explained that this would have to be done through the State's Claims Agency. The plaintiff in her evidence stated that she was not aware that Ms. Mullen was filling out any form and that she just rang that day to say she had a bad fall and for someone to get back to her about it. She stated she could not remember saying that she had tripped on wire. Her memory was that she just stated that she had a fall on the mountain and was hurt badly. She has accepted that she did not tell Ms. Mullen about the hole in the boardwalk. The plaintiff stated that she would not have said she was going to Slovakia on a walking holiday that day as she was not going on this walking holiday until the Dublin City Marathon was over and also she had seven stitches in her knee, not five.

22. Ms. Mullen received another call from the plaintiff's daughter, Ann, on 19th August, 2013, and Ms. Mullen gave Ms. Wall the address of Corporate Development and later that afternoon, the plaintiff rang to confirm the address of Corporate Development and informed Ms. Mullen that she had been talking to a solicitor.

23. The plaintiff in her account to Dr. Memon on 18th September, 2013, stated that she was walking on a sleeper in Wicklow Mountains and fell on right knee and had seven stitches.

24. On 19th August, 2014, on a return visit to the VHI clinic she informed Dr. Lincoln that she was walking on a boardwalk with her husband coming down a mountain and she fell onto the wooden boards and there was nails sticking out of the wood and her foot got caught. On attendance at Dr. Brian J. Hurson on 21st August, 2014, he noted in his report that she was involved in an accident when walking on the mountains, her foot got caught in wire mesh causing her to fall on her flexed right knee. She sustained a cut to the front of her knee.

25. In an email of 5th September, 2013, to her husband, the plaintiff stated:-

> "The sleepers are covered with wire held in place by nails. The sleepers are very badly damaged in places as seen in the photographs. I slipped as I was walking and my knee was badly cut on one of the nails."

26. A preliminary letter of claim was sent on 11th September, 2013, by the plaintiff's solicitors, to the defendant.

27. The letter stated:-

> "Our client was walking on the Wicklow Way with her husband, Damien, on 6th August, 2013. They were on the route from Sally Gap road to Djouce. They were walking on the railway sleepers which they are directed to walk on by signs to avoid damage to the surrounding vegetation. Unfortunately, the boardwalk is not maintained adequately and our client tripped when her foot came into contact with a hole in one of the sleepers and she fell seriously injuring her right knee which came into contact with an exposed steel staple which is used to keep the wire mesh covering the sleepers in place but unfortunately the steel staples are raised and these caused our client to sustain injury resulting in seven stitches to her right knee."

28. Photographs were supposed to be enclosed but were not enclosed with the letter and subsequent to a reminder from the State's Claims Agency by letter of 11th November, 2013,the solicitors furnished photographs. The photograph furnished was one taken by Mr. Damien Wall, the plaintiff's husband, when he returned to the mountain on his own shortly after the accident and took a number of photographs.

29. The plaintiff has told the court that this was not in fact the location of the accident as this area was to the north of the JB Malone monument while the accident occurred on the boardwalk to the south of the monument.

30. There is also a dispute as to where she landed. The plaintiff, herself, stated that she fell forward onto the boardwalk in the area in which the hole was, however, her engineer has told the court that his understanding of the accident was that she fell as she approached a step down to another sleeper approximately 16 inches back from the step and ended up on the lower side of the step, landing on the sleeper beneath that on which she tripped.

The Mechanism of the Fall

31. The boardwalk was approximately 2km long. The plaintiff was walking on a downward slope of a gradient of 11.4% on the sleeper on which she fell. This sleeper was 2475mm or 8ft 1.5 inches long. The plaintiff had proceeded towards the end of that sleeper before she fell. The hole on which she states she snagged her foot on was 20 inches long, 4 inches wide and 1 inch deep according to Mr. Culleton and Mr. Romeril gave the measurements as 80mm long by 100mm wide by 35mm deep. This would equate to 26.7 inches long, 3.9 inches wide and 1.37 inches deep. It was accepted by Mr. Romeril and Mr. Culleton that the hole had probably deepened by about 10mm in the year since the accident, the date of the joint inspection being 21st September, 2015.

32. Considering the disputed evidence the court accepts the evidence of the plaintiff that she fell in the location she described. It is unfortunate that there was some confusion when the wrong photographs were sent to the defendant when the original claim was made but I am satisfied that the plaintiff when she visited the boardwalk with Mr. Culleton on 28th April, 2014, identified the location

of the accident. The court is satisfied that the account given by the plaintiff to Mr. Culleton on that date as to where she landed is the more accurate rather than her own evidence before this Court. She landed on the next sleeper down from the sleeper that she fell on.

33. The court accepts that when the plaintiff spoke to Ms. Byrne and Ms. Mullen she was in a distressed condition, however, I have no reason to doubt the accuracy of Ms. Byrne and Ms. Mullen's evidence as to what she told them and they are likely to be more accurate than the plaintiff at that point in time.

34. The various accounts given by the Plaintiff, lead the court to believe that the Plaintiff has become more certain of the mechanism of her fall since the accident. It is likely because of the suddenness of her fall, that she was uncertain about the cause of it originally.

In the courts opinion the most likely cause of the accident was that described in the initial letter of claim of 11th September, 2013, that the plaintiff tripped when her foot came in contact with the hole. The court finds that the foot did not get planted or fully snagged in the hole because of the measurements of the hole and the boots that I have described. So as the plaintiff was walking along, the most likely cause of the accident is that she tripped on the vertical lip of the hole and fell forward

35. The boardwalk in that location had a number of these indentations which were caused by the vulnerability of the sleepers where the original base plates or chairs had been placed. If the plaintiff had been looking down she would have had a good view of those indentations as she was walking on a downward slope for at least six feet on the sleeper before she came to it. The indentation was undoubtedly a trip hazard if you were not looking at it or if you did not lift your boot high enough to avoid it. The indentations were certainly not hidden and this was the second time that the plaintiff had traversed this area. The indentations would have been obvious to her on the way up the mountain. I do not accept that the boot got completely wedged in the indentation as it is more likely that she was not stepping high enough when the boot got caught in the front of the indentation causing her to fall.

36. I consider that the description by Mr Romeril of the likely mechanism of her fall set out at page 30 of the transcript of the 25th of November 2016 is an accurate description. He stated,

"This is the classic trip scenario. A person who is walking always has one foot on the ground, as you probably know if you're in the Olympics they always watch you must have one foot on the ground. So you have your planted foot and we call it your passing foot, that's the foot that's passing the planted foot. When the planted foot is placed down, the first strike is the heel and then you rotate on to the sole. This is the conventional walking. You then lift the passing foot, it all happens simultaneously and the passing foot goes forward. If the passing foot is dropped, as often is, you are at risk of tripping on a lip or even a depression in this case. That's why you have to lift your feet to avoid tripping on uneven ground. As you're walking in this position you're actually leaning forward. The body uses the weight to move forward. If you trip, if your passing foot trips particularly at or just beyond the planted foot, you will fall forward."

37. Before considering the defendant's legal liability, on the facts of the mechanism of the fall decided by this court there was a high degree of negligence on the plaintiff's part in that she was not looking at the surface of the boardwalk when she fell.

Legal Issues
38. Was it permissible for the defendant to allow the deterioration of the sleepers before replacement. The location was not easily accessible for installation or replacement. The Plaintiff alleges that repair was possible and not difficult. The position taken by the defendant in relation to maintenance was that unless the holes were in locations as such that the sleeper was at risk of falling apart, they were not considered to be an unacceptable hazard to walkers on a trail of this nature classified as moderate.

Statute Law
39. The Plaintiff accepts she was a "recreational user" under section 1 of the Occupiers' Liability Act, 1995 Act, but submits that s. 4(4) of the Occupiers' Liability Act, 1995 provides that where an occupier places a structure on land for use by recreational users, this creates a positive duty on the occupier to maintain the structure in a safe condition., and that the duty of care under section 4(4) is similar to the common law duty of care. The Plaintiff also submits that Section 4(4) is independent of section 4(1) of the Act which sets out a less onerous duty for occupiers. The defendant disputes this.

40. The Plaintiff maintains that the boardwalk is a structure. The defendant argues that it is not, but also submits that there is a burden on the Plaintiff to establish, before the exceptional duty provided for in section 4(4) arises:-

(i) That the proceedings concern a *structure* within the meaning of the subsection

(ii) That the structure has been *provided for use primarily by recreational users*.

(iii) That the structure is unsafe.

(iv) That the unsafeness is attributable to a failure to exercise reasonable care to maintain the structure:.

41. The Defendant argues that the Plaintiff bears the burden of establishing each of these matters, and in the context of an outdoor pathway being used by an experienced hill-walker on a moderate mountain trail, visible and obvious depressions or indentations on the boardwalk were not dangerous or unsafe and the Defendant had no legal duty to remove, fill or otherwise to repair the offending parts of the walk.

42. The relevant sections of the Act are Sections 3 and 4, set out hereunder,

3. Duty owed to visitors.

(1) An occupier of premises owes a duty of care ("the common duty of care") towards a visitor thereto except in so far as the occupier extends, restricts, modifies or excludes that duty in accordance with section 5.

(2) In this section "the common duty of care" means a duty to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to exercise over the visitor's activities) to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon.

4. Duty owed to recreational users or trespassers.

(1) In respect of a danger existing on premises, an occupier owes towards a recreational user of the premises or a trespasser thereon ("the person") a duty—

(a) not to injure the person or damage the property of the person intentionally, and

(b) not to act with reckless disregard for the person or the property of the person, except in so far as the occupier extends the duty in accordance with section 5.

(2) In determining whether or not an occupier has so acted with reckless disregard, regard shall be had to all the circumstances of the case, including—

(a) whether the occupier knew or had reasonable grounds for believing that a danger existed on the premises;

(b) whether the occupier knew or had reasonable grounds for believing that the person and, in the case of damage, property of the person, was or was likely to be on the premises;

(c) whether the occupier knew or had reasonable grounds for believing that the person or property of the person was in, or was likely to be in, the vicinity of the place where the danger existed;

(d) whether the danger was one against which, in all the circumstances, the occupier might reasonably be expected to provide protection for the person and property of the person;

(e) the burden on the occupier of eliminating the danger or of protecting the person and property of the person from the danger, taking into account the difficulty, expense or impracticability, having regard to the character of the premises and the degree of the danger, of so doing;

(f) the character of the premises including, in relation to premises of such a character as to be likely to be used for recreational activity, the desirability of maintaining the tradition of open access to premises of such a character for such an activity;

(g) the conduct of the person, and the care which he or she may reasonably be expected to take for his or her own safety, while on the premises, having regard to the extent of his or her knowledge thereof;

(h) the nature of any warning given by the occupier or another person of the danger; and

(i) whether or not the person was on the premises in the company of another person and, if so, the extent of the supervision and control the latter person might reasonably be expected to exercise over the other's activities.

(3)

(a) Where a person enters onto premises for the purpose of committing an offence or, while present thereon, commits an offence, the occupier shall not be liable for a breach of the duty imposed by subsection (1) (b) unless a court determines otherwise in the interests of justice.

(b) In paragraph (a) "offence" includes an attempted offence.

(4) Notwithstanding subsection (1), where a structure on premises is or has been provided for use primarily by recreational users, the occupier shall owe a duty towards such users in respect of such a structure to take reasonable care to maintain the structure in a safe condition:

Provided that, where a stile, gate, footbridge or other similar structure on premises is or has been provided not for use primarily by recreational users, the occupier's duty towards a recreational user thereof in respect of such structure shall not be extended by virtue of this subsection.

Is the Boardwalk a Structure

43. I have listened carefully to the arguments put forward by the Plaintiff and the Defendant, and I am satisfied that the boardwalk is a structure within the meaning of the act. I am also satisfied that it is provided for use primarily for recreational users.

44. I am satisfied that Section 4(4) is independent of Section 4(1) and must be considered as a separate duty of care, from that defined in section 4(1). There is an onus on the Plaintiff to establish that the boardwalk was in an unsafe condition, and that its unsafe condition was attributable to a failure to exercise reasonable care to maintain it. It has common characteristics to the duty imposed by Section 3, but is not exactly the same.

45. I approve of the statement of Clarke J. in *Ahmed(a minor) v. Longford Town Council* [2014] IESC 46, when he stated:-

"4.3 However, at the oral hearing, as already noted, a concession was made. Counsel accepted that the proviso contained in s.4(4) of the 1995 Act applied. Under that provision the general effect of subs. (1), which is indeed to significantly increase the threshold by reference to which an occupier can be found liable, does not apply "where a structure on premises … for use primarily by recreational users" is present. In such a case the occupier owes a duty to recreational users "to take reasonable care to maintain a structure in a safe condition". While not conceding that s.4(4) is necessarily, in all cases, identical as to the duty which it imposes on occupiers to the common law duty, counsel accepted that, on the facts of this case, there was no material difference between the two tests.

4.4 Indeed, it is worthy of note that it does not appear that any case for a particularly enhanced threshold was

advanced by Longford Town Council in the High Court. Be that as it may, there was, in reality, no significant difference between counsel as to the appropriate approach of the Court to the facts of this case. The test was either, as counsel for the plaintiff argued, the common law test, or, as counsel for Longford Town Council suggested, a reasonable care test under s.4(4) of the 1995 Act with neither counsel arguing that there was any significant practical difference between the application of the two tests at least so far as this case was concerned."

Does The Standard Of Care Change Depending On The Context And Social Value Of The Activity Which Gave Rise To The Risk

46. Mr Pat Culleton, the expert witness called by the Plaintiff, stated that the condition of the boardwalk at the location of the accident was a trip hazard, and that the hazard was the same whether it is in a park or the mountains. He stated that for someone walking normally, this was a trip hazard in any environment.

47. The Defendant has argued that as a matter of law that is incorrect, and relies on a number of decided cases and an extract from McMahon & Binchy, *The Law or Torts*, (4th ed., Bloomsbury, 2013) at para. 7.27, which states that four factors relevant to the assessment of the standard of care are identified. Those are (i) the probability of an accident; (ii) the gravity of the threatened injury; (iii) the social utility of the defendant's conduct; and, (iv) the cost of eliminating the risk.

48. The Defendant asserts that the circumstances of an accident have to be taken into account in assessing the standard of care, and that this has long been part of Irish law. In *Purtill v. Athlone UDC* [1968] I.R. 205 at pp. 212 and 213, Walsh J. observed that "*[w]hat amounts to sufficient care must vary necessarily with the circumstances, the nature of the danger, and the age and knowledge of the person likely to be injured*." Similarly, in *Donaldson v. Irish Motor Racing Club* (Unreported, Supreme Court, 1st February, 1957), at p. 9, Kingsmill Moore J. observed that "*the care taken need only be reasonable care, and what is reasonable depends on all the circumstances, including the probability of an occurrence causing danger, the probability of injury ensuing if such an occurrence takes place, the practicability of precautions, the legal categories involved, and other matters too diverse and numerous to be catalogued*."

49. The Defendant relies on a number of English authorities as being persuasive on the court particularly in relation to outdoor pursuits. Extracts from it's legal submission states:-

> "The exercise which must be undertaken by the courts in assessing the standard of care was set out by Lord Hoffman in *Tomlinson v. Congleton* [2003] UKHL 47, [2004] 1 A.C. 46. The case involved a plaintiff who sustained injuries after diving into a lake created in a disused quarry. In finding for the defendant, Lord Hoffman held, at p. 82:-
>
> *'34 My Lords, the majority of the Court of Appeal appear to have proceeded on the basis that if there was a foreseeable risk of serious injury, the council was under a duty to do what was necessary to prevent it. But this in my opinion is an over-simplification. Even in the case of the duty owed to a lawful visitor under section 2(2) of the 1957 Act and even if the risk had been attributable to the state of the premises rather than the acts of Mr Tomlinson, the question of what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other.'"*

50. In *Mills-Davies v. Royal Society for the Protection of Birds* (Unreported, English High Court, 21st May, 2004), the plaintiff suffered a significant eye injury on a woodland trail. The injury occurred when the Plaintiff tripped on a protruding stump of a small tree which had been cut down in the course of clearing operations to create the trail. He fell on another stump which had a jagged and sharply pointed top. His case was that tripping and penetrating hazards had been left in the pathway by RSPB rendering the trail unsafe. He sought to impose liability under the English Occupiers Liability Act 1957, which imposed a duty of care in respect of a lawful visitor. That duty *was to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. The duty was owed "in respect of dangers due to the state of the premises*."

51. The Court refused to impose such liability. It stated, at para. 57:-

> *"It would not be a breach of the common duty of care to fail to remove such a tree stump taking into consideration the nature of this part of the Reserve, the type of visitor to be expected, the numbers of visitors and the absence of any accident or even complaint."*

52. Thus, the tree stump was not, in the context in which it appeared, a danger which the Defendant was under an obligation to eliminate. The case is also significant in that it emphasises the impracticability of requiring occupiers of open terrain to avoid all risks associated with recreational activity. (see para. 59).

53. The Scottish case *Leonard v. The Loch Lomond and Trossachs National Park Authority* [2014] CSOH 38 reached a similar conclusion. There, the pursuer (a minor) fell along a track near Loch Lomond. He alleged that he fell off the path and down a bank onto a road. He complained that steps provided by the Defendants were uneven, inconsistent in shape and sloping downwards and different angles and with exposed roots and other tripping hazards such as man made gullies. These occurred in a context where there was no barrier preventing him from falling down the road.

54. Lord Uist conducted an extensive review of the authorities which emphasised that liability could not be imposed in circumstances such as those under consideration by the Court there in respect of a danger of which the person was aware. He stated, at para. 25 that this was the case whether the feature alleged to be defective was natural or man made:-

> *"The stone pitched path was not, of course, a natural feature of the landscape but a manmade one. I do not think that makes any difference. It was, as I have already held, a path constructed to accepted and normal standards. It is self-evident that it was constructed in order to secure greater safety for those going up or down the hill by providing greater grip and stability on the ground. Had there been no such path and only mother earth there would have been obvious dangers of slipping on the hill. It also blended or merged well with the landscape and by 2006 was an established feature. There was no history of complaints about, or accidents upon, it. In these circumstances I adopt the approach taken by Lord Emslie in Graham in relation to manmade or artificial features on land. The path was a long-standing artificial feature which was neither concealed nor unusual and did not involve exposure to any special or unfamiliar hazard. It had become a permanent, ordinary and familiar feature of the landscape in respect of which the defenders*

owed no duty to [the pursuer] or anyone else under section 2(1) of the Occupiers' Liability (Scotland) Act 1960. Indeed, I would go further than Lord Emslie and hold that it is not a requirement that the artificial feature be well established or long standing before the principle of Stevenson and Taylor applies: it is sufficient that it is obvious, part of the landscape and does not involve exposure to any special or unfamiliar hazard. If, for example, an accident happened a week after an obvious artificial feature which became part of the landscape (such as a pond, swimming pool or path) had been constructed I see no reason why the principle in Stevenson and Taylor should not apply. Of course, by its very nature, the path in this case presented a danger in the form of the risk of tripping or slipping, but that is a risk which those venturing upon the hill must be taken to have accepted. Adapting the words of Lord Hutton in Tomlinson, it would be contrary to common sense, and therefore not sound law, to expect the defenders to provide protection to members of the public (by means of a handrail or barrier or anything else) against such an obvious danger"(emphasis added).

The social utility of the defendant's conduct

55. It is well-established that conduct which is of high social utility will not be assessed as onerously as that of low social utility. In *Whooley v. Dublin Corporation* [1961] I.R. 60, the plaintiff injured her foot after stepping on a fire hydrant box whose lid had been removed. The evidence was that the lid was designed to be easy to remove in order to be easily accessible to the emergency services.

56. In *Cole v. Davis-Gilbert* [2007] EWCA Civ 396, Scott Baker L.J. in the Court of Appeal discussed the chilling effect which can result to socially valuable activities if too high a standard is imposed. At para. 36, he said:-

"Accidents happen, and sometimes they are what can be described as pure accidents in the sense that the victim cannot recover damages for the resulting injury because fault cannot be established. If the law were to set a higher standard of care than that which is reasonable in cases such as the present, the consequences would quickly become inhibiting.. There would be no fêtes, no maypole dancing and none of the activities that have come to be associated with the English village green for fear of what might conceivably go wrong."

The legal submissions of the Defendant further stated,

57. "In these proceedings, the provision of the boardwalk serves two purposes, both of which should be taken into consideration. First, the provision of the boardwalk is a means of protecting against the erosion of a protected habitat. Second, it provides access for all entrants, including recreational users, to a site of great natural beauty and significance."

58. "There is some comparison to be made between the present case and the English cases which deal with highway authorities' positive duty to maintain roads and footpaths. In the context of trip and fall cases, reference is often made to the judgment of Steyn L.J. in *Mills v. Barnsley Metropolitan Borough Council* [1992] P.I.Q.R. P 291, at pp. 3 and 4:-"

"In my judgment the photographs reveal a wholly unremarkable scene. Indeed, it could be said that the layout of the slabs and the paving bricks appears to be excellent, and that the missing corner of the brick is less significant than the irregularities and depressions which are a feature of streets in towns and cities up and down the country. In the same way as the public must expect minor obstructions on roads, such as cobblestones, cats eyes and pedestrian crossing studs, and so forth, the public must expect minor depressions. Not surprisingly, there was no evidence of any other tripping accident at this particular place although thousands of pedestrians probably passed along that part of the pavement while the corner of the brick was missing. Nor is there any evidence of any complaint before or after the accident about that part of the pavement. Like Mr. Booth, I regard the missing corner of the paving brick as a minor defect. The fact that Mrs. Mills fell must either have been caused by her inattention while passing over an uneven surface or by misfortune and for present purposes it does not matter what precisely the cause is.

Finally, I add that, in drawing the inference of dangerousness in this case, the judge impliedly set a standard which, if generally used in the thousands of tripping cases which come before the courts every year, would impose an unreasonable burden upon highway authorities in respect of minor depressions and holes in streets which in a less than perfect world the public must simply regard as a fact of life. It is important that our tort law should not impose unreasonably high standards, otherwise scarce resources would be diverted from situations where maintenance and repair of the highways is more urgently needed. This branch of the law of tort ought to represent a sensible balance or compromise between private and public interest. The judge's ruling in this case, if allowed to stand, would tilt the balance too far in favour of the woman who was unfortunately injured in this case. The risk was of a low order and the cost of remedying such minor defects all over the country would be enormous. In my judgment the plaintiff's claim fails on this first point."

59. "In this regard, it is submitted that regard must be had to what would be required to replace or to take such measures as to reduce to naught the risk of another person suffering the same injury as the plaintiff. In particular, having regard to the fact that such risks would remain for any person standing off the boardwalk."

60. The Plaintiff argues that there is nothing in section 4(4) of the Act which reduces the duty to maintain the structure in a safe condition by reference to its location, and that the evidence demonstrated that the sleepers had a shelf life of approximately 25 years, and that there was a duty on the Defendant to maintain the boardwalk, and that the Defendant had replaced sleepers where holes had gone right through or more than halfway through the sleeper.

61. The Plaintiff submitted that the Defendants system of inspection was inadequate. It either failed to detect holes on the boardwalk or when holes were detected these were not identified as being sufficiently deep to be considered as dangers. This thus resulted in a failure to maintain the boardwalk at the accident site.

62. The Plaintiff relies on a Supreme Court judgment *Doherty v Bowaters Irish Wallboard Mills Ltd* [1968] I.R. at p. 277. The court was interpretating Section 34,1(a) of the Factories Act 1955, which stated:-

"a chain, rope or lifting tackle shall not be used unless it is of good construction, sound material, adequate strength and free from patent defect"

63. The Supreme Court held that the section imposed a distinct and absolute duty on the Employer.

64. This court does not accept that the duty imposed on an occupier by Section 4(4) of the Act is an absolute or strict duty. It has

to be construed in its ordinary meaning, The duty of reasonable care to maintain a structure in a safe condition, has to be interpreted by applying the law of negligence, in particular the standard of care applicable.

65. The Court does not agree that a trip hazard is the same no matter what the location. It approves of the passages from the English and Scottish authorities recited, in respect of outdoor pursuits and it is also not the law as applied in the Irish courts. It also approves the passages of extracts from the judgments quoted on the social utility of the activity in dispute.

66. Because of the vigilance expected from hill walkers, walking on moderate mountain trails, and the application of the legal principle that the standard of care has to be adapted to the conditions, the social utility of the provision of the boardwalk, the isolated location of same, I do not hold that the defendant was negligent in not filling in the indentations or replacing the sleepers with new sleepers and will accordingly allow the appeal in full.