**THE COURT OF APPEAL**

Neutral Citation Number: [2017] IECA 293

**Record No. 2016/152**

**Ryan P.**
**Irvine J.**
**Whelan J.**
**BETWEEN/**

**LOUISE BYRNE**

**PLAINTIFF / RESPONDENT**

**- AND –**

**ARDENHEATH COMPANY LIMITED AND ARDENHEATH MANAGEMENT COMPANY LIMITED**

**DEFENDANTS / APPELLANTS**

**JUDGMENT of Ms. Justice Irvine delivered on the 9th day of November 2017**

1. This is the appeal by Ardenheath Company Ltd. against the judgment and order of the High Court, Hanna J., dated the 25th February, 2016. In his judgment, Hanna J. found the defendants liable in negligence for injuries sustained by Ms. Louise Byrne on the 20th December, 2012 when she fell whilst walking down a grassy bank from the defendants' car park at Mountview Shopping Centre, Blanchardstown, Dublin 15 to an adjacent footpath. He also found Ms. Byrne guilty of contributory negligence to the extent of 40%.

2. The High Court judge assessed the damages to which Ms. Byrne was entitled in respect of pain and suffering to date in a sum of €50,000 and €70,000 in respect of pain and suffering into the future. The total award made by the trial judge, allowing for agreed special damages of €5,066.87, was €125,066.87 which, when discounted to take account of Ms. Byrne's contributory negligence, resulted in an overall award of €75,040. He also awarded Ms. Byrne her costs of the proceedings when taxed and ascertained.

3. By notice of appeal dated the 23rd March, 2016, the defendant/appellant ("Ardenheath") seeks to challenge the validity of the trial judge's findings in respect of liability and also his assessment of the general damages to which he considered Ms. Byrne entitled both in respect of pain and suffering to date and pain and suffering into the future.

**Relevant background facts**

4. Ms. Byrne was born on the 22nd April, 1967 and is the mother of four children. At the time of the accident the subject matter of the within proceedings she was working as an information officer with the Blanchardstown Centre for the Unemployed on a part time basis. Her work required her to deliver leaflets to housing estates in the Blanchardstown area.

5. On the 20th December, 2012, accompanied by two of her colleagues, Phyllis Lee and Carol Byrne, she drove to Mountview Shopping Centre with a view to parking her car there whilst she distributed leaflets in the locality. The car park was conveniently close to the housing estate which was to be the focus of her activities. It was a drizzly, damp day as they got out of the car. Ms. Lee and Ms. Carol Byrne exited first and stepped over the kerbstone in front of the car after which they had made her way down the adjacent grassy bank to the footpath which was no more than 10 feet away. Ms. Louise Byrne, having retrieved her handbag from the boot of the car, followed taking the same route to the footpath. In her evidence, Ms. Byrne stated that because the car park was busy and she needed to get to the pathway which was just in front of her, she went down the grassy bank. She slipped on this slope and suffered a serious break to her ankle.

6. It is perhaps relevant at this point to give some detail concerning the car park of the Mountview Shopping Centre as the same is relevant to the liability findings ultimately made by the trial judge. The Land Registry Map and Overhead Aerial Image attached to the report of Denis Wood Associates, Consulting Engineers, shows that the shopping centre comprises two building developments. The larger building is served by a car park which provides spaces for approximately 85 to 90 cars. That car park has approximately 250 feet of grass frontage to the north and a further approximate 250 feet of like frontage to the east. The smaller building is serviced by a car park providing approximately 25 spaces and this area enjoys a grass frontage to the north of approximately 150 feet. There are four entrances from the roads and footpaths which surround the north and eastern sides of the shopping centre. Entrance number 1 is at the south east corner of the overall site and is sufficiently wide to accommodate both vehicles and pedestrians. The continuous grass frontage to the north of the larger car park, which incorporates a footpath parallel to the roadway, is broken by two pedestrian only entrances. These are identified as entrances numbered 2 and 3 on Aerial Image 1. Entrance number 4, like entrance number 1, is a wide entrance sufficient to accommodate both vehicles and pedestrians. This entrance separates the two areas of grass frontage to the north of the shopping centre. There is approximately 150 feet between entrance number 4 and entrance number 3. The entire car park is separated from the grass area which surrounds it by a continuous kerbstone which is 6 inches in height. There are no markings on the road surface of the car park to guide the movements of either pedestrians or motorists. Finally, of relevance to the circumstances surrounding Ms. Byrne's fall is the fact that the grass slope between the car park at the point at which she parked her car and the adjacent footpath has a slope of approximately 31°.

**Judgment of the High Court**

7. As to the circumstances relevant to these proceedings, the trial judge found as a fact that Ms. Byrne had driven into the smaller car park and had parked her car 5 to 6 car parking spaces to the right of the entrance through which she had driven. Concerning the grass area upon which Ms. Byrne fell, the High Court judge observed that there was a very definite slope and that "there appears to have been no accommodation of any description to allow for persons coming out of or entering into that part of the car park".

8. The following is what the High Court judge stated concerning the location of the accident and which is recorded at p. 9 of the transcript of his judgment:-

> "The only designated exit, as I have said, in this instance was a shared vehicular entrance. There was a cutaway as one entered or exited the entrance which could physically accommodate pedestrians, I suppose, but it wasn't marked out, it wasn't indicated as such, and there was no way really of saying that pedestrians were to use that or not. A pedestrian, if

one were to be very strict about it, would have to wander down past the entrance and carry on to one of the two pedestrian entrances in the other half, as it were, of the car parking area and then carry on up again. Very often, as we know, people don't do that, people will take shortcuts, as is evident from the photographs. People were taking shortcuts all over the place in this area because that's what people do and that's why people have to be given the choice. But were they given an appropriate choice in this case?"

9. Based on the evidence of Mr. Barry Tennyson, engineer on behalf of the plaintiff/respondent, the High Court judge went on to find, as a matter of fact, that as there was no pedestrian only designated entrance for pedestrians wishing to get from the footpath to the smaller car park or vice versa, they had to go up and down the slope. The trial judge noted the engineer's evidence to the effect that it would have been a simple matter for Ardenheath to have installed a pedestrian only entrance consisting of a step and a barrier at the location where Ms. Byrne had fallen. Its absence was, according to Mr. Tennyson, a "design fault". It was Mr. Tennyson's evidence that the barrier and step would have stopped pedestrians walking up and down the slope and would have cost Ardenheath no more than €5,000. The trial judge also noted the engineering evidence given on behalf of the defendant to the effect that there was no design fault with the entrances to the car park. He further noted the consulting engineer's evidence that there was no justification for the claim that, in failing to provide a further pedestrian only entrance between entrance number 4 and the north west corner of the site, Ardenheath had not taken reasonable care for pedestrians wishing to get from the car park to the adjacent footpath.

10. The trial judge accepted Mr. Tennyson's evidence that the absence of a pedestrian only entrance between entrance number 4 and the north west corner of the car park (*i.e.* along the 150 foot of frontage to the north side of the smaller car park) constituted a basic design fault. This fault, he found, was further evidenced by the fact that there were two pedestrian only entrances for patrons using the larger car park who wished to access the footpath incorporated within the grass perimeter at the north side of the larger car park. According to the trial judge, the standard that had been deployed in the larger car park represented what Mr. Tennyson considered to be good practice, whereas the smaller car park had a design fault which represented bad practice and a departure from the standard of care owed to Ms. Byrne as a visitor.

11. Having found Ardenheath liable for breach of its duty as the occupier of the car park, the trial judge went on to hold Ms. Byrne 40% liable in respect of her injuries. He did so based on the fact that the slope upon which she had fallen was obvious, allied to which it was a drizzly day and the grass was wet and slippery at the time. Given that she had decided to go down the slope, it would appear that the trial judge concluded that she had not done so either "gingerly" or "carefully" such that she had contributed to her fall.

12. As to her injuries, Ms. Byrne sustained a bimalleolar fracture subluxation of her left ankle which required internal fixation and a hospital stay of two days. Thereafter, her left leg and foot were retained in a plaster of Paris cast for six weeks. The trial judge described Ms. Byrne's Christmas as "something of a catastrophe" as she had great difficulty mobilising. She undertook physiotherapy but continued to have discomfort in the ankle with the result that she had the metal fixation removed from her ankle in March 2015, a procedure which was carried out as a day case. X rays taken in April 2015 did not demonstrate any degenerative change but identified the presence of a washer on the medial side of the ankle which has become fused to the bone. The trial judge accepted Ms. Byrne's evidence that she had difficulties with ongoing pain, discomfort and swelling of the ankle and expressed himself satisfied that this would likely continue into the future whilst acknowledging the possibility of some alleviation in her symptoms. He described the scarring to the ankle, which this Court has seen, as significant and bilateral in nature and he considered it reasonable that Ms. Byrne was embarrassed by this scarring.

**Legal Principles**

13. As there is no real dispute concerning the principles to be applied on this appeal, it is unnecessary to refer to them in any great detail.

14. Suffice to say that when it comes to interfering with findings of fact made by a trial judge, the well established principles set out in *Hay v. O'Grady* [1992] 1 I.R. 210 apply. If the findings of fact made by the trial judge are supported by credible evidence, the appellate court is bound by those findings regardless of how voluminous and apparently weighty the testimony against them may be. As was stated by McCarthy J. "the truth is not the monopoly of any majority".

15. An appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence of recollection of fact and a different inference has been drawn by the trial judge. But in the drawing of inferences from circumstantial evidence, an appellate court is in as good a position as the trial judge.

16. As to the circumstances in which an appellate court will interfere with an award of general damages, two of the decisions most frequently relied upon are those of Lavery J. in *Foley v. Thermocement Products Ltd.* [1954] 90 I.L.T.R. 92 and McCarthy J. in *Reddy v. Bates* [1984] ILRM 197. The former judgment advises that the test to be applied by an appellate court is to decide whether there is any "reasonable proportion" between the actual award of damages and what the court, sitting on appeal, would itself be inclined to give. For this purpose, the appellate court will make its own assessment of the damages it considers proportionate and then decide whether the award made by the High Court judge should be considered "an entirely erroneous estimate of the damage or is plainly unreasonable". The latter decision advises, *inter alia*, that an appellate court should only interfere with an award of general damages if it considers that there is an error in the award which is so serious that it should be considered to amount to an error of law and that a general rule of thumb would require a discrepancy of at least 25% before the appellate court could justify intervening.

17. As to the calculation of general damages, the jurisprudence in this area of law requires that awards of damages for pain and suffering be both just and fair. An award must be (i) fair to the plaintiff and the defendant, (ii) objectively reasonable in light of the common good and social conditions in the State, and (iii) proportionate within the scheme of awards for personal injuries generally. (See for example Denham J. in *M.N v. S.M* [2005] 4 I.R. 461 and that of this court in *Nolan v. Wirenski* [2016] IECA 56).

18. It is important, as I stated in *Nolan v. Wirenski*, that minor injuries should attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level that are clearly distinguishable in terms of quantum from those that fall into the other lesser categories of injury. Further, the fact that a judge describes an injury as significant does not mean that the damages must be substantial. How significant the injury is for the purposes of assessing damages should be assessed in the context of the whole spectrum of potential injuries to which any individual might be exposed.

19. As to how a judge at first instance might make a fair and just assessment of the damages to be awarded in respect of pain and suffering in any case, commencing at para. 43 of my judgment in *Shannon v. O'Sullivan* [2016] IECA 93, I stated as follows:-

"43. Most judges, when it comes to assessing the severity of any given injury and the appropriate sum to be awarded in

respect of pain and suffering to date, will be guided by the answers to questions such as the following:-

(i) Was the incident which caused the injury traumatic, and if so, how much distress did it cause?

(ii) Did the plaintiff require hospitalisation, and if so, for how long?

(iii) What did the plaintiff suffer in terms of pain and discomfort or lack of dignity during that period?

(iv) What type and number of surgical interventions or other treatments did they require during the period of hospitalisation?

(v) Did the plaintiff need to attend a rehabilitation facility at any stage, and if so, for how long?

(vi) While recovering in their home, was the plaintiff capable of independent living? Were they, for example, able to dress, toilet themselves and otherwise cater to all of their personal needs or were they dependent in all or some respects, and if so, for how long?

(vii) If the plaintiff was dependent, why was this so? Were they, for example, wheelchair-bound, on crutches or did they have their arm in a sling? In respect of what activities were they so dependent?

(viii) What limitations had been imposed on their activities such as leisure or sporting pursuits?

(ix) For how long was the plaintiff out of work?

(x) To what extent was their relationship with their family interfered with?

(xi) Finally, what was the nature and extent of any treatment, therapy or medication required?

44. As to the court's assessment as to the appropriate sum to be awarded in respect of pain and suffering into the future, the court must once again concern itself, not with the diagnoses or labels attached to a plaintiff's injuries, but rather with the extent of the pain and suffering those conditions will generate and the likely effects which the injuries will have on the plaintiff's future enjoyment of life."

**The appellant's submissions**

20. Mr. Declan Buckley S.C., on behalf of Ardenheath, submits that there was no credible evidence upon which the trial judge could have found Ardenheath in breach of its statutory obligations as occupier of the car park. He argues that its obligation did not extend beyond providing care that was reasonable in all of the circumstances.

21. The reason the plaintiff was injured was because of her own blameworthy actions. According to Mr. Buckley, Ms. Byrne should have been found 100% responsible for her own injuries and for the High Court judge to have found the defendant 60% liable was to permit her to abrogate all responsibility for own actions. He submits that Ms. Byrne knew she was taking a shortcut. She knew she was wearing runners which would not provide her with a good grip. She knew that it was wet and that the grassy area over which she intended to cross had a severe slope. She also knew it was not a designated entrance and that the entrance which she had used to enter the centre by car was no more than five car spaces away. Further, counsel relies upon the fact that Ms. Byrne was under no compulsion to go down the slope she did. She was not in a hurry. It was not argued that she could not find an exit. She knew where it was and she was not under any pressure in terms of time.

22. Counsel then addressed the trial judge's finding that there was a design fault because of Ardenheath's failure to provide a designated pedestrian only entrance comprising a concrete step with a barrier either side proximate to where Ms. Byrne had slipped. He relies on the fact that there was no evidence of any track on the grassy slope to suggest that patrons "habitually went up and down" the slope at any particular point between the smaller car park and the foot path immediately to the north of it. There was no indication for a need for any such path. Mr. Buckley further submits that every pedestrian deciding not to use entrance number 4 to exit the smaller car park would likely take different routes down the slope depending upon where they had parked their car and where they intended to go having exited the car park. This was not a case where there was evidence of a "desire line" as a result of the habitual use of one particular path of travel.

23. Mr. Buckley submits that there was no reason why on the morning in question, having regard to the traffic in the car park, a pedestrian such as Ms. Byrne would not have walked to entrance number 4 and used that as her means of accessing the footpath. He further submits that she did not decide to exit down the slope because she was in any way concerned that she could not safely use that exit. She took a short cut and was not entitled to seek to have his client pay for the consequences flowing from the risk she had taken.

24. Finally, counsel submits that the damages awarded by the trial judge for pain and suffering to date and pain and suffering into the future were not just, fair and proportionate, but were excessive, having regard to the injuries sustained by Ms. Byrne and her likely prognosis. He asks the court, in the event of liability being upheld against his client, to conclude that the award amounts to an error of law such that it should be set aside in favour of a lesser sum in respect of both categories of damages.

**The respondent's submissions**

25. Mr. Eugene Gleeson S.C. on behalf of Ms. Byrne submits that the trial judge was entitled to prefer the evidence of Mr. Tennyson to that of the defendant's consulting engineer, Mr. Colin Flynn. Mr. Tennyson' s evidence was that if Ardenheath had taken reasonable care for the safety of person visiting the shopping centre it would have provided a pedestrian only entrance with a barrier erected on either side of it to ensure that pedestrians did not exit the smaller car park by going down the slope which joined the smaller of the two car parks to the footpath immediately in front of it. He submits that the trial judge was entitled to find that reasonable care required Ardenheath to construct a barrier to stop people going down a desire line and that it was within his discretion to make that finding based upon the expert evidence.

26. According to counsel, there was credible evidence to support the trial judge's finding that there was a design fault in the design of the smaller car park because it did not, unlike the larger car park, have a pedestrian only entrance. He relied upon the principles advised in *Hay v. O'Grady* to support his submission that there was no basis upon which this Court could lawfully interfere with the

High Court judge's finding in respect of liability.

27. Finally, Mr. Gleeson submits that the damages awarded by the High Court judge in respect of pain and suffering to date and pain and suffering into the future were not disproportionate or unfair having regard to the injuries sustained by his client. The evidence was that she had endured much by way of pain and suffering to date and will continue to do so into the future. In particular, she had very significant scarring to the ankle, which was permanent and was the source of great embarrassment to her.

**Discussion**
28. Given that the facts are not in dispute, the question on this appeal is whether the trial judge was correct as a matter of law in the standard of care which he demanded of Ardenheath as occupier of the car park where Ms. Byrne sustained her injury. The starting point for a consideration of this issue is of course the provisions of the Occupiers' Liability Act 1995 ("the Act").

**Occupiers' Liability Act 1995**
29. The nature and extent of the duty owed by an occupier to a visitor to their premises is set out in s. 3 of the Act which provides as follows:-

> "3.(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."

30. Whilst the trial judge in most personal injuries cases will be assisted, in reaching his or her decision as to whether an occupier has complied with their obligations under the Act, by expert witnesses such as consulting engineers, it is for the trial judge, and the trial judge alone, to decide that issue having regard to the facts established in any particular case. The role of the expert witness is to guide the court and to bring to its attention all of the evidence which they consider might assist the judge in forming his or her independent judgment as to whether or not the parties complied with their respective obligations. This evidence will often include assistance in the form of photographs, maps, measurements and any relevant statutory provisions or regulations.

31. It was my experience as a trial judge that the effectiveness of the assistance offered by expert witnesses in almost all disciplines, whether that evidence was in respect of the standard of care proposed or a party's compliance therewith, was frequently compromised by the fact that, all too often, their opinions all too often appeared to correspond too favourably with the interests of the parties who retained them. I continue to remain of that view as an appellate court judge where the transcript may lead one to the conclusion that a given expert had become so engrossed in their client's position that they were clearly incapable of providing truly independent guidance for trial judge.

32. I mention these facts because they highlight the need, particularly in cases where the court is not dealing with a complex specialist field of activity, for the trial judge, not only to consider the expert evidence tendered by the parties but to bring ordinary common sense to bear on their assessment of what should amount to reasonable care. The present case would, in my opinion, fall into that category insofar as it concerns the care to be expected of the owner of a shopping centre car park for visitors seeking to exit the car park on foot.

33. The situation is of course different in cases involving a specialised field of activity such as the practice of obstetrics or the operation of a nuclear power plant, to take but two extreme examples of the types of cases in which a judge should never substitute their own views for those of appropriately qualified experts. In such cases, evidence is required from persons with specialised skills and the judge cannot be the sole arbiter of what constitutes reasonable behaviour, because they know nothing of the risks that may be involved. However, this is not such a specialist case.

**Evidence in the High Court**
34. It is necessary, having regard to the findings of fact made by the High Court judge to mention some particular aspects of the evidence.

35. Whilst evidence was given by Mr. Tennyson regarding "desire lines", a factor referred to by the trial judge in his judgment, it is important to note that there was no worn track or "desire line" going down the grassy slope between the small car park and the footpath evidencing the demand of pedestrians to exit the small car park otherwise than by using entrance number 4.

36. Material also is the fact that there was no evidence to suggest that it would not be reasonable, in the context in which that word is used in the Act, to expect pedestrians and vehicles to share the same entrance such as those numbered 1 and 4 in this case. Further, there was no evidence that such use was in breach of the planning permission granted for the shopping centre or that it was in breach of any other regulation or safety requirement for commercial premises.

**Liability conclusions**
37. Core to the liability finding of the trial judge was his conclusion that there was a "design fault" in the smaller car park, in that, unlike the larger car park, it was not served by a pedestrian only entrance.

38. It is correct, as can be seen from the Land Registry Compliant Map and as was found by the trial judge, that the larger car park does indeed have two pedestrian only entrances (numbers 2 and 3). These are in fact relatively close to each other on the north side of the car park. However, what the trial judge failed to observe is that the larger car park has two continuous areas of grass frontage of approximately 150 feet, one to the north and the other to the east of the shopping centre of equivalent length to that fronting the smaller car park through which there are no designated pedestrian entrances. Thus I cannot identify any credible evidence upon which the trial judge could validly have concluded that there was a "design fault" by reason only of the absence of a designated pedestrian path through the area of continuous frontage to the north side of the smaller car park where Ms. Byrne fell. For this reason, I am satisfied that the trial judge's finding of a design fault based upon the disparity of pedestrian only entrances between the two car parks is not supported by the evidence, regardless of whether it was Mr. Tennyson's opinion that there was such a design fault.

**The duty of care of the occupier**
39. Contrary to what is to be inferred from the judgment of the High Court judge, the liability of an occupier for the safety of a visitor

to one area of its premises is not to be judged by the standard of facilities which it provides for visitors to any other area of its premises. The fact that an occupier may provide lesser facilities or a less safe environment, even if it was its intention that the standards be the same, is not of itself evidence of negligence. The question a court considering the matter must address is whether the area which has the lower standard of facilities or the lesser standard of safety, assuming that to be the location of the subject accident, complies with the occupiers' statutory obligation to take reasonable care in all of the circumstances. Unfortunately, the trial judge did not adopt that approach but instead condemned the occupier for providing what he, incorrectly as it happens, considered to be a lesser standard of care for pedestrians using the smaller car park.

40. Accordingly, I am satisfied that the trial judge made two significant errors. First, he erred as a matter of law in concluding that Ardenheath, by reason of its failure to provide equivalent facilities in terms of pedestrian only entrances in the smaller car park as were available to visitors to the larger car park, had necessarily fallen short of its statutory obligation to provide reasonable care. Second, based upon the opinion evidence of Mr. Tennyson, he found that there was a "design fault" in Ardenheath's failure to provide a designated pedestrian only entrance along that area of grass frontage to the north of the shopping centre where the Ms Byrne fell, when the evidence demonstrated equivalent areas of frontage to the larger car park which had no such pedestrian only entrances.

41. It was these conclusions on the part of the High Court judge, together with his acceptance of Mr. Tennyson's opinion that Ardenheath, if taking proper care for the safety of those expected to use the shopping centre, would have installed a step close to where Ms. Byrne fell and a barrier along the whole of the frontage to the north of the smaller car park to deter patrons from walking down the grass slope, that ultimately caused the trial judge to find Ardenheath liable in respect of Ms. Byrne's injuries.

42. Bearing in mind that what amounts to reasonable care is a question of law for the trial judge on the facts of any given case, the question which this Court must address is whether the trial judge was correct as a matter of law when he concluded that Ardenheath was in breach of its statutory duty to take reasonable care for Ms. Byrne in its failure to fence off the offending slope where she slipped and provide her with a pedestrian only exit or step somewhere along the grass frontage to the north of the smaller car park where she fell.

43. Relevant to this issue are certain factors which may be considered by a trial judge when analysing whether an occupier may be said to have complied with its obligation to provide reasonable care for a visitor to its premises. One such factors is the probability of an accident occurring and in this regard it is relevant that there was no evidence of any history of accidents on this particular slope. A further consideration is the likely gravity of the injury that might result from the risk posed. In this regard, while Ms. Byrne did suffer a severe injury, the gravity of the risk posed by the slope was relatively benign when considered against the gravity of the type of injury that might be sustained due, for example, to the absence of a railing on the top of a public building. Another relevant factor in the judge's analysis would be the cost of eliminating the risk. In this case, the evidence was that the cost of providing the step and adjacent barriers proposed by Mr. Tennyson would have been relatively low i.e. in the sum of approximately €5,000.

**Decision**

44. For my part, I am satisfied that the trial judge erred in law when he concluded that the defendant had failed to comply with its statutory obligations in its failure to have in place the barrier and concrete step system advocated by Mr. Tennyson. First of all, as s.3 (2) of the Act makes clear, the occupier is entitled, when deciding what steps it should take to comply with its obligation, to assume that its visitors will take all reasonable care for their own safety and that an adult normally can look after his or her welfare. The occupier is entitled to take into account that an adult normally can look after his or her welfare. That begs the question as to what Ardenheath as occupier was entitled to expect of a visitor such as Ms. Byrne who wanted to leave the smaller car park on foot to go to the housing estate across the road from the car park.

45. I am satisfied that Ardenheath was entitled to assume that an adult exercising reasonable care would avoid the 31º wet grassy slope, particularly having regard to the presence of the 6 inch kerbstone, the fact that they were wearing shoes that provided little grip, and that they needed to go no further than the modest distance required leave the car park through entrance number 4 using a tar macadam surface. There was, after all, no evidence that entrance number 4 was not suitable as a safe entrance for both cars and pedestrians. Further, the evidence of Ms. Lee was that on the day of Ms. Byrne's accident, whilst the car park was busy, there was no reason why she could not have walked the distance of five or six car park spaces so as to make her exit on a proper and safe surface. This is not a case where, in order to have avoided the wet grassy slope, Ms. Byrne would have been required to walk any substantial distance in order to find a dedicated surfaced exit.

46. All that is not to say that there is anything to stop a visitor such as Ms. Byrne deciding to take a short cut down such a slope to get more quickly or directly to their desired destination. However, if they do they cannot be said to have used reasonable care for their own safety and if they are injured as a result they cannot seek to blame the occupier. I am accordingly satisfied as a matter of law that, in providing visitors to its smaller car park with a safe and proximate entrance (Entrance number 4), Ardenheath complied with its duty to take reasonable care for Ms. Byrne on the 20th December, 2012.

47. I am satisfied that to hold Ardenheath liable for breach of its statutory obligations for failing to install a barrier along the area of grass frontage to the north side of the smaller car park in order to stop pedestrians such as Ms. Byrne exiting the centre by going down a short but steep grassy slope, when there was a safe exit only a short distance away, would be preposterous and would be tantamount to constituting Ardenheath the insurer of the safety of its customers. Further, to conclude that Ardenheath was obliged to deploy preventative measures of the type proposed by Mr. Tennyson in order to meet its "reasonable care" obligations under s. 3(2) of the Act would potentially have significant adverse repercussions for all of those who occupy land open to visitors which is not entirely flat such as the local authorities responsible for many of the wonderful open spaces and parks in this country.

48. The implications of imposing such a standard might be said to support the proposition that "reasonable care" required an occupier of land open to visitors to erect a fence at the top of any grassy slope of 31 degrees or more and to provide a step or a series of steps, presumably at regular intervals, to allow that slope to be negotiated by visitors. Indeed, it might even be said that the occupier was obliged to erect a barrier at the bottom of the slope, if the slope was sufficiently long from top to bottom, lest visitors decide go part of the way up and slip and injure themselves on a wet day.

49. I am satisfied that the visitor should be expected to take reasonable care descending a grassy bank and if it be wet and slippery and they are in unsuitable footwear that they will decline the risk or that if they decide to accept it they will take responsibility for the consequences of that decision. Judges should be careful when interpreting statutory provisions such as s. 3 of the 1995 Act to ensure that they do not inadvertently and contrary to the intention of the legislature by their judgments end up denying children the joy of running down a grassy slope in a public park on a dry summer day or the golfer the pleasure of playing to an elevated green surrounded by a grassy bank. The court must consider the obligation of the occupier against the backdrop of the statutory provision which entitles them to assume that the visitor will use reasonable care for their own safety. In this case, had Ms. Byrne not acted in breach of her obligation to take reasonable care for her own safety, entrance number 4 would have provided her with a safe and

proximate method whereby she could exit the centre.

**Conclusion**
50. For the reasons earlier set out in this judgment, I am satisfied that the trial judge erred in law when he concluded that Ardenheath was in breach of its statutory duty to take reasonable care for the safety of Ms. Byrne when visiting its shopping centre premises on 20th December, 2012.

51. The duty of care owed to Ms Byrne by Ardenheath is that provided for by s.3 (2) of the 1995 Act. That duty is described as "the common duty of care" which 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.

52. In her decision to exit the car park by going down a steep grassy bank which was wet and slippery whilst wearing shoes that had little or no grip, Ms Byrne did not take the reasonable care for her own safety that Ardenheath was entitled to assume she would take. I am satisfied that Ardenheath, in providing a reasonably proximate surfaced exit for visitors wishing to leave the shopping centre from the smaller of its two car parks and having regard to the care that it was entitled to reasonably expect of Ms Byrne, had complied with it statutory obligations under the 1995 Act and that the trial judge erred in law in setting a standard of care which required the installation of a step with barriers either side at the locus of Ms Fogarty's fall.

53. It is of course regrettable that Ms Byrne sustained such a significant injury to her ankle but responsibility for that injury cannot lawfully be laid at the doorstep of Ardenheath who had provided her with a safe and proximate exit which she would have used had she been taking reasonable care for her own safety. Accordingly, I would allow the appeal.