Case Note: *Wall v. National Parks and Wildlife Service* [2017] I.E.H.C. 85

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I - Introduction

This case concerned injuries suffered by a walker on the Wicklow Way, when she tripped and fell. She sued the National Parks and Wildlife Service (occupiers of that section of the Way), complaining of the trail's condition at the point of her fall. Liability was established before Her Honour Judge Linnane in the Circuit Court, a judgment which attracted considerable attention in the press and on social media. That finding has now been reversed on appeal, by Mr. Justice White in the High Court.

II - The Accident

The Wicklow Way is a way-marked route, roughly 130km long, from Clonegal in Co. Carlow to Marlay Park in Rathfarnham. Completed in 1982, it was the first of the many National Waymarked Trails. The more popular sections attract some 25,000 walkers per year. A substantial part of the trail runs through the Wicklow Mountains National Park. One 2km portion on White Hill (the highest point of the Way) is ecologically sensitive. Any significant widening of the path might lead to serious erosion or trampling. Accordingly, in 1997 a boardwalk was installed to preserve the habitat. The boardwalk, interspersed with steps where the slope is too steep, was constructed from disused wooden railway sleepers. Each sleeper was about 8½ feet long and 10 inches wide. Grip was improved by stapling ½-inch mesh chicken wire over the boards.

Over time, the boardwalk's condition deteriorated. Much of the chicken wire was torn away by weather or by usage. The sleepers had never been in perfect condition. Many already had sizeable holes in them when first laid down. In a number of instances, a combination of pooling water and freezing conditions had split the wood. Over 2006-2007, some damaged chicken wire was removed, and u-shaped nails were hammered in to improve grip further. Yet the high foot-fall and adverse environmental conditions made further

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deterioration inevitable. The National Trails Office conducted surveys every two years, and reported any corrective action felt necessary. By 2013, there were a number of points where the wood at one end of a sleeper had disappeared entirely. This created an obvious trip hazard for walkers who did not watch their step with special care.

On 6 August 2013, "a perfect day for walking"[1], the plaintiff came to grief on one such hole. On the facts as found by Justice White, she tripped on the vertical lip of the hole. This particular hole was some 20 inches long, 4 inches wide and 1 inch deep. It 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"[2]. She went down on her right knee, which was then cut by nails embedded in the boardwalk. Her husband drove her to a clinic where she received 7 stitches. She subsequently required further treatment for infection. An experienced walker and marathon runner before the accident, it had significant consequences for her. It sharply curtailed her activities as a runner and hill-climber. Judge Linnane found in her favour, assessing damages against the defendants at €40,000. Justice White has now reversed the finding on liability.

The case has given rise to significant public comment. Almost all of it has been hostile to the claim. Many predicted that landowners would have been less willing to allow walkers on their land if Judge Linnane's ruling had been allowed to stand, and praised Justice White's reversal of that ruling[3]. Very little of the commentary shows awareness of the rather limited point that was in issue in these proceedings.

III - The Scheme of Liability

The *Occupiers' Liability Act 1995* (*O.L.A.*) re-stated the law on this topic. The Act was passed on a wave of public concern at the rise of a "culture of compensation", and sympathy for landowners who were willing to allow others to wander their lands. Under the Act's terms, occupiers owe their visitors "the common duty of care"[4]. However, "recreational users' such as ramblers and walkers are not regarded as "visitors", and the duty owed to

[1] *Wall v. National Parks and Wildlife Service* [2017] I.E.H.C. 85 at [15] [hereinafter *Wall*].
[2] *Ibid.* at [35].
[3] See, for example, A. Doyle, "Compensation culture: We can't apply health and safety standards to the 'great outdoors'", thejournal.ie (26 February 2017), available at http://www.thejournal.ie/readme/compensation-culture-we-cant-apply-health-and-safety-standards-to-the-great-outdoors-3256904-Feb2017/.
[4] *O.L.A.*, s. 3.

them is much less[5]. This lesser duty is the same as that owed to trespassers, namely "not to damage the person or damage the property of the person intentionally" and "not to act with reckless disregard" for their person or property[6]. In relation to open countryside, this is a very undemanding duty indeed. The leading case stresses that recreational users must accept "the inherent risks" of the terrain they enter, and that there must be "something quite exceptionally unusual and dangerous in the state of a particular piece of ground" before liability can be found[7]. By that standard there could of course be no claim on facts such as the present. That being so, much of the public disquiet the case has aroused is misplaced, as the general position is in no way in issue.

However, by s. 4(4) a different and higher standard applies "where a structure ... is or has been provided for use primarily by recreational users". In those circumstances "the occupier shall owe a duty towards such users ... to take reasonable care to maintain the structure in a safe condition"[8]. Apparently, no serious argument was made that this boardwalk was not a "structure" within the meaning of the *O.L.A.* The more generous duty therefore applied[9]. The case turned on whether this significantly broader duty was breached on the facts of the case.

The case therefore puts a spotlight on the nature of this special duty. The Act does not state that the duty, where applicable, is the same as the "common duty of care" owed to visitors. Justice White insisted that it is distinct: it has "common characteristics" to the common duty of care 'but is not exactly the same"[10]. He also accepted the defendant's view that the plaintiff must establish *both* that the structure was unsafe *and* that this lack of safety is attributable to a failure of reasonable care in maintenance[11]. Yet stating that this is so is one thing, actually applying it is another. Teasing those two questions apart would have required careful reasoning. Justice White did not engage in any such exercise, and ended up bulldozing the two questions into one, namely whether the defendants had behaved in a

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[5] "Recreational user", a category which clearly included the plaintiff, is rather elaborately defined in *O.L.A.*, s. 1.
The core concept is someone who is "present on premises ... for the purpose of engaging in a recreational activity", and who has not paid for the privilege.

[6] *O.L.A.*, s. 4(1). "Reckless disregard" is elucidated in s. 4(2).

[7] *Weir Rodgers v. The SF Trust Ltd* [2005] I.E.S.C. 2, *per* Geoghegan J.

[8] *O.L.A.*, s. 4(4).

[9] *Wall*, *supra* note 1 at [43]. White J. merely states his conclusion here, and does not attempt to summarise the arguments he heard on the point.

[10] *Ibid.* at [44].

[11] *Ibid.*

negligent manner[12]. He held that "[t]he 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"[13].

Different views might be held on whether this was appropriate. Delicate conceptual tools are necessary if the two questions are to be prised apart. Asking whether a structure is "safe" is never *simply* a question about the physical state of the structure. It necessarily involves questions of how much care will be taken by others, whether by its users or by those with control over it. For example, the same environment may be "safe" for adults yet simultaneously "unsafe" for unsupervised young children. It could therefore be argued that there is really only one question – whether the defendants acted reasonably, in the light of the state of the structure and foreseeable behaviour by its users. If that is right, the "bulldozer" approach adopted by Justice White is not merely defensible but actually inevitable.

A more rigorous analysis would insist that there are indeed two questions – 1. Was the boardwalk in a safe condition? 2. If not, was this attributable to lack of care? – and that Justice White's failure to answer those questions *separately* reduces the value of his ruling as a guide to future cases. A ruling whether the boardwalk was "safe" when the plaintiff encountered it would have clear implications for the defendants' future maintenance plans. A ruling whether the defendants' actual maintenance strategy was "reasonable" would also have clear implications for the future, though possibly different ones. As it is, Justice White answered neither question. While his finding that the defendants were not negligent effectively disposed of the case, his judgment gives no clear guidance as to whether or when claims of this sort are likely to fail, or what the defendants should do to avoid liability in future.

IV - Application

A significant proportion of the judgment discusses the precise circumstances in which the plaintiff fell[14]. This was, of course, hard to establish in retrospect. It was not even clear precisely *where* the plaintiff fell, or what was the condition of the boardwalk at the

[12] *Ibid.* at [46]-[65].
[13] *Ibid.* at [64].
[14] *Ibid.* at [31]-[37].

point where she did so. On Justice White's view of the facts, the hole would have been highly visible to any walker paying proper attention to where they put their feet. He determined "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".[15] This contrasts sharply with the view of Judge Linnane at first instance, that no contributory negligence could be attributed to the plaintiff.

It is this aspect of the judgment that does the most to diminish it as a precedent. Neither Judge Linnane's approach nor Justice White's squarely addresses the key issue, which is whether a walker can be regarded as negligent for a single poor decision about where to plant her foot – a decision of the sort that must be made tens of thousands of times even on a relatively short trek, and rarely occupies the mind of the decision-maker for more than an instant. Granted that *some* decisions by walkers can obviously qualify as negligent, when will a decision about putting one foot in front of the other do so?

As between the two judicial views, Judge Linnane's view seems easier to defend. An experienced walker, the plaintiff was well aware of the needs both to watch her step and to pick up her feet on such dangerous ground. Her "negligence" (if that is what it was) seems to have consisted of a split-second's inattention. Yet the standard of the reasonable person in negligence law has never been interpreted to require perfection, and tort lawyers do not usually regard premises as "safe" if a moment's lack of attention by the victim puts them in peril of grave injury. If liability is to be refused, it is unconvincing to do so by mere *ex cathedra* statement (from the comfort of the court room) that the plaintiff was "highly negligent". This imposes an impossibly high standard on plaintiffs, for which there is no legal warrant.

Justice White's approach has him applying laws designed for the health-and-safety-inspected town to the largely unregulated countryside and then seeking to avoid the incongruous result by demanding an unattainable level of attention from the plaintiff. What has gone wrong is that ordinary negligence law is being applied to a situation for which it is clearly not fitted. Once that initial mistake has been made, it is difficult for the court to extricate itself – all the remaining judicial choices will be bad ones. Judge Linnane took the law to its logical conclusion, leading to a result that is technically sound but strikes most

[15] *Ibid.* at [37].

observers as absurd. Justice White struggled to avoid this conclusion, but could only do so by demanding an unrealistically high level of care from the plaintiff – demanding that she behave as the paragon of walkers, the walker who never puts a foot wrong. But this is not negligence law as generally understood. "Reasonably safe" premises are, above all, premises where one can make minor mistakes without dire consequences. What Justice White needed, but failed to find, was a good reason *not* to apply the ordinary negligence duty to these particular "premises".

In the concluding section of his judgment, Justice White sought an escape in an argument based on the standard of care[16]. He argued that while the defendants were under a negligence duty, the circumstances pointed to its being a relatively minimal one. Yet this passage suffers from considerable vagueness. The judge referred to a number of factors. He mentioned the type of visitor to be expected, the numbers of visitors, the frequency and seriousness of complaints, and the practicability of precautions. Yet he entirely failed to show that these factors on balance favoured the defendant rather than the plaintiff. He put particular weight on the social utility of the boardwalk. But that is at best only the beginning of an argument against liability. The plaintiff was not complaining about the *existence* of the boardwalk, but about the sorry state into which it had been allowed to fall. (There is no obvious social utility in allowing the boardwalk to decay and disintegrate – quite the contrary, in fact.) The question was whether the defendants should reasonably have done more than they did to make the structure safer. Justice White gave no very clear answer to this.

This is why Justice White's ruling gives so little comfort to the defendants: it gives no clue as to the prospects for any subsequent legal action, or how they might avoid liability in the future. He did not discuss what the defendants had done about the decaying boardwalk since 2007. (If indeed they did anything.) It seems to have been admitted that the boardwalk was approaching the end of its 25-year design life. Yet there is no discussion of the implications of this, or of when the boardwalk would become so decrepit that it would no longer be "reasonably safe" – a point which must surely come eventually, perhaps quite soon. It might be said that it is unrealistic to focus too much attention on the boardwalk at the expense of the defendants' other responsibilities – but this seems to be precisely what s. 4(4) demands, incentivising it to focus on "structures" at the expense of anything else.

[16] *Ibid.* at [55]-[64].

Justice White attempted to dispose of the case merely by emphasising that the defendant's responsibility was fairly minimal. He never squarely addressed the plaintiff's real argument: that while not much was required of the defendants, they do not do even that much, and so should fairly be regarded as negligent.

V – Conclusion

The final result is unlikely to please many of those who understand what is at stake. The defendants are no doubt relieved to have won this bout, but cannot take much comfort from it in relation to future cases. Not all judges will be prepared to follow Justice White in condemning a walker's momentary lack of attention as "highly negligent", or be happy to rule that this decaying boardwalk is "safe". In addition, the ruling gives no guidance on how the defendants avoid liability in the future. In short, the case does nothing to clarify the law on facts like these. It fully justifies the doubts expressed in the Oireachtas while the 1995 legislation was being enacted, that s. 4 tries to exclude the "common duty of care" but then allows it in via the back door[17]. Justice White was able to avoid what he considered to be an absurd liability, but only by the equally absurd gambit of demanding an inhuman level of care and attention from walkers under cover of demanding only reasonable forethought.

As to the decision's merits, it should be remembered that (contrary to what most social commentary seems to assume) we are concerned here not with the general rule but with a rather narrow exception to it. As a generality, facilities such as the Wicklow Way are provided only for those who will take full responsibility for their own safety. Such responsible adults can expect no more than the minimal "recreational" duty, that the occupier will not intentionally harm them or act with reckless disregard for their safety. This generalisation covers nearly all accidents likely to happen on the Wicklow Way and comparable routes. Nothing in the case questions this, or suggests any departure from the general lack of sympathy that such claims have so far encountered. The case concerns only liability in relation to a "structure ... for use primarily by recreational users" as imposed by s. 4(4), and has no more general application.

[17] Helen Keogh T.D., noted "I am afraid the Minister will achieve a result diametrically opposed to the one to which he aspires. Having thrown the common law rules out the window, he is possibly allowing them in the back door. I find [section 4] confusing but I am not a lawyer"; 448 Dáil Éireann Deb. 792 (31 January 1995).

What is missing from the judgments and from public debate is any serious discussion of the reasoning behind s. 4(4). The rationale of the sub-section seems entirely sound. The occupier should only be minimally liable for dangers *naturally* arising from the land, but owes a more serious duty not to *add* to those dangers, by installing an unsafe structure or allowing a safe structure to decay into an unsafe one. If the sub-section is fairly applicable here, then it surely *is* appropriate that a substantial duty of care would be owed, one that should be taken seriously – more seriously, in fact, than it was taken by Justice White.

That being so, the right question to ask is whether the boardwalk is really the sort of structure at which s. 4(4) was aimed. On a literal reading, perhaps it is. On a more purposive reading, a strong case could be made that it should not be so regarded. Its object was not to protect the walkers from the environment, but to protect the environment from the walkers. It was provided to preserve the landscape, and only incidentally facilitated walkers. So while clearly it was designed with walkers in mind, the boardwalk was never for *their* benefit. And it did not make the Wicklow Way a more dangerous place than it was before. No doubt it posed dangers to those who used it without a high degree of care and attention, but so would the eroded landscape that would have resulted if no boardwalk had been installed. Arguably therefore a narrow interpretation of s. 4(4), to restrict it to structures which introduce unnecessary dangers into the environment and cannot be regarded as exercises in proper land-management, would keep the sub-section within sensible bounds. If that interpretation cannot be achieved by judicial construction, then perhaps amending legislation is called for.

Either way, the rather limited significance of this case should not be misunderstood. At no point was the extremely limited nature of the duty owed to users of the Wicklow Way questioned or doubted. The issue was solely as to artificial structures placed along it. Regrettably, the case does little to clarify the legal position in relation to such structures.