THE HIGH COURT

[Record No. 2021/343P]

[2024] IEHC 243

BETWEEN

DENISE BEST

PLAINTIFF

AND

SOUTH DUBLIN COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Micheál O'Higgins delivered on the 22nd April 2024

Introduction

1. Does a tree form part of a public road? Does the defence of non-feasance apply to trees? These are two of the main questions that arise for determination in this case which has been presented as a test-case on the question whether the non-feasance rule applies to trees on a public road.

2. The plaintiff seeks damages for personal injuries suffered due to a fall on a footpath in the early hours of the morning. She says the accident happened when her foot went into a one-inch deep hole in a crack on the footpath outside nos. 45 and 47 Daletree Avenue in Firhouse in Dublin. This presented a tripping hazard that should, according to the plaintiff, have been repaired by the defendant.

3. The defect identified by the plaintiff was caused by tree root growth underneath the footpath from an adjacent tree, causing the footpath to rise and crack. She contends that tree

root intrusion is a gradual and predictable phenomenon and therefore it was foreseeable it would result in a cracked pavement and present a danger to pedestrians, particularly in hours of darkness.

4. The defendant, South Dublin County Council, is responsible for roads and street trees in its functional area. It denies liability. The only criticism made of the defendant is that it failed to repair the footpath before the plaintiff had her fall. There was no positive act of the defendant causative of the defect. Therefore, says the defendant, this is a classic case of non-feasance where the case against the road authority is one of pure omission – the failure to repair a defect on a footpath that the Council did not build, caused by a tree the Council did not plant.

5. In response, the plaintiff makes the novel submission that, the fact the defect was caused by tree root uplift excludes the operation of the non-feasance rule. The plaintiff contends that the definition of *"road"* as set out in s. 2 of the Roads Act 1993 does not include a tree. While the non-feasance rule might alleviate a local authority where it has not taken any positive act in relation to a road or footpath, it does not alleviate a local authority from its common law responsibilities in relation to matters that are not part of the public road. Therefore, the plaintiff says the defence of non-feasance does not apply to, *inter alia,* public parks, areas within a local authority's charge that are not part of the public road, carparks and (on the facts of this case) street trees, unless they are found to form part of the *"road"* as defined in the Act of 1993.

6. There appears to be no Irish authority on the application of the non-feasance rule to trees on the public road. The issue therefore requires consideration of the underlying principles of tort law.

7. Helpful written and oral submissions were provided by both sides on the legal issues arising and I will address some of the legal issues presently. I will divide my judgment into

seven headings as follows: A) The evidence of the plaintiff and the engineers; B) The Non-feasance/ Misfeasance distinction; C) An outline of the legal issues potentially arising; D) Brief analysis of the question of duty of care; E) Analysis of factual liability; F) Doctrine of Judicial Restraint; G) Conclusions. I will begin by saying something about the evidence.

A. Evidence of the plaintiff

8. The plaintiff in these proceedings, Ms. Denise Best, is an office administrator employed by a hospital in Dublin. She is married with two grown up children. She resides on Daletree Crescent in Firhouse, Tallaght, Dublin 24. On 25 August 2018, she was walking home from a local pub along Daletree Avenue, which is a few minutes walk away from her own home, with her husband and two neighbours, having attended a twenty first birthday celebration of a neighbour's child. Her husband and a neighbour were walking in front; the plaintiff and another neighbour were walking behind. As she was walking along, she suddenly tripped on a hole in the footpath and fell forward. She landed on her left side. Unfortunately, she was unable to break her fall and she suffered injuries to her wrist, ankle and knee on her left side. She also suffered facial bruising and injuries to her lips and teeth. It was initially thought that she had suffered a fracture to her left scaphoid, however this later turned out to be a soft tissue injury. Her injuries affected her quite badly for a number of years. It is not necessary to dwell further on the extent of the plaintiff's injuries because this judgment is only concerned with the question of liability.

9. At the time of the accident, the plaintiff was wearing flat sandals. She had had a couple of drinks at the twenty first birthday celebration in the pub. She believes she had about two gins and tonic. She explained that she was limiting herself because she was on a slimming programme and was therefore keeping an eye on what she was drinking.

10. In cross examination, the plaintiff was quizzed on the time, cause and location of her fall. I will come back to these points presently. It was put to the plaintiff that she only discovered the crack in the pavement the following day and that she had told a doctor that she couldn't remember the details of the fall. The plaintiff accepted that she did not actually see the crack on the pavement at the time of her fall, as it was dark and she was traumatised by her injuries. She was unable to say which foot got caught in the crack in the pavement, but she was clear that she fell down on her left side. It was put to her that, in circumstances where it was being contended the defect constituted an obvious hole in the pavement, she should have avoided it by looking out where she was going. She said she couldn't see the hole because it was dark. While there were street lights quite close by, the tree nearby covered much of the light and the estate was quite dark at night.

11. It was put to the plaintiff that she told a paramedic who came to the scene, and a triage attendant in the hospital later on that she had *"slipped off the kerb".* Documents that were said to record this were provided to the court. The plaintiff denied that she had slipped off the kerb and stated her belief that if she had done so, she would have fallen on to the roadway.

Engineering evidence

12. The plaintiff's engineer, Mr. Pat Culleton, provided photographs of the footpath identified by the plaintiff with the crack clearly visible on it. These are to be seen in photographs 1 to 4. The defect was opposite the boundary between nos. 45 and 47 Daletree Avenue. The plaintiff reported to him that at the time of the accident she was walking with nos. 45 and 47 to her right. He noted the footpath was concrete and was five foot wide. There was a two foot seven inch wide concrete bay facilitating an ESB mini pillar set into the garden wall. He noted a diamond shaped hole in the footpath. This was about six inches by six inches wide, and one inch deep and it began seventeen inches out from the verge on the

left. The plaintiff indicated to him that she caught her left foot in the hole and she tripped and fell forward at about 1.15a.m. She gave this recollection about a month after the accident. In his view, the cause of the damage to the footpath was clear. The roots from the adjacent tree had caused the concrete to uplift and crack. The tree canopy extended well over the footpath, and it was clear to the engineer that the roots extended well beneath. There was street lighting in the area, but the light would be *"dappled"* by the canopy of the tree, so it was therefore not surprising that a pedestrian would fail to see the hole at night. In his view, the identified defect in the footpath was a tripping hazard.

13. Mr. Culleton also gave evidence that tree root intrusion was a gradual and predictable phenomenon that must be maintained against. He was therefore of the view that the defence of non-feasance did not apply in the circumstances. He said the defendant was responsible for the maintenance of trees at the locus and there were clear indications that the tree in question had been pruned to maintain it. He said the local authority had a proactive tree maintenance programme and that this was to be contrasted with the position adopted by the Council with respect to road maintenance. The reason for this, he said, was because the local authority has the protection of the non-feasance defence in respect of road maintenance.

14. The defendant also called evidence from an engineer, Mr. Stephen Flood. He inspected the locus on the 23 November 2021, at which point the locus had been repaired and reinstated. He gave evidence based on photographs obtained from google street view images that the damage was not apparent in June 2009, but was visible in May 2018, some three months prior to the plaintiff's fall. He gave evidence that Mr. Bass of South Dublin County Council informed him that the estate was inspected by the Council in 2007 and the survey sheet for Daletree Avenue records that the inspector did not identify any cracks or lips for the footpaths in this area.

15. Under cross examination, Mr. Flood was unaware if any subsequent inspection of the locus took place in the intervening years, but he accepted that if such an inspection had been undertaken, he would have been made aware of it. In addition, the plaintiff had sought voluntary discovery of such matters and the response provided was consistent with no subsequent inspection having taken place.

16. Mr. Flood was asked if he was aware of the South Dublin County Council Tree Management Policy, and he agreed that he was. A copy of the document was provided to the witness and to the court. Reference was made to section 1.2 of the policy document entitled *"Why have a tree management policy?"* and the first sentence in particular which states *"South Dublin County Council has responsibility for the management and maintenance for trees in public spaces – streets, parks and open spaces".* Mr. Flood did not dispute counsel's contention that the reason the Council had that policy was because they accepted responsibility for the management and maintenance of trees in public spaces.

17. Separately, Mr. Flood gave extensive evidence on the importance of trees and the practical benefits that they bring. He referenced the "Design manual for Urban Roads and Streets" issued by the Department of Transport, 2011 (DMURS). He stated that street trees have a number of road design functions including traffic calming, road legibility, demarcating pedestrian zones, creating walk appeal and enhancing pedestrian experience, amenity value functions, aesthetic enhancement, creating landmarks and giving a sense of place and enhancing property values. He stated that trees also have environmental functions including noise buffering, light screening, air quality and reducing air pollution, biodiversity, carbon storage and storm water absorption.

18. Counsel for the defendant elicited this evidence with a view to establishing that street trees are necessary for the safety, convenience, and amenity of road users and for the construction and maintenance and management of public roads. This was directed at the

statutory interpretation issue between the parties concerning the correct construction of s. 2 of the Roads Act 1993. In this regard, the defendant sought to argue that a street tree came within the definition of a *"thing forming part of the road"* and secondly that it was necessary for the safety, convenience or amenity of road users or for the protection of the environment (within in the meaning of s. 2 of the Roads Act 1993).

19. Arising from the agreed engineering evidence and also from evidence given by Ms. Sheila Nolan, a Staff Officer in the Road Maintenance Section of the County Council, the following matters were not in dispute:

- The Daletree Estate was constructed by a private developer, namely Maplewood Homes, in or around 1996;
- A request to have the estate taken in charge was made to the defendant on the 1 November 2000;
- An internal memorandum dated 17 February 2004 confirmed a final inspection had been carried out on the roads, footpaths, services and public lighting on the estate, and all had been completed satisfactorily for the taking in charge;
- The defendant's defence pleads that the estate was taken in charge by the defendant on the 13 January 2003;
- South Dublin County Council by order declared these roads to be public roads in accordance with the Roads Act 1993 at its meeting on the 12 July 2004;
- The tree roots that damaged the footpath came from a small leafed lime tree that was planted on the grass verge between the footpath and roadway;
- The tree in question was likely to have been planted as part of the original design of the housing estate in which Daletree Avenue was situated.

B. The Defence of Non-feasance

20. It is fair to say the non-feasance rule has come in for some criticism over the years. In *O'Brien v. Waterford County Council* [1926] IR 1 per Murnaghan J. it was described as "*anomalous"*. In *Kelly v. Mayo County Council* [1964] IR 315 per Kingsmill Moore J. it was described as *"unsatisfactory"*. In *McCabe v. South Dublin County Council* [2014] IEHC 529 Hogan J. commented on the "*illogical distinction"* between non-feasance and misfeasance, describing the rule as *"blunt and indiscriminate"* and that nobody could say it *"sits easily with general principles of tort law"*.

21. In *O'Riordan v. Clare County Council* [2021] IECA 267, the Court of Appeal acknowledged these criticisms but stated that the rule was so firmly entrenched in Irish law that nothing short of statutory intervention could dislodge it. Noonan J. noted that the rule has been abolished in the United Kingdom and that in Ireland as long ago as 1961, the Oireachtas legislated to remove it. However, 60(1) of the Civil Liability Act 1961 has never been commenced by Ministerial Order. In fact, s 2(3) of the Roads Act 1993 appears to preserve the immunity.

22. In *O'Riordan,* the plaintiff was a cyclist who suffered injuries when he was knocked off his bicycle when he went over a damaged cattle grid. He succeeded in the High Court on grounds of public nuisance, but this was reversed on appeal by the Court of Appeal. Noonan J. held that non-feasance is a defence not just to a claim in negligence but also in public nuisance. Even in circumstances where a highway authority not only knows, or ought to have known, of a danger on the highway but has been repeatedly and explicitly informed of it, it remains the position that it has no liability for a failure to intervene, assuming of course it did not create the danger in the first place. Nor does a highway authority have any duty to warn. As Lord Rodgers put it in *Gorringe v. Calderdale MBC* [2004] 2 All ER 326 (para. 80) *"travellers had to look out for themselves"*.

23. The plaintiff seeks to distinguish *O'Riordan* on the basis that the definition of "road" in s. 2 of the Act of 1993, when properly construed, includes a cattle-grid but does not include a tree. On the statutory interpretation question, the plaintiff notes that the Oireachtas chose to include some 51 or so nouns in the statutory definition of "road" in s. 2 and all of these nouns appear to be man-made and are otherwise than a "living thing". The plaintiff submits that if the legislature had intended trees to be included in the definition of "road", this could have been easily spelt out.

24. For completeness, I will set out the relevant part of s. 2 of the Roads Act 1993 as amended:

> *"road"* includes—
>
> *(a) any street, lane, footpath, square, court, alley or passage,*
>
> *(b) any bridge, viaduct, underpass, subway, tunnel, overpass, overbridge, flyover, **[**carriageway (whether single or multiple and whether or not designated for a particular class of vehicle),**]** pavement or footway,*
>
> *(c) any weighbridge or other facility for the weighing or inspection of vehicles, toll plaza or other facility for the collection of tolls, service area, emergency telephone, first aid post, culvert, arch, gulley, railing, fence, wall, barrier, guardrail, margin, verge, kerb, lay-by, hard shoulder, island, pedestrian refuge, median, central reserve, channelliser, roundabout, gantry, pole, ramp, bollard, pipe, wire, cable, sign, signal or lighting forming part of the road, and*
>
> *(d) any other structure or thing forming part of the road…*
>
> *(i) **[**used, or the use of which is reasonably required, for**]**… the safety, convenience or amenity of road users or for the construction,*

maintenance, operation or management of the road or for the protection of the environment, or

(ii) prescribed by the Minister;"

C. Legal issues presented by the case:

25. Arising from the evidence and the written submissions of the parties, the following legal issues potentially arise for determination:

(1) Whether the definition of "road" in s. 2 of the Roads Act 1993 includes a tree.

(2) Whether the defence of non-feasance is, in any event, still available to the defendant in circumstances where, according to the defendant, the plaintiff as a matter of fact fell on the footpath and the cause of the defect is immaterial.

(3) Whether, at a level of principle, the defendant owes the plaintiff a common law duty of care to repair the footpath, breach of which is actionable in damages.

(4) Whether the defendant's level of control of the roadway and/or its assertion of responsibility for maintaining trees in its functional area operate as exceptions to the *"do no harm"* principle such that it owed a duty of care to the plaintiff.

(5) Whether the defendant owes a duty of care under the Roads Act 1993, breach of which is actionable in damages (for instance, under s.13 of the Roads Act 1993 as substituted by s.6 of the Roads Act 2007 which provides that the maintenance and repair of all such roads is the function of the relevant local authority).

(6) Whether the defendant owes a duty of care *qua* Road Authority, *qua* planning authority, *qua* occupier/owner, or *qua* some other status (e.g. as the local authority responsible for the maintenance of trees in the area).

(7) Whether the defendant owes a duty of care under the Occupiers Liability Act 1995.

(8) Whether the defendant owes a duty of care under s.70 of the Roads Act 1993 which deals with the duty on an owner or occupier of land and the owner or occupier of a structure to take steps to ensure the structure is not a hazard or interferes with the safe use of a public road.

D. Analysis of the Question of Duty of Care

26. For reasons that will shortly be clear, I propose to confine my analysis to some limited observations on just one of these potential issues, namely the fundamental question as to whether the defendant owed a common law duty of care to the plaintiff to repair the footpath. Apart from the statutory interpretation issue, this was the argument most pressed by counsel for the plaintiff in oral submissions. Faced with the reality that the defendant neither built the road nor planted the tree, the plaintiff points to two key features which, on the plaintiff's case, give rise to a duty of care. These are firstly, that the defendant had a special level of control of, and access to, the roadway. Secondly, the contention that the defendant had assumed responsibility for maintaining street trees within its functional area.

27. A key case on the question as to the existence of a duty of care is the Supreme Court's decision in *UCC v. ESB* [2020] IESC 38. The case arose from the River Lee bursting its banks in November 2009 and causing major flooding to a number of properties downstream in Cork City. UCC claimed that the ESB as a dam operator was negligent and guilty of nuisance in the way in which it operated two of its upriver dams, causing flooding damage to properties on the university campus. In the High Court, UCC partly succeeded on liability. This was overturned by the Court of Appeal. On appeal to the Supreme Court, the majority held in favour of the plaintiff and the case was remitted back to the High Court for consideration of damages and contributory negligence.

28. Three judgments were delivered: a joint judgment by Clarke C.J. and MacMenamin J., with whom Dunne J. agreed; a separate concurring judgment by Charleton J.; and a dissenting judgment by O'Donnell J. who found, dismissing the appeal, that no duty of care arose. While O'Donnell J. dissented on the legal outcome, he indicated that his analysis of the legal issues largely accorded with that of his colleagues.

29. The *UCC v. ESB* case potentially has implications for the legal issues the court is concerned with here because, in both cases, "Mother Nature" had caused the difficulty; damage arose from a failure to act, and it could not be said the defendant created the source of the danger.

30. All three judgments emphasised that the earlier decision of the Supreme Court in *Glencar v. Mayo County Council* (No. 2) [2002] 1 IR 84 was the correct starting point for any consideration on the extent of the duty of care in the law of negligence in Ireland (see the joint judgement of Clarke C.J. and MacMenamin J. at para. 7.3, Charleton J. at para. 13 and O'Donnell J. at para. 87-89).

31. Under the *Glencar* test, the basis for establishing a duty of care requires that the damage suffered was both foreseeable and not unduly remote from the acts causing it. In addition, a court must consider it just and reasonable that a duty of care be extended in all the circumstances of the case (see para. 87 of the judgment of O'Donnell J. and para. 7.3 of the joint judgement).

32. The majority held, over-ruling the Court of Appeal, that the ESB did owe such a duty, even though it didn't cause the hazard and even though the extent of the criticism of the ESB was a failure to act.

33. The Supreme Court decided that the approach of the UK courts analysing liability on the basis of the *"do no harm"* approach, was to be preferred to the traditional approach of differentiating between acts of commission and acts of omission. The court held that, at a

level of principle, the starting point is that there is a general principle of non-liability for failure to prevent harm from a danger not created by the defendant (see O'Donnell J. at para. 96). This general position of non-liability for failing to prevent harm occurring to another caused by another person or agency applied even where a public body had statutory powers enabling, or even statutory powers requiring, it to prevent the harm in question.

34. However, the judgments establish that there are important exceptions to the general non-liability rule. The Supreme Court agreed with the judgment of Lord Reed of the UK Supreme Court in *Robinson v. Chief Constable of West Yorkshire Police* [2018] AC 736 at para. 34 where he adopted the following formulation contained in an article by Tofaris and Steel *"Negligence liability for omission in the police"* [2016] 75 (1) CLJ 128:

> *"In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless*
>
> *(i) A has assumed a responsibility to protect to B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."*

35. The Supreme Court ultimately held that the ESB did owe a duty of care under ground (iii) above, namely their conclusion that the ESB had a special level of control over the source of the danger (the River Lee) - see the joint judgment of Clarke C.J. and MacMenamin J. at paras. 11.3-11.18 and also their conclusions at para. 16.3-16.6.

36. The case is authority for the proposition that Irish law recognises the potentiality of a duty of care to prevent harm from a danger caused independently of the wrongdoer where the wrongdoer has a level of control over the danger in question which is substantial and not tangential. That level of control does not have to arise from a legal power. However, in assessing whether any such duty of care arises in the circumstances of any individual case or

type of case, a court must assess (a) whether there is a reasonable relationship between any burden which would arise from imposing such a duty of care and the potential benefits to those who may be saved from the danger in question; and (b) whether it is possible to define the duty of care in question with a sufficient, but not absolute, level of precision so as to avoid imposing a burden which is impermissibly vague and imprecise (see para 11.18 of the joint judgment).

37. In the present case, the plaintiff relies upon both ground (i) (assumption of responsibility) and ground (iii) (special level of control) in support of her argument that the Council owes a duty of care, even though it did not create the source of the danger. In that regard, the plaintiff relies on the evidence of the respective engineers, the defendant's own literature, the defendant's published statements that it has responsibility for maintaining trees in its functional area, and the evidence of the engineer, Mr. Culleton that on his examination of the lime tree in question, there were clear indications that the upper part of the tree had been pruned to maintain it, but nothing was done to repair the roots and that this was causative of the accident. The plaintiff also emphasises that the developer who originally built the estate has dropped out of the picture since the estate was taken-in-charge and that nobody other than the defendant has control over the roadway or adjoining trees, and no-one else is empowered to take steps to remedy the source of the danger.

38. It need hardly be said that the factual context of the *UCC v. ESB* case is quite different to the factual context arising here. We are not concerned here with a river bursting its banks or flood waters pouring from a dam. Dam cases may be said to have their own *"ecosystem"* and jurisprudence and it is clear the Supreme Court considered a large number of dam cases from the United Kingdom, America and other jurisdictions. Nonetheless, the Court's analysis undoubtedly has implications beyond dam cases. This is because all three judgements, before reaching their conclusions, went back to fundamental principles of tort law.

39. One question that potentially arises is what impact, if any, does the decision in *UCC v. ESB* have on the non-feasance defence that South Dublin County Council relies on here. If the court were to accept that either or both of the *"special level of control"* and *"assumption of responsibility"* grounds were made out on the facts, what legal consequences would follow? Would such a finding displace the non-feasance principle or preclude the Council from relying upon it? Or should the Road Authority's immunity be regarded as *sui generis* such that the Court of Appeal's decision in *O'Riordan* (and other highway cases) effectively closes out the question of liability in any case where the defendant does not create the danger or, as it was put, *"fails to make things better"*? If the *UCC v. ESB* analysis is applicable, what factors should weigh in the scales in determining whether it would be just and reasonable to impose a duty of care? Should the nature and extent of the danger be relevant? Who should bear the onus of proving the burden, costs and benefits that would arise, were such a duty found to exist?

40. Before considering the answers to these questions and indeed whether they should be addressed at all, it is firstly necessary to consider the more mundane *factual* issue as to whether the plaintiff has proved her case on liability, and specifically on the questions as to *where* she fell and *how* she fell. This in turn necessitates a closer review of the evidence and the areas covered and not covered.

E. Analysis of factual liability - locus and mechanism of accident

41. Before delivering my conclusions on liability, I think it is appropriate to make some general observations about the *bona fides* of the claim. Firstly, in my view the plaintiff gave her evidence in a straightforward fashion and did her best to answer all questions that were put to her. She struck me as a credible and honest witness who did not overstate what she saw

on the night. It was clear from her evidence that, to the best of her belief, the hole in the pavement was the cause of her fall.

42. The second general point to be made is that the plaintiff undoubtedly suffered personal injuries in this accident and did so as a result of falling on Daletree Avenue on this particular night. There is no suggestion here of a *"try-on"* or anything of that nature. The evidence clearly establishes that the plaintiff suffered genuine injuries which have affected her in her work and spare time activities. Whilst the injuries were in the nature of soft tissue injuries and were not life threating, they were nonetheless unpleasant and discommoding for the plaintiff. Indeed, I note that unfortunately her symptoms have endured for a number of years.

43. Thirdly, the evidence of the paramedic, Mark Ryan, corroborates the plaintiff's core position that on the night in question she suffered a fall on a footpath on Daletree Avenue. He gave evidence that the ambulance was called out to an incident location as recorded on the Patient Care Report (PCR) of 43 Dale Tree Avenue which is quite proximate to where the plaintiff says she had her fall. In fairness to the defendant's position, while it queried the basis for the plaintiff's belief that the fall occurred at the locus of the crack in the pavement, it has never suggested that the plaintiff's case was anything other than genuine. In the view of the court, the overall evidence of the paramedic puts the *bona fides* of the accident beyond doubt.

44. Fourthly, the evidence establishes to my satisfaction that, at the time of the accident, the defendant was or ought to have been aware that the particular piece of footpath captured on the engineer's photographs was damaged by tree root growth, and therefore represented a tripping hazard for persons walking in the vicinity, particularly in conditions of darkness where the foliage from the tree partially blocked the light from the street lamps. Whether this builds a legal duty of care is, of course, another matter.

45. Notwithstanding these general observations on the *bona fides* of the claim, however, the court still has to assess whether the plaintiff has discharged the onus of proving, by way of reliable and admissible evidence, that the locus of her fall was at the point where the roots of the tree had damaged the footpath in the manner shown in the photographs and secondly, that it was the crack on the pavement that caused the plaintiff to fall, rather than anything else. Having carefully considered all the evidence in the case, and having re-read the transcripts of evidence a number of times, I am not satisfied that the plaintiff has proved her case. I say that for the following reasons.

46. In my view, there are number of important gaps and areas of uncertainty which, individually and cumulatively, tend against a finding in the plaintiff's favour.

47. Firstly, there is the plaintiff's own acknowledgement in cross examination that she herself did not see the crack on the footpath prior to the fall or afterwards. Secondly, her acknowledgement that in circumstances where it was dark and she was plainly traumatised after falling, she did not actually know on the night what she fell on. Thirdly, even though there were three other people present when the plaintiff fell (the plaintiff's husband and two neighbours) no other witness as to fact gave evidence. At the very least, that was unsatisfactory.

48. In my view, it is understandable that the plaintiff herself may not have seen what caused the fall. However, it is surprising that there was no evidence from one or other party in her group to describe the fall or identify the locus. All the more so when her husband was a short distance up ahead and a neighbour was walking alongside her. The absence of any other witness meant that there was a gap in the *"causation chain"* and a deficit of information as to precisely how the plaintiff's husband, on the following day, identified the footpath outside numbers 45 and 47 Daletree Avenue as being the locus of the fall.

49. It was put to the plaintiff in cross examination that she herself did not know what caused her to fall, and furthermore that she was accurate in telling Dr. O'Donoghue that she did not recall the details of the night. In these circumstances, counsel for the defendant suggested to the plaintiff (in my view reasonably so) that it was really her husband who had identified the crack in the footpath and he only did so at some stage the following day. According to the plaintiff, he did not see her fall as he was walking up ahead with another neighbour. That being so, since neither the husband or either neighbour gave evidence, the court is left in a position of uncertainty and doubt as to precisely what steps the plaintiff's husband took to identify the locus of the accident.

50. Another piece missing from the jigsaw was the location and perspective of the person who rang the ambulance on the night. This was important because the defendant made much play of the fact that Mr. Ryan, the paramedic who came to the scene, noted the pick-up location of the ambulance was no. 43, not nos. 45/47 Daletree Avenue where the pavement was cracked. This potential discrepancy could have been resolved by the person who called the ambulance explaining what they saw, where they were and what they said to the emergency services operator. The most the plaintiff could say was that she was nearly sure her neighbour Mary rang the ambulance and that she was *"up the road on the phone"*. Since Mary was not called to give evidence, the Court did not have her perspective or, importantly, evidence as to her location relative to the two addresses mentioned.

51. One of the key points pursued by the defendant in cross examination was the fact that the ambulance had been called out to a location that was some houses away from the location of the damaged footpath. This was important because the plaintiff confirmed in cross examination that where she fell was where she stayed, at least until the arrival of the ambulance. Having adduced that evidence and the evidence of the paramedic as to the location of the ambulance call-out, the defendant was effectively inviting the court to draw

the inference that the locus of the plaintiff's fall was not nos. 45/47 where the footpath was damaged, but rather was no. 43, to where the ambulance was called out. It seems to me that, even without the court getting into the exercise of drawing adverse inferences in the manner discussed by O'Donnell J. in *Whelan v. Allied Irish Banks plc* [2014] 2 IR 199 at paras. 91-92, it was reasonable to expect in the present case that this would all be clarified by the plaintiff. Since the onus of proof in a case such as this lies on the plaintiff to prove the location and mechanism of her fall, I find that the plaintiff has failed to discharge that onus, particularly in the light of her concession that it was her husband - who did not see the fall and who did not give evidence – who went out the next day and identified the location of the accident.

52. I make these points not in any sense to criticise the decision to call, or not call, any witnesses. Trial decisions such as that are a matter for the parties and their legal teams. Lawyers can only work with the instructions they are given. It is not the role of the court to speculate or second guess the evidence or the reasons why witnesses may not be available. However, the absence of any other factual witnesses on the plaintiff's side does mean that no other witness was able to assist the court on *where* the plaintiff fell and *how* she fell. This in turn meant that important evidential gaps left by the plaintiff's own evidence were left unfilled.

53. These difficulties are compounded by certain other frailties in the plaintiffs account which, taken together, place a question mark over the reliability of her belief that the cause of her fall was the cracked footpath outside nos. 45 and 47. The plaintiff was uncertain as to which foot got caught in the hole in the pavement. She said in evidence that she was unsure, but she thinks it was her right foot, whereas she told the engineer, Mr. Culleton that it was her left foot. I don't think there was anything sinister in this discrepancy – particularly because

the account given to Mr. Culleton was more proximate to the date of the accident – but it does call in to question the accuracy of her recollection.

54. The paramedic, Mr. Ryan gave evidence in accordance with the Patient Care Report (PCR) that he completed on the night that the call for the ambulance was received at 2.20 a.m. and that the ambulance arrived at the scene on Daletree Avenue at 2.28a.m. This suggests the plaintiff's recollection that the accident happened around 1.15a.m. was incorrect. This, in turn, suggests the plaintiff and her party may have been in the pub for longer than she recalled.

55. Moreover, the paramedic noted on the form under the heading of *"event"* that:

> *"Left hand side ankle swollen, possible sprain. Fall from standing after slipping on kerb with full CSM [circulation sensation movement]".*

Mr. Ryan indicated that in the normal course the history is taken from the patient, as distinct from anyone else, unless the patient is unconscious. According to his notes, the patient here was *"alert"* and not unconscious.

56. The court was also provided with triage notes completed by a nursing attendant in Tallaght Hospital later that morning. The triage note records as follows:

> *"Patient fell after slipping off the kerb. Pain and swelling, top left ankle…"*

Counsel for the plaintiff made the point in cross examination (and developed in argument) that the language on the ambulance PCR form was very similar to the language on the triage note and that therefore the nurse, when making the note, may have borrowed from the paramedic's understanding and language. On this basis it was suggested that the nursing note didn't really add anything to the equation. In my view, that is a reasonable point and probably takes the triage note out of the reckoning. However, it does not in my view fully address the uncertainty created by the ambulance man's note as to the plaintiff giving a history of *"fall from standing after slipping on kerb"*.

57. In fairness to the plaintiff, I think it should also be borne in mind that a history taken in a medical report or even in a contemporaneous note such as this taken at the scene of an accident will often not be a *verbatim* or fully accurate account of what a witness says. While the history given in any medical note may well be important (depending on the facts of a case) experience as practitioners and judges tells us that it can sometimes be unwise to attach too much emphasis to such documents, particularly where they are not attributed as a direct quotation.

58. In my view, a point of greater significance and perhaps the single greatest problem for the plaintiff in this case is the singular absence of any evidence, even of a hearsay nature, of any *realisation on the night* that it was the crack in the pavement that caused the fall. Even allowing for the likelihood that the plaintiff and her companions would have been preoccupied with concern for the plaintiff's wellbeing, and may not therefore have immediately focused on the cause of the plaintiff losing her footing, I think at some stage in the immediate aftermath, attention would have turned to what it was that caused the plaintiff to fall. In my view, it is likely that somebody would have noticed or commented upon the hole in the footpath, if such was evident at the scene, particularly in circumstances where the street lights afforded some light, albeit of a dappled nature.

59. For this reason, I think it is telling that among four witnesses who were present at the scene not one gave *contemporaneous* evidence linking the accident with the crack in the footpath on the night in question. Instead, it wasn't until the following day, on a *post-hoc* basis, that the plaintiff's fall was linked with the locus of the damaged footpath. As to the process followed by the plaintiff's husband to identify the locus the next day, the court was left in the dark.

60. For all these reasons, and with some hesitation, notwithstanding my view that Ms. Best gave honest and credible testimony, I am not satisfied that the plaintiff has discharged

the onus of demonstrating that the admitted defect in the footpath was the location and cause of her accident.

F. Should the Court therefore determine the legal issues?

61. I have given careful consideration to whether, in light of the test-case nature of the proceedings, it would be appropriate to proceed to determine the legal issues identified in the earlier part of this judgment, notwithstanding the conclusion that I have reached on factual liability. While the legal issues raised are undoubtedly important, and while the parties have gone to considerable trouble to assist the court with written and oral submissions on the legal issues potentially arising, I take the view that it would not be appropriate in the circumstances to determine the legal issues here. I say that principally for two reasons. Firstly, the principle of judicial restraint that is embodied in the doctrine of mootness requires that the court should refrain from providing advisory opinions on theoretical propositions of law (see *G v. Collins* [2005] 1 ILRM 1 per Hardiman J.). Even if the Court were to decide the legal issues against the defendant here, that would not assist the plaintiff since her case has fallen at the earlier hurdle of liability. While the plaintiff undoubtedly has a right of appeal, I do not consider that is sufficient reason in the circumstances of this case to warrant deciding the legal issues on a contingent basis.

62. Secondly, the Supreme Court has emphasised in a number of cases including *UCC v. ESB* that the *Glencar* test for determining whether a duty of care exists is context-specific. The third limb of the test in particular – whether it is just and reasonable that the law should extend a duty of care on the defendant for the benefit of the plaintiff – is a question to be considered on a relationship and case by case basis, based on the particular circumstances of the case. To my mind, this reinforces the appropriateness of the court staying its hand on determining the legal issues. A resolution of the legal issues should therefore await

determination in an appropriate case where the liability conclusion provides a more certain foundation for determining the wider issues.

G. Conclusion

63. In summary, I hold the plaintiff's case fails on liability and should be dismissed. Resolution of the wider issues will have to await another more suitable case.

Signed: Mícheál P. O'Higgins.

Appearances:

For the plaintiff: Declan Doyle S.C. and Michael Byrne S.C. with Grainne Berkery B.L.

For the defendant: Peter Bland S.C. with Paul McKeon B.L.