

# COMMON SENSE PREVAILS IN WICKLOW WAY JUDGMENT

High Court judgment supports the well-established principle that people who go into the uplands for recreation should take responsibility for their own safety. **Helen Lawless** reports.

*"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."*

Judge Michael White's ruling on February 17<sup>th</sup>, 2017, overturning the €40,000 award made last year to a woman who was injured in a fall on the Wicklow Way, sent a wave of relief across the country. Mountaineering Ireland was particularly pleased that the judgment addressed two key concerns – the responsibility of walkers for their own actions and the fact that structures on the side of a mountain should not be treated the same as those in an urban park.

Judge White went further than finding the woman negligent. His ruling that the responsibility to maintain structures is not an absolute duty set down a clear marker for the assessment of future cases.

The relief the judgment provided for landowners was evident in statements from the three main farmers' organisations. State agencies, community groups and other recreational user groups echoed their comments.

As this is a significant case for outdoor recreation in Ireland, and one which Mountaineering Ireland assisted with, a summary of the case is provided below.

► Helen Lawless is Mountaineering Ireland's Hillwalking, Access & Conservation Officer.



## Location of accident

The case was taken by a woman, Ms Wall, from north County Dublin, following a fall on a boardwalk section of the Wicklow Way close to the JB Malone memorial and overlooking beautiful Lough Tay. On a dry and clear day in August 2013, the woman walked with her husband from Roundwood to the top of Djouce mountain, and they were returning along the same route when the accident occurred. The woman caught her foot in an indentation in the boardwalk which caused her to fall forwards, sustaining injuries to her knee. As the location is part of Wicklow Mountains National Park, she sued the National Parks and Wildlife Service for damages, claiming that the condition of the boardwalk had caused her injury.

## Structures for recreational users

It is pivotal to the case that the woman fell on a boardwalk section of the Wicklow Way. Section 4(4) of the Occupiers Liability Act imposes a higher duty of care on the occupier (typically the landowner) for structures 'provided for use primarily by recreational users.' Both the Circuit Court and the High Court judges considered the boardwalk to be such a structure. Had the injury resulted from a slip on a wet or rocky hillside, or from the collapse of a farm gate, the same judgment would likely not have resulted, as in both those situations the landowner's duty of care would have been comparatively minimal.

## Circuit Court judgment

The case was first heard in the Circuit Court, where the woman gave evidence that due to the injury she was unable to pursue her previously active lifestyle which included marathon running and regular walking. The judge found that the National Parks and Wildlife Service had not taken reasonable care to maintain the boardwalk in a safe condition, and she was awarded €40,000 in general damages. In her written judgment, the judge referenced two cases related to the maintenance of structures in playgrounds.

## Decision to appeal welcomed

The State Claims Agency, which had defended the case on behalf of the National Parks and Wildlife Service, immediately took the decision to appeal the award to the High Court. This decision was welcomed by Mountaineering Ireland, for two main reasons:

- The Circuit Court judgment went against the well-established principle that people who go into mountains and other parts of the countryside for recreational activities are aware of the risk in what they're doing and take responsibility for their own safety;
- It was Mountaineering Ireland's view that there should be a distinction made between the standard of maintenance for a structure located in the mountains for use by hillwalkers, and for example, a children's swing in an urban playground.

## High Court hearing

Due to the importance of this appeal, Mountaineering Ireland offered its





The Wicklow Way boardwalk below the JB Malone Memorial, overlooking beautiful Lough Tay in the Wicklow Mountains.

assistance to the State Claims Agency and were pleased to be requested to provide a witness in the High Court. The High Court hearing took place over five days in November and December 2016. Other witnesses were called on behalf of the National Parks and Wildlife Service and County Wicklow Partnership; the National Trails Office also provided assistance.

The mechanism of the woman's fall, the structure of the boardwalk and the National Parks and Wildlife Service's maintenance procedures within Wicklow Mountains National Park were all examined in detail. The evidence provided on behalf of Mountaineering Ireland covered the ethos of personal responsibility, which is at the heart of mountain activities, the condition of the boardwalk and its use by hillwalkers. The Visitor Safety in the Countryside approach, which provides guidance on how to balance management intervention with personal responsibility, was outlined in Mountaineering Ireland's evidence.

## Common-sense judgment

On February 17<sup>th</sup>, 2017, Judge Michael White delivered a clear and strong judgment setting aside the Circuit Court award. In dealing with the mechanism of the fall, the judge concluded there was a high degree of negligence on Ms Wall's part as she was not looking at the surface of the boardwalk when she fell.

In addressing the National Parks and Wildlife Service's legal liability, the judge emphasised that the duty of reasonable

care to maintain the boardwalk was not an absolute duty. Drawing on judgments from England and Scotland, the judge concluded that the standard of care had to be adapted taking into account the location of the boardwalk and the benefit to society from the provision of the boardwalk. On that basis the judge found that the National Parks and Wildlife Service was not negligent in not filling in the indentations in the boardwalk or in not replacing the sleepers, and he overturned the Circuit Court judgment.

With regard to costs, which would be substantial given the duration of the High Court appeal, Judge White requested the State Claims Agency to consider the precedent value of the judgment before seeking to pursue the injured woman for their costs. It was subsequently agreed both sides would pay their own costs.

## Welcome precedent

This judgment clarifies case-law in a way that will be valuable if cases arise in the future related to structures provided for recreational users (under Ireland's common-law legal system significant emphasis is placed on previous decisions in the higher courts). As section 4(4) of the Occupiers Liability Act does not refer to the responsibility of recreational users or qualify the duty of reasonable care, this judgment is particularly important.

## Conclusions

This case had rekindled fears amongst private landowners about people entering onto their property to engage in

recreational activity. Some landowners may be unaware that the Circuit Court judgment has been overturned, or they may be unclear about the basis to the judgment. By engaging positively with any landowners we come across, walkers and climbers can help to allay the landowners' concerns, and also contribute to the relationship we rely upon for continued access.

It is worth reiterating that this case related specifically to structures provided for recreational users (e.g. stiles, bridges and boardwalks) and that the majority of these structures are on managed trails, where there is an insurance policy in place to indemnify landowners.

Mountaineering Ireland is currently engaging with other relevant organisations to examine the recent judgment and consider if there is need for amendment to the Occupiers Liability Act.

It is also important that the responsibility of recreational users for their own actions continues to be emphasised by Mountaineering Ireland and within its member clubs.

It is fitting to conclude with the words of Edward Whymper, when reflecting on the appalling tragedy that befell his party while descending after the first ascent of the Matterhorn in 1865:

*"Climb if you will, but remember that courage and strength are nought without prudence, and that a momentary negligence may destroy the happiness of a lifetime. Do nothing in haste; look well to each step; and from the beginning think what may be the end"* ■