THE COURT OF APPEAL

UNAPPROVED

Record Number: 2022/10
High Court Record Number: 2016/781P

Costello J. **Neutral Citation Number [2023] IECA 39**

Noonan J.

Ní Raifeartaigh J.

BETWEEN/

DAMIEN DAVEY

PLAINTIFF

-AND-

SLIGO COUNTY COUNCIL, MDS DISTRIBUTON LIMITED AND VLASTIMIL ZACHAR

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 23rd day of February, 2023

1. Mr. Davey, a Council employee, was part of a group working on the road when the group was hit by a lorry whose driver had fallen asleep. One person was killed and others, including Mr. Davey, were injured. The dispute in this appeal is between those responsible for the lorry and the Council. The High Court (Coffey J.) determined that as between the second and third defendants (collectively "MDS") and the first defendant ("The Council"), MDS bears sole responsibility for the plaintiff's injuries. MDS appeals that finding and contends that liability ought to have been apportioned between it and the Council.

Background facts

2. The accident happened at 11:18 am on Thursday, the 13th August, 2015 on the main Dublin to Sligo road, the N4, near Castlebaldwin. The Council was doing works on the hard shoulder of the northbound single carriageway road and was carrying out three operations at the same time, namely cutting the verge and the hedges, picking litter and clearing out road drains. The working group on the hard shoulder consisted of a small moving convoy of vehicles and workers on foot. First came two tractors with hedge trimming attachments, one behind the other which were trimming the verge at different depths.

3. Behind the tractors were three Council employees on foot picking up litter. These included the plaintiff, Mr. Davey, and Mr. Padraig Noone. Behind them came a JCB type digger which was being used for cleaning out road drains. Behind the digger was a Mitsubishi 3 ton pickup truck with a large illuminated sign on the back with flashing lights and a right-pointing arrow. The convoy was moving slowly north at a rate of approximately 333 metres per hour. All of the vehicles were inside the broken yellow line demarking the hard shoulder of the road but only slightly so and at a short distance of between 100 and 500mm from the yellow line.

4. The MDS lorry was driving north with Mr. Zachar at the wheel, and was, at the material time, the only vehicle on the northbound carriageway. It was a Scania HGV tractor unit weighing 15 tons of the kind one normally associates with hauling container trailers and the like. It was common case that some time prior to the accident, Mr. Zachar had activated the cruise control system on the lorry and set it at 88kmh, which was the limited maximum speed of the vehicle. The national speed limit of 80kmh applied to the lorry.

5. As the lorry approached the convoy, it veered, apparently gradually, off the road and collided with the right rear of the Mitsubishi pickup, spinning it round, and then with the digger which in turn struck the pedestrian workers. Mr. Noone was tragically killed in the

impact and Mr. Davey and his other colleague suffered injuries. In fact, the court was informed that there are some eight personal injury/fatal injury claims arising from this accident. The parties agreed that the determination of liability in this matter would govern all claims.

6. The trial of the liability issue between the Council and MDS ran over 14 days in the High Court and on day 3, MDS admitted that Mr. Zachar had fallen asleep at the wheel. The trial before the High Court was in effect a claim by MDS for contribution from the Council on the basis that the set-up of the roadworks put in place by the Council failed to take adequate precautions for the safety of the Council workers. Much, if not most, of the trial of the issue was taken up by expert engineering evidence given by three consulting forensic engineers, Dr. Mark Jordan for the plaintiff, Mr. Tom Rowan for the Council and Mr. Paul Romeril for MDS.

7. The accident was investigated by the Health and Safety Authority, arising out of whose findings a criminal prosecution against Mr. Zachar was brought and the HSA inspector, Mr. Greg Murphy, in his report made no adverse findings against the Council and considered that the precautions they had taken were reasonable. Following a trial in the Circuit Criminal Court, Mr. Zachar was convicted of careless driving causing the death of Mr. Noone and causing serious bodily injury to two others. Mr. Zachar did not appeal his conviction.

8. The accident occurred on a sunny summer's day with ideal driving conditions. The topography of the locus was that as Mr. Zachar approached the scene of the accident, he negotiated a gradual bend coming on to a straight stretch and encountered the working group some 100 to 150 metres after the bend. Evidence was given of the relevant traffic count at the locus, to which I will return. This is relevant to another point upon which emphasis was

placed by MDS, namely that the Sligo Fleadh was taking place during this week which increased the traffic on the N4.

9. As I have noted, very detailed and lengthy engineering evidence was heard by the trial judge, most of which was concerned with the precautions which MDS alleged that the Council ought to have taken in relation to these roadworks. I propose to summarise some of the main headings in this regard, without attempting an exhaustive list of the many issues that arose:

(1) It was said that the Council ought not have been undertaking these works at all in circumstances where the road was unusually busy, and they should have been arranged for another date when the Fleadh was not taking place.

(2) The Council failed to carry out any or any proper assessment of the risks involved in this work.

(3) The Council overseers supervising this work were absent at the time of the accident.

(4) The Council failed to have a proper traffic management plan in place that ought to have complied with certain prescribed standards including the Department of Transport's publication dealing with Temporary Traffic Measures and Signs for Roadworks and also the National Roads Authority/Department of Transport/HSA publication "*Guidance for the Control and Management of Traffic at Roadworks* (2nd Edn, 2010)".

(5) The Council failed, in accordance with these standards, to provide a lateral safety zone of at least 1.2 metres out from where the works were taking place in addition to a longitudinal safety zone.

(6) The Mitsubishi pickup was not an adequate buffer vehicle for the purpose of protecting the convoy and a lorry mounted crash cushion (LMCC) should have been provided.

(7) The Council's traffic management plan ought to have included a stop and go system together with advance warning cones, speed mitigation measures and appropriate signage.

(8) Special speed limits should have been introduced.

Judgment of the High Court

10. Coffey J. delivered an *ex tempore* judgment on the 29th October, 2021, two days after the conclusion of the trial, albeit a judgment that is written and detailed. The judge commenced by summarising the case made by MDS, in effect the plaintiff in the issue, and summarising the facts as I have outlined them. He noted in addition that the works had commenced three days before the accident and had been observed by Mr. Zachar who told the Gardaí that he had driven the same road three times earlier in the week and had seen people cutting grass.

11. The judge noted that the works were preceded by warning signs at three different locations, respectively at 6.2km, 270m and 159m from the locus of the accident. All vehicles on the work site had flashing beacons and the large sign on the pickup had four flashing lights, one at each corner. All operatives on site were wearing high visibility vests and trousers. When asked by the Gardaí as to whether he had seen the signs, Mr. Zachar said "*It's not that I didn't see it. I don't remember*".

12. The judge noted that it was not in dispute that Mr. Zachar had successfully negotiated the bend immediately preceding the works and he concluded therefore as a matter of probability that Mr. Zachar was awake immediately before he came on to the short straight

stretch of road before the locus. As the lorry was the only vehicle in the northbound carriageway, there was nothing to impede Mr. Zachar's view of the roadworks. The judge noted that the traffic count for the relevant section of the road on the morning of the accident was measured at 400 vehicles between 8 and 11am.

13. One of MDS' grounds of appeal is that the judge in fact misinterpreted the traffic count evidence and the true position was that the traffic flow was measured at 400 vehicles *per hour*. Accordingly, the traffic count for the relevant three-hour period was 1,200 vehicles rather than 400 as the judge believed. Thus, when the judge calculated that the traffic passed in both directions at the rate of one vehicle every 27 seconds and on the northbound carriageway every 54 seconds, in fact the respective times should have been 9 seconds and 18 seconds. Speaking of the traffic rate that he had (allegedly incorrectly) taken, the judge said (at para. 11):

> "*This would suggest that the traffic on the road was not particularly busy on the morning of the accident and certainly not at a level to warrant an abandonment of the works.*"

14. MDS contends that had the judge in fact got the number right, he might well have reached a different conclusion. To put this perhaps in context, if one were to assume an average speed on this section of the road similar to Mr. Zachar's of say 90 kmh, that would equate to 25m per second. If there is a time gap, again obviously on average, between vehicles of 18 seconds, in terms of distance this equates to 450m.

15. The judge noted that a garda witness gave unchallenged evidence that the pickup would have been "*very visible*" from a distance of 300m. The judge said that it was not in dispute that as Mr. Zachar had successfully negotiated the preceding bend, he must have

fallen asleep during the short straight section of 100 to 150m, which at the speed he was travelling, would have taken between 4 and 6 seconds to traverse.

16. During that brief period, the lorry veered off the carriageway on to the hard shoulder. The conclusion of the investigating garda, which was not in dispute, was that the lorry was approximately 500 to 600mm inside the broken yellow line when it struck the right rear of the pickup, which it will be recalled was about 100mm inside the yellow line. The lorry therefore overlapped the pickup by 400 to 500mm. The judge noted the evidence that the digger was also about 100mm inside the line of the hard shoulder.

17. This meant in the judge's view that it was likely that if the pickup truck had been 1.2m in from the line of the hard shoulder, the lorry would not have collided with it but would have struck the digger if the angle of deviation was two degrees or more. Although the judge did not make any definitive finding on the latter point, the engineering evidence was variously that the likely angle of deviation of the lorry was one or two degrees and in making the latter finding, the judge appears to have favoured two degrees.

18. Also of importance, the judge noted that when Mr. Zachar was interviewed by the gardaí, he had no memory of the impact with the pickup or the digger and said he only awoke after the second impact with the digger. The judge then went on to make a number of findings of fact which may be summarised as follows:

(1) Mr. Zachar was awake up to 100 to 150 metres from the point of impact.

(2) While awake and at a distance of 300 metres from the point of impact, Mr. Zachar had a clear and uninterrupted view of the Council's works area.

(3) Mr. Zachar had passed and seen two clearly visible warning signs at 270 metres and 162 metres from the point of impact.

(4) As Mr. Zachar negotiated the bend and probably much earlier, he must have been aware that he was feeling drowsy from which the judge inferred that he made a conscious decision to continue driving and not to pull in and take a rest.

(5) Mr. Zachar was aware that he was at risk of falling asleep not least because he had experienced previous episodes of falling asleep while driving in the past.

(6) Mr. Zachar recklessly chose to ignore his drowsiness and the risk of falling asleep and persisted in driving, colliding with the pickup truck and digger whose presence and location he must have seen as he negotiated the bend.

19. The judge then turned to consider the adequacy of the precautions that were taken by the Council to protect its workers including the plaintiff. He considered that the evidence established that the pre-eminent guidance manual was chapter 8 of the Temporary Traffic Measures and Signs for Roadworks ("TSM"). He found the TSM guidance confusing and of little value to the court. In contrast he found the NRA Dashboard Manual to be clear and readily applicable to the facts of the case. He accepted the evidence of the Council's engineer, Mr. Rowan, which was that the level of protection required by the Manual was equalled or exceeded by the precautions taken by the Council. However, the judge was of the view that in failing to provide for the 1.2m lateral safety zone, the Council had been negligent but otherwise, the precautions were adequate and reasonable.

20. Central to this appeal is the next finding of the judge which I should set out in full (at para. 18):

"... I am of the view that such negligence as there was on the part of the Council in failing to operate a 1.2 metre lateral safety zone was overwhelmed and made

irrelevant by the negligence of the third named defendant who in the knowledge of where the pickup and digger actually were and being further aware that he was drowsy and at risk of falling asleep nonetheless recklessly chose to drive into the area of danger that he solely thereby created. The recklessness of the third named defendant therefore constitutes a novus actus interveniens for which he and his employer must bear sole responsibility (See Conole v Redbank Oyster Company & Anor [1976] IR 191). I am in any event of the view that the true purpose of a lateral safety zone is to protect foot workers and the operators of plant and machinery from inadvertently straying onto the live carriageway. The mere fact that a precaution which could be considered necessary to prevent a different type of accident would by pure coincidence have also possibly prevented or ameliorated injuries from the accident that did in fact occur, is not a good reason for finding that there was a breach of duty on the part of the Council that should enure to the benefit of the second and third named defendants."

21. The judge went on to hold that as regards expert evidence to the effect that there should have been cones in advance of the works, he was of the view that if a collision with a pickup truck weighing 3 tons failed to wake or even register with Mr. Zachar, it was unlikely that contact with cones had the capacity to awaken him. There was in any event no evidence before him that cones could have the effect of waking up a driver who had fallen asleep.

22. As regards the alleged failure to have a traffic management plan including a stop/go system in place, the judge said the following (at para. 20):

"*A vehicle whose driver has fallen asleep has no driver and is impervious to visual cues. I reject therefore the suggestion that a stop/go system would as a matter of probability have prevented the accident that occurred in this case*."

He felt that if there had been a stop/go system, in the circumstances the likelihood was that Mr. Zachar would have collided with any stopped vehicles thereby extending the risk of potential injury to a larger number of people. He also concluded that speed reduction measures would likely have had no effect on the defendant who was already exceeding the national speed limit.

23. Finally, on the issue of a lorry mounted crash cushion, the evidence suggested that it should be deployed at not less than 50m from the works area and in the present case, there was no evidence to demonstrate as a probability that the lorry would have encroached on the hard shoulder at a point which would have brought it into contact with such a vehicle if it was there. The evidence on the contrary suggested the likelihood that the encroachment into the hard shoulder occurred closer to the works. In any event, the judge noted Mr. Romeril's evidence that such vehicles are only used on motorways and dual carriageways. He therefore dismissed the claim for indemnity and contribution against the Council.

Grounds of Appeal

24. The appellant's notice of appeal contains 28 grounds, one of which includes six sub grounds. It has to be said, and not for the first time, that the inclusion of a multitude of appeal grounds is rarely, if ever, of assistance to this Court. The converse is the case – see *Egan v Bank of Ireland* [2022] IECA 294 at para. 48. The prolixity of the grounds in this case is, as in *Egan*, underscored by the fact that in their written submissions, the appellants identify three issues arising in this appeal. In reality, there are only two. The first is that neither party pleaded nor argued *novus actus interveniens* and in determining the case in the way in which he did, the judge deprived MDS of the opportunity to make submissions on this question which, in any event, the judge decided incorrectly. Secondly it is said that the judge failed to properly consider and engage with the expert evidence and had he done so,

he would have apportioned liability. This is the result that ought to have ensued from the judge's finding that the Council had been negligent.

Discussion

25. The fundamental issue between the parties is causation. While it may seem trite to say so, liability in negligence is not established by merely proving that the defendant was negligent. The plaintiff must also establish that the defendant's negligence caused the damage complained of. That is both obvious and basic but frequently, the causal link between the negligence and the damage is far from obvious. *Novus actus interveniens* is merely a subset of causation and a legal doctrine designed to facilitate the resolution of issues of causation where the link between negligence and damage is unclear.

26. The doctrine was explained by the Supreme Court in *Breslin v Corcoran & Anor* [2003] 2 IR 203 where the defendant left his car unlocked with keys in the ignition and it was stolen by a thief whose negligence caused a collision. The court held that the chain of causation from the owner's original negligence was broken by the subsequent negligence of the thief. Speaking for the court, Fennelly J. said (at 214):

> "*A person is not normally liable, if he has committed an act of carelessness, where the damage has been directly caused by the intervening independent act of another person, for whom he is not otherwise vicariously responsible. Such liability may exist, where the damage caused by the other person was the very kind of thing which he was bound to expect and guard against and the resulting damage was likely to happen if he did not.*"

27. This passage was cited with approval by Murray J., delivering the judgment of this Court in *McCarthy v Kavanagh & Anor* [2020] IECA 344 where he said (at para. 108):

> "*The underlying test is that where human actions form one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff it will not avail the defendant if what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, (Hayes v Harwood [1935] 1 KB 146, 156) cited with approval in Cunningham v McGrath Bros [1964] IR 209, 214 (per Kingsmill Moore J.)*"

28. Thus, where the act of the third party causing the damage ought to have been anticipated by the defendant as reasonably likely to occur and would have been prevented had the defendant not been negligent, the law will regard the defendant as having "*caused*" the damage. If, however, the act of the third party and the ensuing damage was not foreseeable by the defendant, the chain of causation will have been broken.

29. In the present case, *novus actus* will not aid the Council where it ought to have reasonably anticipated the possibility of a driver falling asleep and veering off the highway into the works **and** had it taken the precautions MDS says it should have taken, the damage would have been prevented or lessened.

30. MDS says that the evidence establishes that the risk posed by a driver falling asleep is a well known one and is the most common cause of single vehicle accidents. Accordingly, it says, the Council ought to have anticipated it. Even if that is so, MDS must go on to establish that the measures it advocates would, if taken, have prevented or lessened the damage.

31. I have already indicated in broad terms what the measures advocated for are. One of the primary steps that ought to have been taken, MDS says, was that the Council ought to have had a lateral safety zone of 1.2m. This means that the various vehicles which were in fact 100mm inside the yellow line ought to have been 1.2m inside that line. The importance

of this, MDS says, is that as the lorry overlapped the pickup by only 400 to 500mm, had the pickup been 1.2m in from the line, the lorry would have missed it altogether and likely only glanced off the digger. Thus, it says, the accident would have been prevented or its effects lessened in the absence of the Council's negligence in this regard.

32. There is however a practical difficulty with this contention. The evidence of Mr. Romeril as contained in his "*advice on liability*" document dated 28th May, 2019 was that the margin is only 2.95m wide. The pickup was 2m wide and the digger 2.4m wide, accordingly rendering it apparently impossible for them to have been 1.2m inside the yellow line. The alternative of course would have been to have the 1.2m lateral safety zone projecting out into the live carriageway by some form of cordoning such as perhaps cones. That however, would have changed nothing as the accident would have happened in precisely the same way, since all the vehicles would of course have still been in the same position on the hard shoulder

33. There is also a legal difficulty with this contention. The trial judge accepted the evidence of Mr. Rowan, which he was entitled to accept, that the purpose of this lateral safety zone would be to prevent persons or machines inadvertently straying out into the live carriageway. That was the risk it was designed to guard against. Even if MDS is correct in asserting that the accident would not have happened, or at least not happened in the same way, had the lateral safety zone been implemented, then that outcome would have been the result of pure chance.

34. Thus, if a precaution is designed to prevent X but would by chance have prevented Y, the defendant is not liable if Y occurs because it was not reasonably foreseeable that the taking of the precaution might have prevented Y. As the trial judge put it, and I agree with him, the mere fact that a precaution against one type of accident would by coincidence have

prevented the different accident that in fact occurred, is not a reason for finding that there was a breach of duty by the Council. Thus the failure to implement the 1.2m zone was not legally causative of the accident that actually happened.

35. In that context, even if the possibility of a driver falling asleep and hitting the works was foreseeable, the taking of this particular step would not foreseeably have prevented that risk.

36. The same considerations apply to the MDS contention that the works ought not to have been taking place at all while the Fleadh was on in Sligo. It contends that this gave rise to a "*dramatic*" increase in the traffic, which it puts at 30%. It is of course obvious that had the works not been taking place, no accident would have occurred, or at least one that injured the various plaintiffs.

37. In discussions between counsel for MDS and the Court, the Court asked if in those circumstances, MDS was suggesting that the Council should therefore be 100% responsible for the accident and counsel agreed that it was. I cannot see how that can be the case. By that reasoning, if a plane fell from the sky and struck the works, the Council would equally be liable. Here again however, there seems to me to be a disconnect between the measure that allegedly should have been taken and the event that actually occurred.

38. The reason for postponing the works due to increased traffic volume can only logically be that the risk of a vehicle hitting the works is increased simply because there are more vehicles or possibly because the conditions obtaining in heavy traffic would make it more likely that a vehicle might veer off the highway. The precise reasons for there being an increased risk were not explained by the evidence. Nor was it explained how one vehicle passing close to the works every 18 seconds would amount to heavy traffic increasing the risk to the point that the works should be abandoned altogether.

39. However, none of this appears to me to be particularly relevant in circumstances where the undisputed evidence established that the lorry was the only vehicle on the northbound carriageway at the material time. Therefore, whether there was light or heavy traffic is really of no moment because, when the accident occurred, there was no traffic save the lorry. Here again, the risk posed by heavy traffic was not the risk that actually eventuated in this case and thus not a risk which the abandonment of the works, even if warranted, was ever designed to prevent.

40. Nor, like the trial judge, do I believe that limiting the speed in the environs of the works was likely to have any effect on someone who was already disregarding the national speed limit, as the judge found. In any event, like a warning sign, a speed limit sign will have no effect on a driver who is not conscious.

41. In fact, it seems to me that the evidence established that the only precaution that might have had some bearing on the outcome was a physical barrier of sufficient strength to halt or arrest the progress of the lorry into the works. The only precaution approaching that which is referenced in the evidence was the possibility of deploying a LMCC. In any event, as the judge held, and was entitled to hold, such lorries are normally only deployed on dual carriageways or motorways and even if it had been there, the MDS lorry would probably have missed it. Moreover, there was no evidence to suggest that such a buffer vehicle would have been capable of absorbing a direct impact from a 15 ton lorry travelling at 88kmh to a degree sufficient to prevent or mitigate the accident which in fact occurred.

42. One cannot lose sight of the fact that the fundamental cause of this accident was that Mr. Zachar fell asleep at the wheel of a 15 ton lorry which he had pre-programmed to continue on at its maximum, and unlawful, speed. From the moment he fell asleep, the lorry became in effect an unguided missile heading towards the working group in circumstances

where all the traffic signs, lights and cones in the world would have made not the slightest difference to the tragic consequences that ensued. It is fortunate indeed that more were not killed, although that is scant consolation to Mr. Noone's bereaved family.

43. While MDS is correct in asserting that the *novus actus* issue was not flagged by the judge, I reject the contention that this deprived it of a fair hearing. As I have said, *novus actus* is concerned with causation and causation was exhaustively debated in the High Court both in evidence and submissions. It does not therefore appear to me that attaching a particular label to that issue in any way affected the course of the case. I fail to see how the case would have been presented or argued differently even if the judge had asked the parties to address *novus actus*. I am not satisfied therefore that MDS has established any unfairness arising as a result, particularly as I do not believe that this is in fact a case where liability falls to be determined by the application of the doctrine.

44. Although the judge considered that *novus actus* was a relevant consideration and that the negligence of MDS "*overwhelmed*" the negligence of the Council, I would take a slightly different view. It seems to me that the real issue was whether, given the fact the Mr Zachar fell asleep at the wheel of his lorry, there was <u>in fact</u> any causal connection between the negligence of the Council, whether as found or otherwise, and the damage that occurred. For the reasons I have explained, I do not believe that there was any such causal connection and that being the case, I am of the opinion that this is not a true case of *novus actus* at all. In my view, the sole cause of the damage here was the negligence of MDS and any negligence on the part of the Council was not causative in the legal sense. Thus, even though the judge reached his conclusions by reference to the doctrine of *novus actus* and I would not analyse the case in this way, this does not mean that MDS should succeed on this appeal.

45. For the same reason, I reject the complaint of MDS that it followed from the judge's finding of negligence against the Council that there should have been an apportionment of liability.

46. Despite that, it has to be said that the approach of the Council to the carrying out of these works was entirely suboptimal. The trial judge found that the Council was negligent in failing to provide a lateral safety zone and provide a proper risk assessment for the three different categories of work that were being simultaneously carried out, with particular reference to the safe location of the vehicles involved. This does not reflect particularly well on the approach of the Council and it is to be hoped that lessons have been learned from this tragedy.

47. MDS also criticises the trial judge for an alleged failure to properly engage with the expert evidence. However, a reading of the judgment as a whole satisfies me that the judge gave detailed and careful consideration to the competing evidence and theories advanced by each of the experts and came to conclusions which were open on that evidence. The reasons for those conclusions are given by the judge or are readily inferred from his findings. One of the appellant's criticisms is the fact that the judge, it is said, got the traffic volume wrong, but even were that so, as I have already explained, MDS has failed to establish that this resulted in any erroneous finding material to the judge's overall conclusion.

48. As cases like *Doyle v Banville* [2012] IESC 25 and *Donegal Investment Group plc v Danbywiske & Ors.* [2017] IESC 14 establish, there will be instances where the outcome of a case will depend on complex expert evidence, and the resolution of the case may to varying degrees depend on nuanced and reasoned findings in relation to that evidence. This is not such a case. The facts here are stark and, in my judgment, much of the engineering evidence given in this case was, in truth, largely irrelevant to the real issues. It was not a case that

called for an elaborate reconciliation of evidence about the number and location of traffic cones, traffic signs or warning lights. At the end of the day, nothing the Council did or did not do contributed to the loss suffered here. There was one cause and only one cause.

49. It is somewhat remarkable that Mr. Romeril's reports, while containing very detailed and elaborate analysis of traffic management plans, guidelines and the like, do not even refer to Mr. Zachar's negligence. That of course is not in any way to criticise Mr. Romeril who was merely doing that which he was instructed to do. It does however illustrate that much of the engineering evidence in this case, detailed as it was, largely ignored the elephant in the room. As the authorities demonstrate, the necessity for engagement and analysis of evidence is required in order to enable the parties, and indeed an appellate court, to understand the reasons why one side won and the other lost. There is little room for doubt in this case. Appellants not infrequently elevate this requirement to an art form in itself, subjecting courts of trial to criticism for failing to mention one piece of evidence, or analyse another. What is required is that the judgment "*engages with the key elements of the case made by both sides and explains why one or other side is preferred*" – *Doyle v Banville* [2012] IESC 25 at para. 10.

50. However, as Collins J., speaking for this Court, observed in *McCormack v Timlin & Ors* [2021] IECA 96, "*... appellate courts must be astute not to permit Doyle v Banville – inspired complaints of 'non-engagement' with the evidence to be used as a device to circumvent the principles in Hay v O'Grady;*" – at para. 58. I made a similar observation in *Twomey v Jeral Limited & Ors* [2022] IECA 177 that "*appellate courts should not encourage 'rummaging in the undergrowth' of the evidence in an effort by appellants to demonstrate some minor point that may have been, apparently at least, overlooked by the trial judge but where the overall rationale is perfectly clear.*" – at para. 29. The threshold

for success in a *"non-engagement"* argument is high – see the observations of MacMenamin J. in *Leopardstown Club Limited v Templeville Developments Limited* [2017] IESC 50 -and it is not met here.

51. These considerations seem to me to be applicable to many of the appellant's voluminous grounds of appeal. I have dealt with most but some merit particular mention. The efficiency of the trial judge in producing such a comprehensive judgment within two days of the conclusion of the trial has, regrettably it must be said, earned him the criticism of rushing to judgment. Ground (ii) pleads that he failed to take adequate time to carefully and properly consider and evaluate the evidence and issues, thus rushing to judgment. This in my view is an entirely unworthy criticism that should never have been made and it was, quite sensibly, not pursued in written or oral argument.

52. Ground (vi) contains six sub grounds, all concerned with an alleged failure to properly consider the evidence relating to Mr. Zachar. This includes a claim that the judge wrongly inferred that he must have been awake when he negotiated the bend and aware he was feeling drowsy, thus making a conscious decision to continue and so forth. The judge felt this was reckless and, it is said, he was wrong to do so. I think the trial judge was perfectly entitled to draw this inference, but even if he was not, it matters not a jot. The plain fact of the matter is that Mr. Zachar fell asleep at the wheel, this was negligent and admitted to be so, extraordinarily however, only on the third day of the trial and not before. Although the trial judge was entitled in my view to draw inferences and arrive at conclusions as to the circumstances surrounding Mr. Zachar falling asleep, at the end of the day they change nothing.

Conclusion

53. In summary, I am satisfied that the conclusion of the trial judge was one that was open on the evidence and correctly arrived at. The appellant has failed to establish any operative error leading to that conclusion and therefore this appeal must fail.

54. I would accordingly dismiss the appeal and affirm the order of the High Court. With regard to costs, my provisional view is that as the Council has been entirely successful, it should be entitled to the costs of the appeal against MDS. If MDS wishes to contend for an alternative order, it will have liberty to deliver a written submission not exceeding 1,000 words within 14 days of the date of this judgment. The Council will have a similar period to respond likewise. In default of such submission being received, an order in the terms proposed will be made.

55. As this judgment is delivered electronically, Costello J. has authorised me to record her agreement with it. I have also had the opportunity of reading the concurring judgment of Ní Raifeartaigh J. herein and I agree with it.