

## THE HIGH COURT

[2016 No. 4546 P.]

BETWEEN

NUALA RYAN

PLAINTIFF

AND

TIPPERARY COUNTY COUNCIL

DEFENDANT

**JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 17th day of May, 2019**

1. The plaintiff is a housewife and resides at 13 St. Bernadette's Terrace, Clonmel in the County of Tipperary.
2. The plaintiff has sued the defendant, a local authority having its offices at Civic Offices, Nenagh in the County of Tipperary with responsibility for the construction, upkeep, and maintenance of the public roadways and laneways in Clonmel, County of Tipperary.
3. The plaintiff obtained authorisation under s.14 of the Personal Injuries Assessment Board Acts, 2003 and 2007 on the 10th day of February, 2016 bearing authorisation number PL1223201469580.
4. On or about the 4th day of January, 2014 the plaintiff was cycling her bicycle in the laneway at or near St. Bernadette's Terrace, Clonmel in the County of Tipperary when she was caused to fall heavily to the ground by a dangerous and defective section of the laneway, as a result of which the said accident, the plaintiff claims to have suffered severe personal injuries, loss, damage, inconvenience and expense.
5. The plaintiff gave evidence that she was born in December 1957 and is now aged 61 years of age, and that she has lived at number 13 St. Bernadette's Terrace for the last 17 years.
6. She described herself as having been an active person prior to the accident and had two Jack Russell dogs at that time whom she walked. She also used her bicycle and went into town which was a 20-minute journey bicycle. The plaintiff described how her bicycle skidded on the pebbles in the laneway which is between numbers 5 & 6, St. Bernadette's Terrace, which was shown to the court in photograph number 3 and the plaintiff contended that there was a large number of pebbles on the surface of the laneway. The contention was that the local authority, its servants and/or agents in the form of contractors laid a stripe of tar as far as the arch and then stopped. The plaintiff described how when she hit the ground she was trapped and could not move and that two girls picked her up. She described skidding under the archway where the lane meets the arch.
7. The plaintiff's complaint was that a contractor to the local authority laid tar in the laneway, but that other works was completed from start to finish for a particular network of laneways in that area. There was a gradient down from a red garage door in number 4 down to the archway and a gulley trap with a bode/sunken area of tarmac and pebbles. The plaintiff's contention was that the surface of the lane was left as if it were like marbles on top of a skating rink. The plaintiff was brought by her husband to hospital in Clonmel and she was discharged 3 days later. A senior radiologist then noticed a fracture on her lumbar spine. She was given an anaesthetic patch to her back and transferred to Waterford Hospital where she was found to have a wedged compression fracture of the 2nd vertebra. The plaintiff had to wear a spinal brace for which she was fitted while in Waterford Hospital and she wore this brace post-accident for a 12 week period.
8. The plaintiff suffered pain in her lower back and left leg down to her foot and was found to have osteoporosis. Her mobility was quite restricted and as a result of the injury she is obliged to sleep downstairs.
9. The plaintiff finds herself on a waiting list for the epidural treatment which she hopes might help but as a result of difficulties suffered by her she could not exercise and has therefore put on a lot of weight and is on tablet medication at present. The plaintiff was obliged to desist from walking as a hobby for a period of time. The plaintiff is not able to carry out household tasks such as Hoovering which her husband now does instead and she cannot sit for very long because of the pain. The plaintiff suffers from pain in the back and has had to also desist from cycling for the present.
10. Under cross-examination the plaintiff confirms that she owns her own house. She thought that she was safe but was not expecting this accident to happen as she had learnt to ride a bicycle when she young and she had never fallen before from a bicycle.
11. The plaintiff said she was not expecting to fall at the locus. The plaintiff confirmed that there had been potholes along the lane which had been filled in. The plaintiff confirmed that she was claiming special damages in the sum of €1,680 which were not agreed.

**Evidence of Mr. James Ryan**

12. Evidence was heard from Mr. James Ryan husband of the plaintiff. This witness confirmed that most of the houses at the locus are privately owned through tenant purchase schemes. This witness confirmed that there had been potholes on the laneway and that nothing had happened to fix these potholes until 2014 at the time of the local elections when Mr. Ryan contacted a Council member, Siobhan Ambrose. Mr Ryan had attended the County Council offices to complain about the defective gate at the locus and about the pot holes there. Consequentially the County Council put grit into the holes in the laneway. This witness confirmed that a Mr. Cooney a local contractor had been undertaking work at the time for the Tipperary Council and that this man did do work on the laneway. He identified two laneways on either side of William O'Brien Street which had received a full tarmac completed works in mid-2005. This witness told the Court that he thought that the workers would be coming back to finish their laneway. This witness under cross-examination indicated that a good tarmac job had been done up to the end of the archway but that they had then left the scene.

**Evidence of Mr. Jack O'Reilly, Engineer**

13. Mr. Jack O'Reilly an engineer from O'Reilly's Engineers gave evidence of his inspection of the locus on the 15th of September, 2014 and that the plaintiff's husband was there and his wife subsequently confirmed the details to him. Mr O'Reilly described this as a service laneway originally a local authority complex which was now a mature area.

14. This witness said that there was 85 yards beyond the archway down the laneway and as shown at the right hand side of photograph 2, which was produced to the Court, there was a back gate into the plaintiff's residence. This witness described grit and crushed stone and gravel and a grate under the arch with loose pebbles over a macadam surface. This witness described how the tarmacadam ends exactly at the end of the laneway at the end of the strip of cream paint and that it is not smooth and he described (as shown in photograph 5) a joint line showing the commencement of a sinking effect with dishing overall 3 inches from the surface of the gully to the surface of the macadam. He described this dishing as being there to provide for run-off water from the second patch to the drainage of the gully and he said that there were two lines of varying concentration of pebbles. This witness said that the source of the pebbles could only be from the laneway that they are washed down and trapped in. In the opinion of this witness, it is a space 90 yards long and if it had been continued in terms of its surfacing there would have been no problem. The witness said that there was therefore a reasonably foreseeable dishing which was catching material running off the dish and that in his opinion this was a design issue.

15. With reference to photographs 4 and 5 the plaintiff's engineer on looking left to right at the photographs referred to infilling which had been done on the right hand side. The witness noted that the archway was 9 feet high and he said that this arch exacerbated pebbles which can't get out and this witness said that tar should have had sufficient strength to withstand traffic and that the gate was closed by the residents and can be used to close the lane and that work had definitely been done to the gate and that the gate had been changed since his report.

16. Under cross-examination Mr. O'Reilly said that everyone knows that cyclists have duty to look after themselves. He said that this was service yard with a dead-end and it was for residents use and he said that he agreed that the plaintiff cycles that route three times a day. He said if you see a problem on the surface you avoid it and he agreed that it was correct that the plaintiff had cycled on the right side of the lane. He agreed that the dimensions of the archway were 7ft 9inches wide and that the opening end it was 8ft and he said a cyclist can see to the end of the road and can see anyone coming and can cycling on any part of it.

17. This witness said that he was unable to say for certain whether the plaintiff had consciously elected to cycle on one part other than another part of the path and that she may not have been concentrating on where she was cycling. Mr. O'Reilly said that there was no dispute but that there was gravel on the road and that the gravel didn't get there yesterday. He said there were significant chippings near the gully and that the chippings were across the entire width of the road. The witness said that it was a public lane/archway under the control of the local authority and that chippings shouldn't have been there. He said chippings need not have been there and that if the plaintiff was at the front or the back that it wouldn't be a normal process for a normal person she may not have perceived it as a hazard. This witness did agree however that an engineer or supervisor inspecting the lane would see the chipping and the overlaying tar as a hazard. He said the width of the laneway was 7ft 9inches with chippings on tar which gives a marbling effect across the entire laneway.

18. In terms of the surfacing the laneway he said it was hit and miss approach were repairs had been carried out in the past. This witness said that cars turned in there and they were not the cause of the problem because the risk of the damage was greater if one were travelling at speed. He said he had no idea by whom the repairs had been carried out but that it would have been most appropriate to have crushed stone material. The plaintiff's engineer was not in a position to say whose repairs were actually there. He said that the chippings had been washed into a depression created by the laneway

#### **Evidence of Mr. John Fulham**

19. Mr. John Fulham is an engineer who was called to give evidence on behalf of the defendants. This witness gave his qualifications to the court and indicated that originally the report was carried out by Joseph O'Sullivan engineer who is now retired and signed by him. This witness said that the lane was made of crushed stone construction and was both in the 1930s. He also added that there was no evidence of any resurfacing of the stone part of the laneway in relation to the contention of the Mr. Ryan in his evidence who said that the laneway had been tarmacadam since he moved in and that was seventeen years ago and he was never challenged on this evidence. This witness said that there were potholes to the left and right of the laneway and that photograph number 7 showed a lot of damage and photograph number 8 showed the worst section of the potholes. He said that this was not surprising for a non-bound surface. He described the gravel finish as crushed loose as opposed to being tight. This witness agreed with Mr. Reilly engineer in terms of the type of material used and but he thought that it looked as if repairs had not been made by the local authority and he said that run off material from the stone part was washed out from materials and that the original material was still in place. He said that the more recent repairs had caused a problem.

20. This witness said that any road user including a cyclist would have a good view of the laneway and he said that the concentration of stones on the surface suggest that the plaintiff had tried to avoid them and he agreed that there was no alternative route in or out of that laneway and that it was 80 metres long.

21. Under cross-examination Mr. Fulham agreed that there were other connected laneways built at the same time and that William O'Brien Street had adjoining sections and he said in the other sections the archway cuts it off. He agreed that the laneway was built at the same time and that the last portion was tarmacadam started to finish on both sides and that on his instructions it was not recently tared and that the extent of the tar was from the road to the end of the archway. This witness took the view that if there was material washing off that it was vital to have a gully trap there and that the purpose of the gully trap was to prevent water collecting. He said that it was inevitable that one would get some material and that material ought to be compacted and kept in place. He didn't know why tarmacadam had not been placed all the way down on the laneway and he agreed that tar would be better it would be flatter and that there would be drainage to the side. He agreed that whatever drainage was used there was loose material getting onto the surface where there was run off water.

22. It was put to this witness that Mr. Ryan, engineer for the plaintiff had given evidence which was uncontroverted that this was council land and that the local authority fixed potholes along the laneway. Mr. Fulham argued that it is a laneway that had never been fixed before. Under cross-examination it was put to this witness that there was loose material and that it wasn't looked after by the local authority and that Mr. Ryan had said that there was one repair since 2014 carried out by the local authority. This witness said that he didn't know the age of the tarmacadam but that the lane was generally in good condition and it was put to him that Mr. Ryan thesis had been that sometime from 2005 onwards it was tarmacadam and he said he didn't know that he didn't want to say that it was not ten years old.

23. Robert Hogan, Town Foreman, Clonmel, gave evidence that he had worked for the defendants for 28 years contracting, resurfacing and doing general operative/maintenance work. This witness said that there was no evidence of council repair work that it was not the type of material they would use. This witness said that new stone was not used to repair the surface not for potholes but for the surface of a laneway and that they did not do any works on this laneway and he maintained that this included not doing pothole refill work.

## Medical Reports

24. The plaintiff's medical reports were handed in to the Court. Dr Kelly, General Practitioner referred to his report of 22nd September, 2015. He noted that the plaintiff attended the accident and emergency department and was reassured. She was reviewed however and on 15th January, 2014 was contacted by South Tipperary General Hospital and sent to Waterford Regional Hospital and she was diagnosed with L2 end plate fracture and associated osteoporosis and was advised to continue analgesia and to have physiotherapy for four weeks and then to have review. The plaintiff was in a spinal brace four weeks later and remained in same for four weeks. The plaintiff was seen again on 14th February 2014, with back pain and difficulties sleeping as a result of this pain. Paramol and Ibuprofen were prescribed and on 18th February 2014 this was changed to Vimovo a different anti-inflammatory medication with stomach protectant. Further changes were made because of difficulties with her stomach. A muscle relaxer, Baclopar, was added in on 3rd March, 2014. On 8th April, 2014 some of her medication was altered and her antidepressant medication was stopped because she was having difficulties with her memory. A DEXA (Dual Energy X-Ray Absorptiometry) scan showed marked osteoporosis of the lumbar spine.

25. In March, 2015 the plaintiff suffered from mood difficulties and irritability, she had marked weight gain with a lot of back pain and lack of progress with this difficulty which was affecting her daily life. An MRI scan in March, 2015 showed a wedge compression fracture noted L2 and this was unchanged compared to the previous reports in May, 2014. L4/L5 showed similar evidence of mild degree of degeneration as did L1-2 and L2-3 and L3-4. The plaintiff suffered from mild memory loss with a score of 26 of out of 30 when tested. The plaintiff had mid back pain radiating down to her right leg causes her difficulty walking her dogs or walking home from town. She is not able to Hoover and has pain going up and down the stairs and she therefore currently sleeps downstairs. The plaintiff is described as mildly depressed and there has been no improvement in the previous 21 months and she had little relief from painkillers. The plaintiff was continuing to wait for a breast reduction operation at that time and for an epidural and had difficulty sleeping. In the opinion and prognosis given by her GP the plaintiff suffered from a fall from her bike which resulted in exacerbation of degenerative changes to her back and may or may not have caused an L2 osteoporotic fracture, she was obviously found to have had a background of same which made her predisposed to fracturing her lumbar spine spontaneously or due to trauma and he said the causative effect of the accident is difficult to determine. This doctor found that the plaintiff's discomfort and pain is unlikely to resolve due to the background of degenerative changes in her lumbar spine and her osteoporosis. This witness noted that she had a premonitory condition of depressed mood but that prior to the accident she did not attend his surgery complaining of back pain on such a frequent basis.

26. Mr. Ruairí Mac Niocaill Consultant Orthopaedic Surgeon prepared his reported which is dated the 3rd October, 2016 and the radiological examination is referred to from January, 2014 showing compression of the anterior-superior aspect of L2, wedge compression. Subsequent images in Waterford Regional Hospital confirm fracture. The MRI scan performed in Waterford Hospital in January, 2015 again confirmed this L2 anterior wedge compression fracture with mild/moderate degenerative changes in some of the other adjacent vertebrae including some facet joint degeneration in her lumbar spine. This report sets out in terms of opinion and prognosis that although her pain is not directly over the L2 vertebrae it would not be uncommon for patients having had a lumbar spine fracture, to have ongoing low back pain, the presumption being that the alteration in the biomechanics following the fracture causes abnormal loading of the lumbar spine generally and may cause previously asymptomatic degenerative changes to become symptomatic. Her pain is troubling for her but she does not have an indication at the moment that surgical intervention is required and on that basis she is awaiting a review with pain specialist for an epidural injection to address the low back pain for her and should that prove unsuccessful she may require to be seen by a sub-specialist spine surgeon.

27. Professor Molloy, Consultant Physician/Rheumatologist prepared a report dated 10th May, 2017. He describes the nature of the plaintiff's fall and that she had a fracture as described he said she has ongoing pain and discomfort with pain down her left leg persisting and that he was arranging an EMG of this to evaluate the situation further. He noted that exercise was advised to build up her back muscles and that this would involve exercising in water which she has found comforting and helpful and that she was very frustrated by the fact that she had not gone back to her pre-accident state and that she is still restricted and her quality of life is affected. Professor Molloy's report dated 25th July, 2017 notes that the plaintiff remains symptomatic and that she had been doing her exercises, hydrotherapy and is on medication for osteoporosis. He said it was difficult to predict when the symptoms will settle and it is now five years since the accident and her difficulties appear to be chronic and will require medication and management for the foreseeable future. He did note that she was doing exercises weight bearing specifically he noted the continued difficulties in her quality of life and that this will require significant lifestyle changes in order to minimise her symptoms.

28. Mr. Michael O'Riordan in his report of 19th November, 2018, found the plaintiff to have tenderness and extremely limited movements of the lower spine and that the tips of the fingers can just about get to the tops of the patellae and that extension was zero and that latter bending was only a few degrees each side. This report says that the degree of disability complained of is in excess of what one would expect from this type of injury and that it would be extremely unusual to have tenderness in the spine nearly five years post injury and that the degree of stiffness is way in excess of that would one would expect with this type of injury. He said that osteoporosis which she has is not caused by falls and that it almost certainly predated her fall and would have rendered her more liable to an injury falling the fall.

29. Dr Chhabra in his report referred to as his follow up report following an examination of 9th February, 2017 noted that because the plaintiff was immobilised in a brace this has therefore exacerbated her symptoms for some time due to her pre-existing degenerative changes in view of the lack of mobility in her spine. He said she could continue to have some intermittent difficulties in her spine in the future and in fact was seen by Mr. Mac Niocaill a few weeks ago and noted that she had been put on a waiting list for an epidural injection to address her back pain by a pain specialist. Mr. Chhabra's previous report had given by way of opinion and prognosis that she had symptoms as of that report related to her degenerative disk and mild facet joint arthritis in the lower lumbar area starting from L2/L3 and he felt that because of pre-existing degenerative changes and prior history of sciatica she is likely to have intermittent difficulties in her spine in the future.

## Legal submissions on behalf of the plaintiff

30. These submissions highlight that the evidence clearly establishes that the plaintiff's injury was not caused by the County Council's failure to repair the laneway (nonfeasance) but by negligent design and construction which created a nuisance which was the cause of foreseeable harm to the plaintiff. The plaintiff's submissions stress that the tarmacadam had been laid over 9ft of the length of the archway to fall to a gully and that this was to prevent surface water from escaping from the laneway onto the street. Because the tarmacadam sloped down to the gully there was a dishing effect on all sides. This was design and construction, the effect of this was that stones from the laneway were carried onto the tarmacadam surface by rain water and accumulated there. It is also that the tarmacadam was not of sufficient strength to take the weight of the vehicles passing over it and rutting had been caused on either side of the drain leaving a depression for the accumulation of pebbles. The plaintiff relies on *Sheehan v. Ireland* [1977] I.R. 550 where Costello J. at p. 554 stated:

"There presently exists in the law relating to the liability of road authorities for defects in public roads and footpaths and

distinction between misfeasance and nonfeasance. If an authority commits a positive act of negligence in the construction of a footpath or in its maintenance that is an act of misfeasance it is liable to a person injured thereby but if it merely fails to maintain a footpath so that it falls into disrepair that is merely nonfeasance and it is not liable to someone injured due to its lack of repair."

31. Lavery J. in *Kelly v. Mayo County Council* [1964] I.R. 315 at p. 318:

"as such (highway) authority they are liable to damages for injury suffered by a road user if they had been negligent in doing repairs or an interfering with the road. They are not liable for injuries suffered caused by the want of repair of a road."

32. Cross J. para. 15 *Loughrey v. Dun Laoghaire Corporation* [2012] IEHC 502 regarding a trip on an uneven pavement the court found as a matter of probability that the cause of the deterioration in the slab was either poor specification and design or faulty construction and then that the court would be obliged to conclude that the differential was caused by the fault of the local authority and misfeasance rather than nonfeasance and he said that either the faulty construction or poor specification and design or a combination of the two represented an act of misfeasance on the part of the local authority. A number of authorities were referred to as establishing that the accumulation of stones and debris is a nuisance for examples in *Clements v. Tyrone County Council* [2005] 2 I.R. 415, *Butterly v. Mayor of Drogheda* [2007] 2 I.R. 134 and *Siobhan Martin v. Louth County Council* [2011] 2 I.R. 114. *Hilary and Easter Terms* 1998 p. 99 McMahon and Binchy 4 Ed. paras. 19.74).

33. It is argued in these submissions that the incident was caused by the work carried out by the council i.e. in the construction of a ditched gully and tarmac which sloped and was unsafe design in circumstances where it was clearly foreseeable that because of the depression in the tarmac caused by its construction, stones from the laneway would accumulate which caused a nuisance and danger to persons using the laneway.

34. It was argued that it was foreseeable incident that traffic would use the laneway and it that it was not solely for pedestrian access. It is argued further that if tarmac had been laid properly with underlying support of sufficient strength it would not have rotted and it is further argued that rotting in the tarmac would cause an accumulation of stones thereby constituting a nuisance and danger to persons using the laneway.

#### **Legal Submissions on Behalf of the Defendant**

35. The defendant submits that the front of the laneway had been resurfaced in tarmac but the balance of it remained as originally constructed in the 1930s. It is submitted that there was wear and tear on the laneway, as evidenced by the potholes. There was evidence that some of the potholes had been the subject of repair work. This repair was done by placing stones in the holes. The local authority was convinced that it had not done such repairs and that the manner of filling these holes was not their method of work. The plaintiff claimed that by reason of an accumulation of stones present as she entered the archway in the region of a drain comprised in the tarmac surface of the laneway. It is common case that the source of the stones was the original laneway. The plaintiff's engineer had indicated that the tarmac surface comprised rotting which resulted in a greater concentration of the pebbles in certain areas.

36. The defence of nonfeasance and negligence/contributory negligence on the part of the plaintiff was pleaded. The defence set out the distinction between nonfeasance and misfeasance as summarised by Costello J. (as he then was) in the *State (Sheehan) v. Government of Ireland* [1987] I.R. 550, 554 as follows:

"There are at present exist in the law relating to the liability of road authorities for defects and public roads and footpaths a distinction between misfeasance and nonfeasance. If an authority commits a positive act of negligence in the construction of a footpath or in its maintenance that is an act of misfeasance it is liable to a person injured thereby. But if it merely fails to maintain a footpath so that it falls into disrepair that it is guilty merely of (nonfeasance) it is not liable to someone injured due to its lack of repair. The prosecutor's advisors were aware of this distinction in the law, a distinction which means that Mr. Sheehan's claim would fail if the only wrongful act to be established against the corporation was a failure to repair".

37. Reference is made to the decision of Lavery J. in *Kelly v. Mayo County Council* [1965] I.R. 315: "as such [highway] authority they are liable in damages for injuries suffered by a road user if they have been negligent in doing repairs or interfering with the road. They are not liable for injuries suffered or caused by the want of repair of a road. This is a familiar distinction – they are liable for misfeasance but not for nonfeasance. The *Kelly* case involved a fourteen-year-old boy who was injured when he was thrown by reason of a pothole in the road surface, from his bicycle. The claim was dismissed.

38. In *Hampson v. Tipperary County Council* [2018] IEHC 448 the plaintiff came to harm it is submitted on a pavement which was thirty years in antiquity and a hole developed between two concrete kerbs where there was a drainage pipe situate beneath the kerb arrangement. The court was not satisfied that there was any deficiency in the original construction and dismissed the plaintiff's claim on the grounds of nonfeasance.

39. Hogan J. in *McCabe and South Dublin County Council* [2014] IEHC 529 he said the council could only have been liable if there had been evidence that it repaired the particular opening in question and that it had done so in a negligent fashion and were there had been in those circumstances there would have been an act of actionable misfeasance. But there was in fact no evidence to this effect and he therefore affirmed the decision of the Circuit Court and dismissed the plaintiff's action.

#### **Application of the nonfeasance rule**

40. In relation to this case it is submitted that the laneway was over seventy years in antiquity by the time the incident occurred, the subject matter of these proceedings. It is submitted that there was no suggestion of negligence in the laneway as constructed day 1 nor was there any evidence that the local authority had been involved in any works of repair on the laneway. It is submitted that the local authority is entitled to abate a nuisance created by a third party but is under no legal obligation to do so.

41. It is submitted in this case that the stones on which the plaintiff came to harm were identified as either the breakup of the laneway or infill material used in the repair of potholes by third parties and that no liability in law can attach to the defendant on either basis.

42. The suggestion of rotting on the resurface tarmac area is in the respectful submission of the defendant an irrelevance. A cause or approximate cause of the incident as identified by the plaintiff was the stones or accumulation of stones at the locus and the tarmac surface was not the source of those materials. The defendant's claim that this is a nonfeasance issue and that therefore

no liability can attach to the defendant.

43. Reference is made to *Glencar Exploration Company Limited v. Mayo County Council* [2002] 1 I.R. 84 when the Chief Justice indicated that it is necessary in reaching a decision for the court to look at the existence and scope of the alleged duty to consider whether it is just and reasonable that a common law duty of care as alleged should in all the circumstances exist.

44. It was further submitted that the plaintiff herself has a duty and an obligation to take care for her own safety both at common law and pursuant to statute and that s. 671 of the Roads Act of 1993 provides for this.

45. It was submitted that the plaintiff could have removed these stones herself that she was using the laneway on a daily basis and that there was no one more familiar than herself with this laneway and that she was one of seven householders for whom this laneway existed.

46. It was submitted that the extent of the duty claimed is that the local authority should exercise a greater degree of vigilance or have a greater degree of foresight than the plaintiff in respect of the alleged hazard. She did not see it as hazardous, did not see any need to take a simple step to remove the accumulation did not think that the cycling of her bike was contraindicated but effectively claims that the council should have and effectively suggests therefore that the council ought to exercise greater care for her than she did for herself.

47. It was further submitted therefore that the incident occurred by reason of her own negligence and breach of duty which breach was of such significance as to preclude any liability on the part of the defendant.

#### **Findings of Fact**

48. It is clear that the design of construction of the lane caused a nuisance and that the negligent reinstatement which was never completed fully caused this accident. The plaintiff, her husband and engineer gave credible evidence. Mr. Ryan's evidence was not contradicted. The defence engineer did not answer the points made by the plaintiff's engineer and the court finds that the stones and the debris on the surface of the lane was a nuisance and a danger to the public and to the plaintiff.

49. The court finds that the gully scoping on the surface and dishing effect were factors which led to this accident.

50. It was reasonably foreseeable that if the gully and tarmacadam surface were constructed in such a way as to lead to a slope with dishing that the resulting accumulation would cause a trap for the public and for the plaintiff. This court awards €65,000 in general damages plus €1,680 in special damages giving a total of €66,080.