[2019] IEHC 617

THE HIGH COURT

[2016/1115 P.]

BETWEEN

HELEN STEPHENSON

PLAINTIFF

AND

SLIGO COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Robert Haughton S.C. delivered on the 8th day of August, 2019

1. The plaintiff is a married woman who resides at Celbridge, Co. Kildare and this claim for personal injuries, loss and damage arises out of an accident on the morning of 2 March, 2014 when the plaintiff was caused to slip and fall on the access road to Aughris Pier, Co. Sligo, as a result of which she sustained a scalp injury and a displaced fracture of the left distal radius.

2. The claim as originally pleaded asserted "negligence, nuisance and breach of duty, including statutory duty" on the part of the defendant its servants or agents in:-

> "a. Failing to maintain the access slipway.
>
> b. Failing to clear the slipway of hazardous material.
>
> c. Failing to clear a foreseeable slip hazard.
>
> d. The management of the slipway in all the circumstances.
>
> e. The maintenance and repair of the slipway, on all the circumstances.
>
> f. Acting in reckless disregard for the Plaintiff's safety,
>
> g. Acting in such a manner as to cause injury to the Plaintiff,
>
> h. Acting in such a manner that caused a public nuisance resulting in [injury] to the Plaintiff,
>
> i. Failing to notify the Plaintiff of the approaching danger,
>
> j. Failing to notify the Plaintiff of the defect in the slipway,
>
> k. Acting in breach of s.4(4) of the Occupier's Liability Act 1995.
>
> l. The Plaintiff will rely on the doctrine of *res ipsa loquitor*."

3. It became apparent at opening and in the course of the plaintiff's evidence that she slipped and fell not on Aughris Pier as such, but rather on a steep access lane running from the tarred public road down to the pier.

4. During the hearing the court acceded to an application to amend the Personal Injury Summons to include the following particular of negligence:-

"Failing to install any adequate draining in order to prevent a slipping hazard being created."

5. The purpose of this amendment was to permit the plaintiff to adduce evidence and argue that the accident was caused by misfeasance on the part of the defendant as a roads authority.

6. The court heard evidence at Sligo High Court on 2 and 3 May 2019, and further engineering evidence at the High Court sitting in Dublin on 29 May, 2019. Thereafter the parties lodged written legal submissions, and the court heard legal argument on 30 July, 2019.

Findings of Fact

7. The plaintiff was born on 14 October 1960, and works as an administrator in fashion retail. She and her husband Ron Stephenson were on a short visit to Sligo for the weekend and had arrived the previous day. They were staying in the Beach Bar, a B&B run by Mr. Darren McDermott situated not far from Aughris Pier. After breakfast the plaintiff and her husband went for a walk and headed for Aughris Pier. It took them ten or fifteen minutes to reach the access road to the pier.

8. At this point it is necessary to recount the largely uncontested evidence describing the access lane and pier, which also featured on the many photographs produced by each side's engineers. Both lane and pier are shown on an historic 25" OSI map (1888 – 1913). It was not disputed that the pier, slipway and access route were constructed in the Victorian era, sometime post 1829, and probably built by the Grand Jury of Sligo and funded pursuant to ss. 67 and 68 of the Grand Jury (Ireland) Act 1856.

9. The lane is the only means by which pedestrians or vehicles can access Aughris Pier from the land. It is approximately 59 metres from the asphalt approach road to the concrete surface of the pier/slipway. It is a steep lane – such that there are warning signs erected on the approach – an image with a car being driven over a pier, with "cautious dangerous pier ahead". The lane is straight, and for the most part it is about 5 metres wide. Approaching from the top, the first section from the asphalt road consists of 3.2 metres of roughened concrete, followed by a 23.7 metre long section of cobbled stones with a downhill gradient of 15.2%. These cobblestones were probably part of the original access lane surface installed at the time the pier was built. Beyond these there is a 32 metre section consisting of a combination of weathered concrete, gravel and rock outcrops with downhill gradients of 13.9% - 15.4%. The sides of the access lane become increasingly precipitous the further one walks. As you descend, on the left side there is a stone wall, extending about 16.25 metres adjacent to the cobblestone. Where this ends there is a steep grass bank on the left, the

lower parts of which have natural vegetation that encroach onto the laneway surface. This gives way to a rock face at some 36 metres down the access road. The rock face commences at a height of some 2 metres, and is topped by grass, but at 38 metres down is fully exposed from the top to ground level, and this exposed rock face, which is near vertical, runs on below the lane and backs onto the concrete apron forming the harbour. The precise condition of the access route below the cobbled area as far as the pier in critical areas was a matter of some controversy, the evidence on which is considered later in this judgment. Where the lane reaches the pier it opens out onto a concrete apron access ramp some 10.7 metres wide, which leads onto a concrete slipway, both of which are cast in panels with a tamped surface finish. The pier wall extends on the left or western side, sheltering the slipway.

The Plaintiff's Evidence

10. I found the plaintiff to be a truthful witness, but she had poor recollection as to precisely where the accident happened. She was wearing a heeled walking shoe/boot. She described how her husband went ahead of her down the access ramp and – "[…] I followed him down and as I went down, I think it was like midway, I started to lose my footing and I put my hand out to the wall to try and save myself and then I went down and I smashed my head and after that then it was just […] Ron came up to me and he picked me up from the ground because I was still in shock and he helped me back […]".

11. She further described how she "felt myself starting to slip and I thought I could save myself by putting my hand on the wall." [Day 1, p. 19.] When asked did she recall what caused her to fall she stated "just that it was slippy". She confirmed that there was no one on the access ramp other than herself and her husband. She sustained a laceration to the back part of her head which later required seven staples, and she suffered a displaced fracture of her left wrist.

12. In response to the Court asking her to demonstrate how she fell, she did so, saying:-

> "[W]ell when I was walking down and I felt it slippy, I put my hand out and then I went down […] my left hand […] I was grabbing for the wall [on my left] […] I don't know if I touched it, I just went down and slapped my head and my leg went from under me."

Under cross-examination she clarified that her reference to the "wall" on her left was the "rock embankment". She said:-

> "I put my hand out to the rock. I didn't catch the rock and I slipped…I just know there was rock when I tried to save myself from falling." [Day 1 p. 33.]

13. She said she was midway down the access ramp when she fell. However midway down would have been adjacent to the grass bank. In response to the court she said [Day 1 p. 35]:-

> "I know I definitely reached out to hit a rock to save myself. So it was along, it must have been, it could have been the beginning of it and judge but I know I went, I did try, I hit off – my hand tried to reach the rock and I didn't catch it and I went down.
>
> Q. [Mr. Justice Haughton]: So you recall there being a rock on the left-hand side?
>
> A. Definitely, yes, Judge.
>
> Q. And do you recall what kind of surface you fell on?
>
> A. It was wet.
>
> Q. Yes but were you conscious of there being cobbles or a different surface?
>
> A. To be honest, Judge it was a walkway. I am not sure."

14. Further cross-examined by Mr. Bland S.C. on behalf of the defendant, the plaintiff confirmed that the surface was wet and that it had rained, and she agreed that the accident location that she indicated was "approximately 50 metres down the descent". I find this to be consistent with an "X" that the plaintiff marked in court on image no. 11 (of photographs taken by Mr. Duggan, the defendant's engineer) under cross-examination. The plaintiff also agreed that the "X" that she had marked on the photograph was roughly a couple of feet out from the rock embankment.

15. Where the plaintiff marked the "X" was clearly below the cobbled stone surface, and some way down the rock embankment, and about two feet out from the base of the embankment – which, at this point, is steep but not quite vertical.

16. The plaintiff accepted under cross-examination the general proposition that "when you go downhill on a wet surface there is a risk of slipping" [Day 1, p. 37]. She stated that when she fell her husband was actually down on the flat concrete surface that marks the beginning of the concrete apron leading to the slipway – evidence with which he later concurred. Further in response to the court the plaintiff stated:-

> "We were just going down to have a look at the pier. So I just took my time going down.
>
> Q. But…did you go slowly and he go on ahead?
>
> A. I just took my time. I wasn't thinking, I just took my time and I was walking.
>
> Q. Had you any fear of slipping?
>
> A. No [I] just took my time because it was wet.
>
> […]
>
> Q. Well did it go through your mind that you might slip?
>
> A. No, well I mean I didn't think I would slip but I just took my time. I was being careful." [Day 1, p. 39.]

The plaintiff went on to state that she "would have been in close to the wall going down […]". She continued:-

> "Well I was walking along that part but I know that when I went to fall I barely touched the rock. So I was obviously in close enough to be able to reach the rock to try and save myself. I remember that bit. I hit the rock and then I went down. I didn't grab it because I slipped that quickly." [Day 1 p. 41.]

Further in response to the court [Day 1 p. 41.] the plaintiff agreed that she had walked over a smooth section and that her foot "just went from under me. My left foot slipped […] it was on – it was concrete, it wasn't grass." As to the manner of her walking in response to the court [Day 1 p 42.] she said she had been taking her time, and her strides were normal "just a normal walk". Asked could she feel any grit under your feet at any stage she responded:-

> "No, just it got very sort of slippy. Well I mean that's when I went down. So it got slippy and I just went down. It was very quickly."

The plaintiff did not notice any slippiness before she fell – "I just went down from nowhere - and she said she was looking straight ahead at the time. She thought her husband was roughly 15 – 20 yards from her when she fell.

Mr. Darren McDermott's Evidence
17. The plaintiff called a Mr. Darren McDermott who runs the Beach Bar B&B with his wife. He had been up and down the access lane to the pier many times since he was a child and he would have walked there or gone on a bicycle. His evidence was that in the summertime in July up to 100 children go to the pier for a safety swimming course. He had seen slime below the rock face but he located this on the concrete section below the access lane i.e. on the entrance to the pier and on the slipway. As this was not where the plaintiff fell his evidence, including his evidence that as a boy he had slipped in the general area of the pier, did not assist the court.

Mr. Ron Stephenson's Evidence
18. Mr. Ron Stephenson gave evidence on Day 2, and I found him to be a truthful and accurate witness. He described what happened when they reached the access ramp leading to the pier:-

> "I went down, Helen followed. I was just at the base. Helen is always very slow on going down hills or anything like that. She came down by the cliff face for a bit of support. As I was waiting for her I could see then that she was a bit unsteady on her feet and out of nowhere then that was it, she just slipped, her legs went". [Day 2, p. 22.]

19. I am satisfied from his evidence that he witnessed the fall, and that at the time he was standing at the base of the access lane where it interfaces with the concrete apron that leads on to the slipway. He was looking back up at his wife and waiting for her. He stated that when she fell "she would have been about fourteen foot approximately from him." He described how he saw that "she was starting to get a bit unstable on her feet and then it just happened, that was it, she slipped" and that "she went backwards and put her hands out to save herself", and her head hit the ground. Mr. Stephenson got over to her as quickly as he could and helped her up, and with his arm around her shoulders helped her back to the Beach Bar. He described her as being in a great deal of shock, and that she was bleeding heavily down the back of her neck. He also observed the deformity in her wrist.

20. Under cross-examination Mr. Stephenson agreed that it was a wet morning and that the ground was wet underneath, and that he walked down the middle of the access lane. Under questioning from the court Mr. Stephenson disagreed with the "X" marked by his wife on image no. 11 as being the point at which she slipped. His evidence was that she was "a lot nearer to me", and he felt she got it wrong because five years had elapsed since the accident. He saw her touch the rock face two or three times on her way down the access lane. As to her manner of walk he said – "[…] she was taking short strides. She is always extra careful [about] anything like that. That's why I'd always be ahead of her no matter where we go for a walk. When we'd reach where we're going I'd be ahead of her." [Day 2 p. 32.] The court then asked:-

> "Q. […] Did you look at the ground where she fell?
>
> A. Me, no.
>
> Q. Did you ask her why she fell or what caused her to fall?
>
> A. Well I didn't ask her but she just slipped and I went over to get her up."

21. I conclude from this evidence that the plaintiff simultaneously became unsteady on her feet and slipped falling heavily to the ground and that this occurred about two feet out from the rock face, some fourteen feet up from the bottom of the access lane (where it interfaces with the flat apron leading on to the slipway). I also accept that neither the plaintiff nor her husband inspected the surface on which she slipped and fell, and neither could give any helpful evidence as to what caused her to fall.

22. As to confusion over where the plaintiff fell, I have come to the conclusion that this occurred because the plaintiff was inaccurate in pointing out the precise locus to her solicitor Ms. Orlaith Traynor in the first instance. Ms. Traynor in turn pointed out the wrong point to the defendant's Executive Engineer Ms. Rosie Friel at an inspection on 14 October, 2014, at which the plaintiff was not present, and Ms. Friel unwittingly photographed the wrong spot. The same error misled Mr. Sean Walsh engineer who investigated on behalf of the plaintiff on 4 May, 2015, Mr. Duggan, who investigated on behalf of the defendant on 8 September, 2016, and Mr. Fergus O'Kelly the marine engineer who inspected on the plaintiff's behalf on 8 November, 2018. To add to this confusion, the photographs included by Mr. O'Kelly and Mr. Walsh (in his first report) focus almost entirely on the slipway and the pier, and perceived slip hazards caused by green seaweed and marine flora mainly below the high water line. Receipt of Mr. O'Kelly's report prompted the defendant's solicitors Messrs Hegarty and Armstrong to write to the plaintiff's solicitors on 19 February, 2019, enclosing photographs of the access route taken by Ms. Friel on 14 October, 2014, and requesting that the plaintiff identify on one of these photographs or a plan precisely where on the route she claimed to have slipped and fallen. Unfortunately, the response seems to have repeated the same error, which was only really corrected when Mr. Stephenson's evidence was heard. This has implications for my consideration of the engineering evidence.

The Engineering Evidence
23. Mr. O'Kelly the marine engineer was called after the plaintiff, and before Mr. Stephenson gave evidence. He examined the access road pier and took photographs on 8 November, 2018. Insofar as his report and evidence deal with the tidal zone around the slippery pier his evidence did not assist me. In particular, his reference to the growth of marine flora on surfaces exposed to the marine environment, and the appropriate regular removal of marine growth from inter-tidal surfaces in harbour areas historically by the use of quicklime, and more recently by using safer E.U. approved chemicals, is not relevant, although I do accept that the defendant did in fact use chemicals to clear this pier periodically. This is because I am satisfied that the plaintiff fell above the tidal zone in an area

where it would not be reasonable to expect a local authority to apply chemicals to remove marine growth.

24. Mr. O'Kelly also gave evidence in relation to the access lane. He was challenged on his competency to deal with this, given his stated expertise as a consultant marine engineer. I am satisfied that his qualification as a chartered engineer and his extensive experience in civil and mechanical engineering entitled him to give expert evidence on the access road surface. His evidence focused on the fact that the surface water run-off from the earth and banks either side of the access road was not being channelled away from the road surface. He pointed out where the effect of surface water is evident on the rock face and opined that this has led to algal growth which is quite extensive, and "first becomes evident in the roadway as a biofilm, basically algal growing in the roadway in a thin form […] that is as a result of fairly continuous water flowing to allow the material to grow." He identified this by reference to photographs showing a smooth section of the access road adjacent to the rock face (his photographs nos. 3 and 4, Ref: 8506 and 8501 respectively), which portray a dark section of a road surface with the description "surface water run-off and bio-film on road" and "surface water run-off with algal growth on road way". He confirmed as per his report:-

> "On inspection, the algal growth is visible (dark green) on the west side of the access road and could be seen to extend out from the rock face and down the access road at various points. This bio-film was tested carefully, while wearing safety boots. The surface was found to be extremely slippery similar to walking on ice. After closer inspection it became apparent that there is a translucent bio-film on parts of the west side of the access road and down to the slipway. Again this bio-film was tested carefully, while wearing safety boots. This surface was found to be extremely slippy, similar to walking on ice. Where the translucent bio-film was present, the surface had the appearance of simply being wet."

25. He said this "translucent bio-film" was not evident to the naked eye. He said it would start as algal growth and that the dark green was chlorophyll and as it grows it develops its colour. He confirmed that there is no evidence of maintenance being carried out by the defendant on the access road down to the slipway. He agreed that there was evidence that chemicals were being used to clean the tidal area but no evidence of any chemical cleaning of the access road.

26. Under cross-examination Mr. O'Kelly confirmed that the plaintiff was present on 8 November, 2018 when he asked her to point out where she fell, and she indicated the general area adjacent to the rock face, which Mr. O'Kelly marked on his photograph no. 1 ref. 8518 as being an area ranging over 20 metres running from the base of the access route up alongside the bottom edge of the rock face. It would seem that she was unable to be more specific. Cross-examined closely as to precisely where Mr. O'Kelly's photographs no. 3 and 4 were taken, it emerged that no. 3 was taken further up the access road from the 20 metre section identified by the plaintiff, and only photograph no. 4 came within that area – but precisely where within that area could not be said. Mr. O'Kelly acknowledged that photograph no. 4 could have been taken "anywhere within the 20 metres".

27. On this evidence photographs nos. 2 and 3 taken by Mr. O'Kelly in the plaintiff's presence on 8F November, 2018 were certainly taken higher up the access lane from the point at which I have held the plaintiff slipped and fell. As to photograph no. 4 the plaintiff is unable to satisfy me as a matter of probability that this portrays that part of the access road on which she slipped and fell. Mr. O'Kelly's more detailed evidence specific as to the surface in the areas portrayed in these photographs therefore does not assist.

28. Mr. O'Kelly gave evidence that, having found there to be a slippy surface on the slipway, he went back over the areas where he had found translucent bio-film, and he found that the slippery areas extended beyond the areas with visible dark green bio-film. Mr. O'Kelly was cross-examined on the basis that his inspection and report occurred four and half years' post-accident. Mr. O'Kelly agreed that no algal growth was visible on the surface in Mr. Duggan's images nos. 14 and 15 taken on 8 September, 2016 in the area beside the rock face where he had been led to believe the plaintiff slipped (using the photo supplied by Ms. Friel with an "X"). He agreed that if there was algal growth at the date of the accident on 2 March, 2014, it was not possible for it to have been present then, to have disappeared in 2016, and to have reappeared in 2018.

29. I believe little weight can be attached to Mr. O'Kelly's evidence of slippery biofilm, in that it was specific to an area which was considerably higher up the rock embankment than where the plaintiff actually slipped and fell. Secondly, Mr. O'Kelly does not point to specific areas of slippery translucent bio-film across the whole of the 20 metre area inspected by him on 8 November, 2018. Even if he had observed slippery areas at that time, I find that they would not necessarily have been present four and half years earlier, even if it is accepted, as it was his evidence, that such slippery bio-film develops slowly over a period of time. As to the suggestion that the defendant should spray chemicals, such as those used for removing seaweed off piers, on this access roadway, Mr. O'Kelly agreed that he had never heard of it being done by a local road authority on roads giving pier access. Mr. O'Kelly agreed with the court that it might not be a very practical solution, but he identified it as something that could be undertaken when the seaweed removal was taking place at the pier.

30. Mr. O'Kelly also agreed that there were mud/silt deposits at the side of the access lane resulting from surface water run-off down the bank and access ramp. He adopted an observation in Mr. Duggan's report that:-

> "It is possible that the accident locus was contaminated with mud silt deposits from surface water run-off and this would obviously provide a slippery surface irrespective of the slip resistance of the ramp surface."

31. Towards the end of his evidence he suggested two possible engineering solutions; the first, a sunken standard stainless steel drainage channel (an "ACO" channel) installed along the western side of the access lane; and the second a retaining wall at the top of the bank which would prevent water getting on to the access lane. Mr. O'Kelly did not consider that it would be difficult to build such a drain that would be flush with the road surface and continue across the slipway apron, although he could not comment on cost. Under cross-examination on this issue it was put to him that such a drain would not work on a slope of this steepness, and he agreed that such drains are "mostly designed for flat surfaces". Mr. O'Kelly did not agree that such a drain with a steel cover would in itself constitute a slip risk, but he agreed that it would "clog up with leaves, twigs etc." Mr. O'Kelly also agreed that it would not be a straight drain. Mr. O'Kelly had not considered the possibility of an open drain. He also conceded if putting in a drain where there is rock under foot on the access laneway that would have to be drilled out or blasted. He agreed this would add to the cost. Mr. O'Kelly also agreed that this would reduce the width of the access road and, if continued further down the width of the lane would be reduced below "a minimum 5 metres width". He agreed that such a drain would have to swing left along the rock face where the access lane reaches the concrete apron, and that it would then involve digging up the pier to lead the run-off into a conduit pipe to discharge into the sea. A possible cost of €50,000 was put to Mr. O'Kelly. He hadn't costed such a solution but it seemed high to him.

32. I was not satisfied on the evidence of Mr. O'Kelly that either of the engineering solutions which he had suggested had been properly designed or thought through, or that they were feasible from a practical or engineering perspective.

33. The plaintiff also called Mr. Sean Walsh, a Consulting Engineer experienced in accident investigation and in providing evidence to the courts. His initial inspection was on 4 May, 2015. Unfortunately, notwithstanding that he appears to have had a photograph (his

photograph no. 6) which showed on it the plaintiff's mark "#" indicating that she fell close to the rock embankment on the access laneway, his report focuses primarily on slip hazards caused by seaweed or other biological contaminants in the vicinity of the pier and slipway. However, much of his evidence given on 3 May, 2019 [Day 2] focused on possible misfeasance, and led ultimately to the amendment of the pleadings. In order to give both parties a better opportunity to investigate and deal with this, the case was adjourned and the hearing resumed on 29 May, 2019. Mr. Walsh revisited the locus of the accident on 3 May, 2019 and prepared an addendum report. Mr. Duggan on behalf of the defendant likewise reinspected the locus in the context of new allegations of misfeasance, but also in the light of Mr. Stephenson's evidence as to where the plaintiff fell.

34. Over the two days on which he gave evidence Mr. Walsh firstly gave a useful additional descriptive evidence of the access lane and the different surfaces, and the various times at which different works appear to have been carried out. His view, which I accept, was that the cobbled area was the surface originally installed along the entire length of the laneway, and where it remains it is not particularly well maintained but has stood the test of time reasonably well save that the edges have become overgrown with grass/weed. Below the cobbled section he describes the combination of various "concrete surfaces and repairs with some rock outcrop, and a road width varying from 4.6m to 5.4m". This accords with Mr. Duggan's evidence. He describes this section, which includes the section of approximately 20 meters alongside the rock embankment, in his report as follows:-

> "In general the surfaces are defective and severely ravelled. In addition, grass and weed is permanently present at the edges at all times, with evidence of more significant contamination by other materials arising from water flow from adjacent ground on to the access road at other times."

What he describes is clearly visible from his photograph C, looking down the access lane towards the rock embankment, and showing a broken concrete surface with loose gravel and some sections worn through to a darker base material or rock. His photograph D, looking from the concrete apron of the pier back up the access lane, shows the same characteristics. I accept this irrefutable evidence as broadly representative of the condition of the lane at the time of the accident.

It is notable from these photographs that the worst of these surface features exist either above or below the point at which I am satisfied the plaintiff slipped and fell. The area in which she fell certainly has grass growth at the base of the embankment, and some loose material, but it has a smoother and less broken up concrete surface a foot or so further out from the rock base.

It is apparent from Mr. Walsh's photographs and the engineering evidence generally that the concrete slab work in the vicinity of the slipway end around the pier is in much better condition and has a more modern appearance.

Mr. Walsh did not disagree with evidence and opinions of Mr. Duggan on behalf of the defendant, and emerging from his reports, as to the time line of various works. He accepted that the concrete surfacing on the lower part of the access laneway was probably undertaken in the 1960's or 1970's as it was rounded and typical of the aggregates used in concrete at that time. He accepted that the slipway and pier apron were cast in concrete panels laid in or about 1985, and this seems to be supported by a sign on the winch house above the slipway which is somewhat rusted and is headed "The Small Harbour Improvement Scheme". He also accepted Mr. Duggan's evidence that severe storm damage in late 2013/early 2014 resulted in repair works to the pier area for which state funding of €53,250 was approved as part of the Local Authority Development and Marine Leisure Programme. Importantly he accepted that these works did not extend into the access lane.

35. Mr. Walsh was somewhat critical of the manner in which the resurfacing work had been undertaken on the lower part of the access lane (in the 1960's or 1970's), but his evidence did not attempt to relate this to acceptable road repair standards of that time. His view was that concrete had simply been poured with no attempt to finish it at the edges, and that as a consequence grass and other permanent foliage had encroached into that area, in turn causing further "ravelling" of the surface which, on Day 2, he had described as "ravelled and broken in a number of areas". On Day 3 he gave evidence in line with his second report at p. 3 where he states that:-

> "No provision for drainage is provided. The road-way is provided for pedestrian and vehicle use and for both amenity and commercial use. The edges of the carriageway are provided in such a manner that they directly abut the embankments and permanent foliage in the form of grass and weeds now grow out onto the roadway. This presents a slipping hazard in and of itself in wet weather, in light of the steep incline, but also impedes the flow of surface water. This increases the risk of additional hazards arising in the form of organic bloom of the type shown in photograph Q. The current staining of the carriageway along the left hand side, as best seen in photographs F and K, confirmed contamination of this area."

36. Photograph Q it must be said shows the modern concrete surface nearer the slipway, and not the vicinity of the plaintiff's fall. Photographs F and K focus on the concrete surface near the embankment of wall *above* where the plaintiff fell. They do both show a lighter colour overlay on the concrete which he described as a "stain" which could be "scratched off" which demonstrates the presence of organic material which would present a slip hazard in wet weather. Mr. Walsh tied this back to cracks and holes, featured in his photographs, in the rock face that were evidence of egress of water/seepage onto the road surface, which he said would encourage the organic growth. His evidence, in line with his second report, concludes:-

> "This results in a combination of permanent foliage growing on the pavement, and ground water running from the embankments. The absence of any drainage whatever and any cleaning of permanent foliage from the carriageway results in additional organic growth in wet conditions. Notwithstanding substantial works in the general area in recent times no meaningful steps had been taken to eradicate this severe hazard arising from particular circumstances in this location."

37. Mr. Walsh's evidence also focussed on a small section of concrete infill that appears at the bottom of the laneway on the left hand side, linking the older concrete surface to the base of the rock embankment (where there is grass), and also encroaching onto the slipway. This is seen clearly in Mr. Walsh's photograph N taken on inspection on 3 May 2019. Mr. Walsh described this [Day 2 p. 57] as "[…] a repair that contains a small drainage channel at the bottom of the rock face, but that appears to have been I expect an initiative by whatever workman was charged with filling in a hole."

The drainage channel runs parallel to the rock face and is twelve inches wide and one-inch-deep, and is visible for about three feet, although Mr. Walsh felt it may have been a little bit longer – perhaps five feet - when constructed. This feature is some twelve feet or so *below* where the plaintiff fell. Mr. Walsh considered that it was not a big job – merely an infill for a damaged or worn section of pavement.

38. Mr. Walsh's view was that this re-instatement indicated an understanding by the defendant's workman of the particular hazards arising at this locus. This, he suggested, highlighted the importance of the defendant cleaning the sides of the road in light of the particular problems presented by the high embankments, but no such cleaning ever seems to have been undertaken, and the road

remained in "exceptionally poor condition".

39. Mr. Walsh then gave evidence of minutes of a meeting of Sligo County Council held on 2 May, 2014, two months after the plaintiff's accident, where Item 29 recorded a motion to the effect: - "To ask Sligo County Council to improve the width along the road down to Aughris Pier Skreen" to which the response by Mr. T. Kilfeather, Director of Services, is "the roadway down to the pier at Aughris is very narrow adjacent to the pier itself and apart from site cleaning it would be difficult to improve it due to high embankments on each side". Notwithstanding this, it didn't appear that any cleaning had occurred such as to render the area safer. He also noted the minutes of a meeting of the Ballymoate – Tuppercurry Municipal District of 20 June, 2016, Item 7 of which recorded a motion "to call on Sligo County Council to prepare a report on the road to Aughris Pier". It is not clear whether this refers to the approach road, or the access lane down to the pier. At any rate, the report provided by Mr. P. Hughes, Senior Executive Engineer was recorded as follows:-

> "The road from the coast road to Aughris Pier is in a reasonable condition. The road will be maintained with potholes to repairs etc on an ongoing basis".

In fact, in Mr. Walsh's opinion, the access lane continues to present in exceptionally poor condition.

Mr. Bland objected to Mr. Walsh's evidence based on these documents as being based on hearsay. Perhaps more significantly it is *ex post facto*, and for that reason alone I do not take it into account. However I do accept Mr. Walsh's evidence, with which Mr. Duggan did not disagree, that the defendant has not in fact undertaken any cleaning maintenance work on the laneway.

40. Secondly, Mr. Walsh suggested that in addition to cleaning the sides of the laneway a solution would have been to install a simple channel, such as is evident at the base of the access lane, to take away run off. However, he was careful not to suggest that this was work that should have been carried out by the workman at the time they undertook the particular repair at the bottom of the laneway, and he commented that:-

"[…] the person in charge, it seems to me, used his initiative and installed something on the little piece that he was responsible for and presented a reasonable improvement at virtually no extra cost […] to help carry away the leaking from the rock face, and also to provide a clear definition at the edge of the road."

41. Under cross-examination Mr. Walsh was asked why he hadn't attempted to photograph the surface of the specific area where the plaintiff marked as being the locus of the accident. Mr. Walsh's response was [Day 3 p. 38.]:-

> "I went and surveyed the entire area under consideration and found ample evidence of the capacity for organic material in wet conditions and conditions of high water table that is, there is, ample grass on the ground; there is evidence of water coming through the rock that wasn't coming through in May [2019], and brings nutrients etc that we have. There is evidence of this occurring very nearby at a lower level where the water […] table is now present."

42. He added:-

> "Judge, that is my answer. It is my answer based on the fact that you can't take a photograph taken in the distance with an X on it […] walk up to what you may consider to be the mathematical geometric centre of that X, take a picture of that point and then say that you have cracked the case, ignoring all the other evidence around you, the staining on the same concrete; evidence of water coming through the rocks and clear and present organic material very near by issuing from the rocks."

Mr. Walsh did confirm under cross examination that he didn't find present on the date of either of his inspections the organic biofilm/organic bloom on the laneway as described by Mr. O'Kelly as a result of his inspection on 8 November, 2018. He acknowledged that he could find no particular slip hazard from organic material, but repeated that he had seen "extensive staining" which he believed was also visible from Mr. Duggan's images nos. 14, 34, and 35 (also taken on 3 May, 2019). The staining showed up as a thin powdery buff coloured layer which you could scrape away using a coin. Mr. Walsh clarified that this in itself did not present a slip hazard but was evidence of a layer covering the concrete surface towards the edge of the laneway. Mr. Duggan's image no. 34, which purported to be the accident locus as identified by the plaintiff in her evidence, did not, Mr. Walsh accepted, show any evidence of slime or biofilm, but did, he believed, show a dry coating. Mr. Walsh confirmed that the slime that he observed only occurred lower down in the pier area. Mr. Walsh did accept that wet concrete presents very good slip resistance and "wet grass less so and the organic materials we are talking about are particularly slippery". He agreed that weathered concrete with a textured surface provides good slip resistance when dry and wet, if it is maintained properly. By reference to Mr. Duggan's image no. 35 Mr. Walsh said that some 15% of the surface visible there "is contaminated by some kind of material that would be wet – will be slippery when wet. The remainder of the photograph, I can't see any particular hazard in it." It is pertinent to note that this would leave over 80% or this surface free of any potential hazard.

43. Under cross-examination Mr. Walsh also confirmed that he had not, in his *addendum* report, proposed any specific drainage measure but had confined himself to stating that:-

> "The absence of any drainage whatever and any cleaning of permanent foliage from the carriageway results in additional organic growth in wet conditions."

Later he added that "cleaning and drainage go hand in hand" and he was not recommending a Rolls Royce remedy:-

> "I think a simple, basic finishing of the side of the carriageway in the normal and proper way and then normal and proper maintenance of a drain, put in a simple channel, concrete channel and just keep the thing flowing, that would be perfect."

He did not appear to agree with Mr. O'Kelly's suggested "stainless ACO drain down the hill" at Mr. Duggan's estimated cost of €45,000 and had no comment to make as to Mr. Duggan's suggested €35,000 as the cost of an open drain. However, when it was put to Mr. Walsh that it would be prohibitively expensive to put similar drainage on boreens and sea access routes across the country, he said that the comparison of this lane with other boreens or sea access lanes is unreasonable because "the circumstances, or the conditions on this particular very short section of road are extraordinary", as it is the only access to the pier, which is a popular amenity as well as a fishing harbour, and as it runs down an incline with "a source of underground water directly along the road". Mr. Walsh's evidence was also that such a drainage channel would not have to be absolutely straight, and would require "a very small amount of rock excavation if needs be".

44. It was put to Mr. Walsh that what he had observed as buff powdery material on the surface was, as found by Mr. Duggan, simply "silt in between the lumps and bumps of the textured surface of the weathered concrete". Mr. Walsh said he was referring to "dried material", and the discolouration is not found throughout this particular road. It is only found on the side, running alongside the rock. He went on to say [Day 3 p. 89] "[…] I can't say precisely what it [was]. But it wasn't like material like silt when I examined it, the material I examined".

45. Mr. Morgan Duggan of Rowan Engineering Consultants Limited, was the only witness to give evidence on behalf of the defendant. I was satisfied that he was an experienced consulting forensic engineer with a degree in civil engineering and had the necessary experience and expertise gained over many years to give expert evidence.

46. His first report dated from his inspection on 9 August, 2017, and his supplemental report followed re-inspection on 3 May, 2019. His evidence on gradient, which was not disputed, was as follows:-

> "[…] it is a steep access route down to the sea. At the accident location itself there is a 15.2% gradient and that would be typical of what you would expect to find on access routes down to the sea and slipways. The maximum recommended on a slip road would be 17%. So the gradient varied from 13.9 to 15.4, that was taking various measurements from the top of the access road down to the slipway itself Judge."

47. On his first visit Mr. Duggan found the various surfaces provided reasonable slip resistance to his rubber soled boots – this applied to the cobbled section as well as the concrete surfaced area below that. Using a "slip alert" he carried out a slip assessment. On that first inspection the conditions were wet as it had rained earlier and he found that the concreted area contained some silt, and when tested on the silt the surface provided a medium risk of slip. In his first report he stated:-

> "The slip assessment on a rock out crop and an adjacent area with mud/silt deposits indicates that both surfaces provided a medium (bordering on high) risk of slip when wet."

He found no evidence of biofilm or anything of that nature on either of his inspections. On the second occasion he confirmed that the conditions were dry. Mr. Duggan had checked the Met Éireann weather report for the day of the accident and that had indicated that there was 3.6mm of rainfall up to 11.00am on that day (the evidence indicated that the plaintiff fell at or shortly after 10.30am). Mr. Duggan clarified that his first inspection had been at 11.30 in the morning and that, while it had rained while he was driving there, it had stopped by the time he arrived on site. In his first report he does state that: -

> "It is possible that the [accident locus] was contaminated with mud/silt deposits from surface water run – off and this would obviously provide a slippery surface irrespective of the slip resistance of the ramp surface."

48. At his second inspection Mr. Duggan took a photograph – his image no. 30 – some 14 feet uphill from where Mr. Ron Stephenson was standing when the accident occurred. I am satisfied that this is a photograph of the surface area of the access lane identified by Mr. Stephenson as where his wife slipped and fell. Image no. 31 is a closer up view. The lower half of each of these images shows the concrete surface, interspersed with some grass leading up to the base of the rock embankment. Closer to the wall the surface of the concrete is coarser, and further out it looks quite smooth.

49. Mr. Duggan's images nos. 33 and 35 were taken by him on 3 May, 2019 a further 14 metres uphill at the accident location identified by the plaintiff (as marked on the photograph furnished to the defendant's solicitors in 2015). Mr. Duggan did not find any biofilm or algae present at either of these locations. He did observe "deposits of silt, similar to what you would get on the side of a road; silt which is deposited as the water runs downhill […] when you rub your boot on the actual surface it is silt, so it is gritty, Judge".

50. Mr. Duggan did not consider an open concrete drainage channel as an appropriate engineering solution having regard to the steep gradient and the likelihood that deposits of silt would build up and create a slip hazard, and the fact that to construct a channel, which would need to be kept tight to the stone wall, would entail trimming back of the bank which would involve property not in the ownership of the local authority. Mr. Duggan believed that a compulsory purchase order would be required, in the absence of agreement from the adjacent landowner. Mr. Duggan also foresaw problems at the bottom end of such a channel where it encounters the concrete apron of the slipway/pier, which would require digging up the pier and the installation of a drainage pipe to lead run-off across the pier to discharge into the sea. A "catchpit" would be required in advance of the piping. He also rejected a stainless steel ACO drainage pipe solution which he said would be inappropriate on an access with over 15% gradient, and which he opined would in itself create a slipping hazard. He estimated that putting in open concrete channels for the full length of the access route on both sides would cost in the order of €35,000, and that the cost of linking it for discharge directly into the sea would be additional to this. He did not consider such works to be practicable, feasible or justifiable in terms of expense.

51. Mr. Duggan emphasised in his evidence that he found no evidence of a slippery substance above the slipway apron anywhere on the concreted area. He found grass growth and silt but nothing of the nature described by Mr. O'Kelly in his evidence. This is true both of Mr. Duggan's first inspection in 2016 and his second inspection in 2019.

52. In the context of whether or not the plaintiff was showing reasonable care for her own safety, Mr. Duggan stated [Day 3 p. 120.]:-

> "[…] I would expect pedestrians to show extra care when walking down a steeply sloping hill in wet weather conditions […] I would expect a pedestrian to look down towards the walking surface, Judge, to make ensure they have a safe footing."

53. Under cross-examination Mr. Duggan agreed that Aughris Pier is a public amenity, but he considered the primary purpose was for launching boats. However, he accepted that it was used occasionally for swimming and that an Irish Water Safety course runs here during the summer. He accepted that the only access by foot was down the access lane. Mr. Duggan agreed that in his first report he states:-

> "It is possible that the access ramp was contaminated with mud/silt deposits as a result of surface water run-off down the bank and ramp and this would obviously provide a slippery surface irrespective of the slip resistance of the ramp surface."

He didn't depart from this, and confirmed [Day 3 p. 125]:-

> "That was my observation that mud and silt that travelled down and deposited with the surface water would provide less slip resistance than a dry concrete surface."

I cannot accept as correct the suggestion that Aughris Pier exists primarily for the launch of boats, or that it is in some way the preserve of fishermen. In present times it is clearly used both for amenity purposes such as swimming and promenading, as well as for launching or taking out boats, or indeed tying up boats. Such boating activity could be for recreational purposes or for commercial fishing. Moreover the defendant must have been aware of this mixed use.

54. When Mr. O'Kelly's evidence and photographs (from his inspection on 8 November, 2018) in relation to slippery "translucent biofilm" were put to Mr. Duggan, he indicated that he had some difficulty with this in that:-

> "It would take a number of years for biofilm to build up. There was no biofilm evident during my initial inspection in 2015 or my subsequent inspection in 2019, and this inspection took place in 2018 and I think Mr. Walsh had an inspection in 2016. Such a biofilm wasn't evident at the accident location during four engineering inspections. […] I can't comment on his photographs. If this is a translucent layer that is on photograph 3 […] all that I can see evident from photograph 3 is that it is a darker section of the concrete […] which could simply be surface water or run-off, as evidenced during my inspection."

He accepted that there had, to his knowledge, been no maintenance of the access route and such had been the case for over 100 years. He agreed that it had been "raining steadily" on the morning of the accident.

55. As to the small area of concrete repair with a shallow drainage and channel at the bottom of the access lane, he characterised this as "a localised repair on foot of some occurrence whether it was damaged through a storm or vehicular wheels had rutted". He repeated his view that if such a channel were to be extended up along the access route it would be necessary to excavate and rock-break along the face of the embankment and along the surface itself, and to do a similar job on the other side of the laneway.

56. In response to the court Mr. Duggan confirmed that the repaired section with the shallow drain clearly pre-dates the extensive concrete apron resurfacing work carried out on the pier/slipway in or about 1985. Like Mr. Walsh he did not consider that the small repair extended beyond 5 feet or 1.5/1.6 metres, or that it extended any further downhill.

The Cause of the Plaintiff's Slip and Fall

57. I find that the plaintiff did indeed slip and fall on the surface of the access lane at a point some fourteen feet before she reached the concrete apron at the top of the pier/slipway, and where she was just within touching distance of the rock embankment. The unsteadiness that her husband observed was, I believe simultaneous, with the slip.

58. I am not satisfied on the balance of probability that she slipped on a translucent biofilm or other organic substance. In particular, I am not satisfied that Mr. O'Kelly at his inspection on 8 November, 2018 has located any such substance on the road surface in the area that she actually fell, and even if he had done it would be improbable that this existed on 2 March, 2014 given that neither Mr. Walsh nor Mr. Duggan identified anything of a similar nature during their inspections in the intervening period and at their further inspections on 3 May, 2019. I am also not satisfied that what Mr. Walsh observed as a buff coloured dust was anything more than light silt deposited by water run-off, and that it could not be characterised as a particular slip hazard.

59. In my view only Mr. Duggan at his second inspection has taken photographs of the surface in the vicinity of the access lane where Mr. Stephenson saw the plaintiff actually slip and fall. His photographs images nos. 30, 31 and 32 feature this area. I am satisfied that it consists of a concrete surface which, closer to the rock embankment, has a coarse textured finished, and a little further out is quite smooth. It is photographed on a dry day and while there may be a film of dust on it in my view this could not be said to represent a slip hazard, even in wet conditions.

60. I accept as correct Mr. Duggan's opinion that this concrete surface finish had no biofilm or algal growth and showed good slip resistance in dry conditions. I also find that where the access lane is contaminated with mud or silt deposits from surface water run-off, this would provide a slippery surface, irrespective of the slip resistance of the concrete surface, in wet conditions. However, critical in this regard is that the plaintiff and her husband in their evidence did not identify any contamination, whether from mud, silt deposits, grass, algal growth or otherwise, as the cause of her slipping, or as being present where she fell, or afterwards on her clothing.

61. Accordingly, although I accept Mr. Walsh's evidence in particular that the general condition of the laneway access is very poor in the vicinity of the rock face, I cannot draw an inference that she slipped on mud or silt deposits or some other contaminant on the concrete surface. Her slipping could equally be consistent with the simple presence of rain/surface water on the concrete surface which has of course a steep downhill gradient in the order of 14% - 15%. While the defence asked the court to infer that she was not taking reasonable care for her own safety, I do not believe that such criticism is justified. In particular no criticism can be made of her footwear, or of the careful slow pace with which she was descending – clearly slower than her husband. Nor can she be criticised for looking straight ahead at the moment that she slipped, rather than watching where she was putting her feet at all times. In making these findings it is of particular significance that it is a steep access route, and it was a wet morning.

62. This raises an immediate difficulty for the plaintiff in maintaining this action, as she has not satisfied me that she slipped on any identifiable danger or slip hazard on the access lane. Her account, as corroborated by her husband, is equally consistent with slipping on a smooth part of the concrete surface in rainy conditions on a steep incline. Nevertheless I will go on the consider the legal issues that arise, particularly in the context of the claim of misfeasance.

Legal issues

63. Based on these findings, the pleaded claim and the party's legal submissions, the following legal issues may be said to arise:-

> (a) Whether the plaintiff can maintain a claim under the Occupier's Liability Act 1995 as against the defendant as a road authority; and
>
> (b) Whether the defendant is entitled to rely on the defence of nonfeasance.

Application of Occupier's Liability Act 1995 to a Road Authority

64. The plaintiff's claim is pleaded as an action in negligence and nuisance, and in breach of s.4(4) of the Occupier's Liability Act 1995

("the 1995 Act"). Section 4(1) sets out the duty owed to "recreational users", which is: –

> "(a) Not to injure the person or damage the property of the person intentionally, and
>
> (b) not to act with reckless disregard for the person or the property of the person […]"

65. It was never suggested that there was intention to injure, but Mr. Christle S.C. did rely on "reckless disregard". Section 4(4) provides:-

> "Notwithstanding *Subsection* (1), where a structure on premises is or has been provided for use primarily by recreational users, the occupier shall owe a duty towards such users in respect of such a structure to take reasonable care to maintain the structure in a safe condition:
>
> Provided that, where a stile, gate, footbridge, or other similar structure on premises is or has been provided not for use primarily by recreational users, the occupier's duty towards a recreational user thereof in respect of such a structure shall not be extended by virtue of the subsection."

For the purpose of this section, I have no doubt but that the plaintiff and her husband are properly characterised as "recreational users" and fully entitled to be using the access lane for their walk to Aughris Pier.

66. Interestingly in written and legal submissions Mr. Christle raised another argument, namely that the defendant was in breach of the "common duty of care" arising under s. 3 of the 1995 Act, which is owed towards an entrant as of right. This duty is:-

> "[…] to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety […].) to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon."

For the purposes of this argument Mr. Christle submitted that the access road to the pier was being used by the plaintiff at the time not for the purposes of engaging in recreational activity, but rather for the sole purpose of accessing the pier – and he maintained that only when she reached the pier would she have been a "recreational user".

67. This latter argument is unduly narrow and is not reflective of the facts.

Quite clearly the plaintiff and her husband were holiday/weekend visitors to this area and went on a recreational walk; the walk from the Beach Bar B&B to the pier was just as much part of that recreation as the intended act of walking on the pier itself.

68. Although there was no direct evidence as to the ownership of the land on which the access road exists, all of the evidence pointed to it being part of the public roadway. It appears to have been constructed, along with the pier by the Grand Jury. It facilitated public access from the roadway proper down to the pier, and there is no suggestion that such access was ever closed off or limited in any other way. Further, the uncontested evidence was that resurfacing work on the access road was undertaken by the local authority in the 1960's or 1970's, that at some point prior to 1985 some further patching work was done - involving the shallow drain at the base of the access route - and that pier improvement works were carried out in or about 1985 and further works in or about 2016 to repair storm damage.

69. There was no evidence that the access road had ever formally been taken in charge by the defendant. However, s. 2 of the Roads Act 1993 defines "public road" to mean "a road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority". "Road" is widely defined to include "any […] lane […] or passage […] or footway". It was not disputed that the access lane is and was at all material times a public right of way, and the evidence showed that it was under the maintenance and control of the defendant. It therefore comes within the definition of "public road".

70. I am satisfied that the fact that the defendant undertook surfacing of the access lane in the 1960's and 1970's further demonstrates that it accepted it was a public right of way in respect of which Sligo County Council had a maintenance function.

71. It must follow that the plaintiff's claim is against the defendant *qua* road authority. Such a claim engages the common law liability of the road authority for misfeasance and negligence and public nuisance, which I accept has survived the Occupier's Liability Act, 1995 which placed the former law of occupier's liability to entrants on a statutory footing. In particular I accept Mr. Bland's submission that the 1995 Act contains no express repeal of s. 60 of the Civil Liability Act 1960. Section 60(1) provides that:-

> "(1) A road authority shall be liable for damage caused as a result of their failure to maintain adequately a public road."

72. Subsection (1) was directed at changing the common law on misfeasance. Subsection (7) provided that s .60 should not come into operation until such day, not earlier that 1 April, 1967 as might be fixed therefore by order of Government. It is notorious that no such order has ever been made by Government, so that s. 60 remains in abeyance. It is in this statutory context that, since 1961, the courts have continued to hold road authorities liable under the old common law rule where a trip/fall or road traffic accident occurs as a result of their proven misfeasance. Mr. Bland on behalf of the defendant submitted that "no slip or trip and fall claim against the road authority has been determined under the Occupier's Liability Act 1995 in the twenty-four years and thousands of slip and fall claims since its enactment for the very good reason that it has been universally accepted that the Occupier's Liability Act 1995 has no application to such claims against roads authorities." This accords with my own experience as a practitioner and as a judge.

73. Mr. Christle sought to rely on section 13(2) of the Roads Act 1993 as placing on the defendant an obligation to maintain the access lane. It provides:-

> "(2) It shall be a function of the Council of a County, the Corporation of a County or other borough or Council of an urban district to maintain or construct all local roads – (in the case of the Council of a county – in its administrative county, […]."

However, this provision is empowering, and does not create a mandatory or actionable duty to maintain or upgrade any particular road. As Mr. Bland argued, it is a matter of policy for the road authority to decide how and where and when to spend the monies at its disposal for road maintenance and construction, and it is not an area in which the courts can or should interfere. As Keane C.J. stated in *Glencar Exploration plc v. Mayo County Council* [2002] IR 84, at p.140 – 141:-

> "For the purposes of this case, it is sufficient to say that the mere fact that the exercise of a power by a public authority may confer a benefit on a person of which he would otherwise be deprived does not of itself give rise to a duty of care at common law. The facts of a particular case, however, when analysed, may point to the reasonable foreseeability of damage arising from the non-exercise of the power and a degree of proximity between the plaintiff and the defendant which would render it just and reasonable to postulate the existence of a duty of care. *That approach is consistent with the reluctance of the law to impose liability for negligence arising out of an omission to act rather than out of the commission of positive acts which may injure persons or damage property."* [Emphasis added].

This principle was applied by Finnegan P. in the context of a road traffic accident in *Flynn v. Waterford County Council* (unreported, High Court, 20th October, 2004), where the "Stop" sign had been vandalised, left in the ditch and led to an accident at the junction. There was no positive obligation on the road authority to erect a sign.

74. It is therefore clear that the road authority has no statutory or common law duty to improve an existing road which can be the basis for an action in negligence.

Mr. Bland's submissions on this issue receive express support from the decision of McDermott L.J. in *Neill v. Department of the Environment for Northern Ireland and the Northern Ireland Housing Executive* [1990] NI 84. The facts there were that the plaintiff slipped and fell on a wet patch of footpath which was slippery by reason of silt and grime brought out from the base of an adjoining hedge by the seepage of water from a spring. He claimed damages from the first defendant, the Department of the Environment for breach of Article 8 of the Roads Order (NI) 1980, breach of Article 3(1) of the Water and Sewerage Services (NI) Order 1973 and negligence, and from the Northern Ireland Housing Executive for negligence. In effect the plaintiff had to prove some defect in the road surface rendering it dangerous to the traffic in order for him to succeed against the first defendant. The second defendant was sued as the owner of two flats abutting the footpath and from which the seepage from a spring emanated. McDermott L.J. determined that the first named defendant, insofar as it had responsibility under the Roads Order, was not liable for negligence when the negligence alleged amounted to nonfeasance and did not contain any element of misfeasance. He also held that the Department of the Environment could not be liable in negligence in the absence of evidence of faulty design, stating:-

> "[B]ut in this case we do not know when the road was made, who made it, or when thereafter seepage began to occur. It is not without significance that faulty design is not specifically pleaded and even if it could be spelt out of existing particulars the evidence stops far short of persuading me that the Department of the Environment was negligent in this regard."

Accordingly, he struck out the case against the first named defendant. The plaintiff went on to succeed against the second named defendant for negligence in failing to remove or reduce hazard to its neighbours. However, this has no application to the present case, at any rate in circumstances where the owner of the property from which seepage may have occurred on to the lane access is not a party.

75. I therefore conclude that the Occupier's Liability Act 1995 has no application to consideration of liability in the present case. Further the common law rule applies - nonfeasance is a defence, and in order to succeed the plaintiff must prove that her slip and fall were caused by misfeasance on the part of the defendant.

Nonfeasance v. Misfeasance

76. In *Kelly v. Mayo County Council* [1964] IR 315, at p. 318, Lavery J. described the doctrine of nonfeasance as follows: -

> "[…] They are liable in damages for injuries sustained by road users 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 nonfeasance."

77. As we have seen from the *Neil* case, there the plaintiff slipped on slime on a footpath caused by seepage from a spring from an adjoining hedge, it was held that the roads authority was not liable in respect of nonfeasance. In the recent decision of *McCabe v. South Dublin County Council* [2014] IEHC 529, the plaintiff tripped when she caught her foot in an opening in the footpath caused by a missing stopcock cover. After treating of the major authorities on misfeasance Hogan J. stated at paras. 23 – 24:-

> "23. In the present case the Council did not repair the opening at all, even though it had set out to do so, or having done so, the opening was subsequently tampered with and removed by person's unknown. On any view of these two possibilities the Council is not liable by reason of the operation of the nonfeasance rule.
>
> 24. If the opening was not repaired at all then the Council has no liability by reason of its inaction, even if it had intended to repair the opening itself following a notification of the missing stopcock cover. It is true that, as the plaintiff argued the Council intended to repair the opening. This in itself is not sufficient to take the case outside of the nonfeasance rule, since the authorities are at one that there must be actual negligence in the actual repair of the highway before the case comes outside the scope of the nonfeasance immunity."

78. I also accept that the court must view the alleged defects as at the time of the construction of the footpath or the carrying out of relevant repairs. As O'Hanlon J. concluded in *Hampson v. Tipperary County Council* [2018] IEHC 448 at para. 45: -

> "The Court has to view this locus in the standards of the time and while it may have been somewhat unusual in terms of its construction, that by the standards of the time it was adequate for its purpose i.e. pedestrian traffic on footpath. This Court therefore dismisses the plaintiff's claim."

79. Mr. Bland also opened to the court the decision of the UK Court of Appeal in *Burton v. West Suffolk County Council* [1960] 2 WLR 754. There the plaintiff drove off the road due to a patch of ice. The council had carried out some drainage works earlier in the year, which were not in themselves dangerous, but they had not made further inlets at the side of the road which might have allowed for surface water drainage, thus avoiding flooding and icing over. The claim was dismissed, and the judgments in the Court of Appeal affirming such dismissal establish the principle that a local authority cannot be held to be guilty of misfeasance if it carries out work on a road to remedy a specific defect, and it fails to carry out further work to another defect, when the claim relates to the other defect that was not addressed. *Per* Ormerod L.J. at p. 10:-

> "I think the rule is clear. If a highway authority does work on a road by way of repair or reconstruction it must be done properly and in such a way as not to cause a danger on the road. That does not mean, in my judgment, that in a case like the present one, where some work has been done and done properly to improve the drainage of the road, the

> Defendants should be held liable for failing to do further work which would result in further improvement of the drainage, although without further work the road may still be liable to flooding. To hold otherwise would, in my judgment, be extending the rule as to misfeasance to a point far beyond that established by authority."

80. I find this decision helpful both as to its facts, which bear some resemblance to the present case, and as to the principle thus enunciated which in my view is a logical application of the broad principle that the road authority is only liable for some positive act of negligence when it undertakes repair or reconstruction of a roadway.

Application of the Law to the Facts

81. In claiming that the defendant was negligent in failing to clean the surface of the access lane *viz*. by removing all the grass/weed growth, mud/sand or gravel, or any other slip hazard, the plaintiff was clearly relying on acts of nonfeasance.

82. Similarly, in alleging that the defendant should have used chemicals to clean the lane, just as it did when periodically cleaning slime off the pier/slipway, the plaintiff was pleading acts of nonfeasance. However it may be dressed up in words, the failure to clean is a failure to maintain.

83. Moreover, the fact that the chemical cleaning happened so close to the access lane, but did not extend onto it, cannot be relied on for misfeasance. Even if it could be characterised as maintenance work, the principle in *Burton* applies – the defendant had no obligation to carry out further works beyond the pier/slipway.

84. In any event I do not consider that the case for the use of chemicals to treat a roadway such as this is made out from an engineering or environmental perspective. The use of chemical cleaner may be justified to combat the risk of slipping on algae or sea-weed on a pier or slip-way, exposed as they are to the marine environment, but it would take a lot more to persuade me that the use of such chemicals on approach roads is appropriate, justified or financially feasible.

85. There was no real engineering criticism, in the context of normal and acceptable local authority practice at the time, of the manner in which the lane resurfacing work was carried out in the 1960's – 1970's. In particular no evidence was adduced that would satisfy me that a drain – be it a shallow open drain on concrete or of some other construction – should have been incorporated at that time.

86. It is clear that at some point prior to 1985 council workers put in a short section some 5 feet in length of shallow open drain below the rock face at the bottom of the access lane. As the photographs show, and as Mr. Walsh accepted, I find that this was part of a very limited "patching" job. It did not extend up the lane, or down towards the harbour. I further accept that this was not planned to any degree, but rather was probably done on the initiative of the 'ganger' or council workers when patching in the vicinity. It was at a remove of 12 or 14 feet from where the plaintiff slipped.

87. In applying the *Burton* principle I find that carrying out this minor patching did not have the effect of imposing on the defendant a positive duty at or about the same time to construct such a drain (or any other more elaborate drain) along the length of the access lane, or even along the length of the rock embankment, to carry water run-off from the laneway and rockface. While some such works may well have been desirable to render the lane access safer for use by pedestrians and others, there was no duty to carry out such works.

88. Accordingly, if the defendant was negligent it was by omission, and the defence of non-feasance must therefore succeed.

89. Finally if, contrary to the views just expressed, the defendant by reason of its interference with the access lane had assumed a duty at some time in the past to construct drainage at the side of the laneway, the issue of causation still arises. Even with a good side drainage channel, rainwater would still fall on the surface of the lane and, in combination with the steep incline, would create some risk of slipping – and the evidence adduced fails to satisfy me that the plaintiff's slip, which probably occurred on a section of smooth concrete surface, was caused by any defect or danger created by the defendant.

90. The plaintiff's action must therefore be dismissed.