

## THE HIGH COURT

[2002 No. 4890 P]

BETWEEN

MARGARET MC FADDEN

PLAINTIFF

AND

BRAY URBAN DISTRICT COUNCIL  
(OTHERWISE BRAY TOWN COUNCIL),  
THE ELECTRICITY SUPPLY BOARD AND EIRCOM PLC

DEFENDANTS

**Judgment of Mr. Justice Herbert delivered on the 19th day of January 2007**

1. In this case, I am satisfied on the evidence of the Plaintiff and the evidence of Staff Nurse Emma Brennan, which I accept, that on the 10th April 1999, the Plaintiff, at between 9.15 pm and 9.30 pm set out on a long walk accompanied by Ms. Brennan, who was then aged fifteen years. On their evidence, which was unshaken by cross examination on this point, I find that they commenced to walk up the public footpath at Killarney Road, Bray, Co. Wicklow, at approximately 10.50 pm. I find that it was then dark and the street lights were lit. I am satisfied that the Plaintiff was wearing appropriate footwear in the form of laced "runners". I accept the evidence of these witnesses that as they walked the Plaintiff was on the inside, that is furthest away from the carriageway of the road and, that they were then walking slowly. From the evidence of these witnesses and, from the evidence generally, including the photographic evidence, I am satisfied and, so find, that this particular footpath was at this time in several parts in a very considerable state of disrepair, in the sense of having a very worn and, in places, broken and uneven surface. I accept the evidence of the Plaintiff that she tripped and fell forwards on to her hands which she had flung out in an attempt to save herself from injury. I accept the evidence of the Plaintiff that at the exact moment when she fell, Staff Nurse Brennan was walking somewhat ahead of her and that when she fell, part of her hand struck the footpath ahead of Ms. Brennan while her legs remained at all times behind Ms. Brennan.

2. Staff Nurse Brennan told the court that it was her recollection, which she accepted was vague after the passage of seven years, that the Plaintiff had injured her right leg. I am however satisfied that she is mistaken in this recollection. I accept the evidence of the Plaintiff that she tripped with her right leg but that as she fell forwards her left leg twisted under her and was injured resulting in immediate severe pain in that leg and inability to walk or to place any weight on it. Fortunately, a taxi passed shortly afterwards which was stopped by Ms. Brennan and the Plaintiff was brought to her home. She was seen by Mr. Eamon Kelly, consultant orthopaedic and hand surgeon at St. Vincent's Hospital on 12th April 1999, on a referral from the Accident and Emergency Department of Loughlinstown Hospital. Mr. Kelly told the court that in his expert opinion the Plaintiff had sustained a low velocity rotational type injury to her left leg resulting in a moderately severe fracture of the left tibia with instability of the lateral malleolus. The fracture was reduced and fixed with a surgical plate and screws. Mr. Kelly told the court that this injury was consistent with the description of her fall given by the Plaintiff and he was satisfied that she had sustained this injury in the manner described by her.

3. Serious issue was joined between the Plaintiff and each of the three Defendants named in this action as to where on Killarney Road, Bray, the Plaintiff had tripped and for what reason.

4. In her evidence in chief the Plaintiff told the court that she had tripped where the footpath was damaged and there was a bit rising up, a sort of lip, at a drain or stop-cock, - a sort of square thing in the footpath. She identified this in evidence on a booklet of photographs, stated in evidence by Mr. Karl Searson of Searson Associates, Consulting Engineers, to have been taken by him at 5.45 am on 6th October 1999, and numbered 1 to 5. In her evidence in chief Ms. Brennan, told the court that the Plaintiff had fallen on the footpath near the "Green House", which I accept, because of its very distinctive green roof, is a local name for the house known as "Ardcairn", on Killarney Road, Bray. Ms Brennan told the court that after she had lifted the Plaintiff, she looked at the footpath where the Plaintiff's feet were. She noticed a concrete object about eight inches square in the footpath beside a wooden ESB pole and, there was a hole or drop right in front of this. This concrete object, which she called a "drain", had a steel cover with "Uisce" stamped on it. She identified this object in photographs 2 and 4 of the same booklet of Searson Associates photographs.

5. In cross examination by Senior Counsel for the first named Defendants, Staff Nurse Brennan accepted that she had seen the Plaintiff falling past her, but did not see her trip. She said that she thought the Plaintiff must have tripped over this "drain" as she called it but, she accepted that she did not in fact know on what the Plaintiff had tripped. Ms. Brennan's evidence, if accepted by the court, is only corroborative therefore of the fact that the Plaintiff fell on the public footpath between ESB pole No. 189 and the south western cut stone and yellow brick, pillar ending the ornamental railings of "Ardcairn", adjoining this footpath.

6. It is clear from the evidence of Mr. Karl Searson, Consulting Engineer, who gave evidence in the Plaintiff's case and, who took photographs of this location as I have earlier indicated, that the surface of the footpath at this point was, on 6th October 1999, - almost six months after the date on which the Plaintiff fell on Killarney Road, - considerably unravelled over its inner half, on all sides of this drain or stop-cock and, a nearby large "P & T." junction box cover, showing clear surface evidence of what appears to have been a number of separate excavations in the footpath at different times prior to 10th March 1999. I accept the evidence given on behalf of the first named Defendant that the stop-cock, on a feeder pipe from a water main under the carriageway of the road and, its concrete surround was installed at this location in 1880 and, I accept also the evidence given on behalf of the third named Defendant that the telecommunications junction box and cover was installed at this location in 1984. I accept the oral and documentary evidence offered on behalf of the second named Defendant that on 20th October 1982, the Electricity Supply Board had "pulled through" a power cable through cable duct laid in a trench opened by a Builder between ESB pole 189 and the lower side of the south western cut stone and yellow brick pillar at "Ardcairn". An issue arose at the hearing as to whether this particular trench was later in-filled by this Builder or by Wicklow County Council, (as Statutory Undertakers prior to the first named Defendant), at the request of the Builder, but I am satisfied on the evidence and, I so find, that the second named Defendant was not shown to have carried out any works whatever affecting this area of footpath. There was no evidence that any changes whatsoever had been made to this area of the public Footpath at Killarney Road, Bray, between 10th April 1999, and 6th October 1999, when Mr. Karl Searson took his photographs. However, as appears from photographs taken in March 2006, by Mr. O'Brien, Roads Supervisor of the first named Defendant and produced in evidence by Mr. Peter Phelan, Town Engineer for the first named Defendant and admitted into evidence, that the wooden ESB Pole, No. 189, which appears on Mr. Searson's photographs of 6th October 1999, was replaced by a large metal pole in late 2002 or early 2003 and, in 2006 prior to the hearing of this action, the entire footpath in this area was re-laid using attractive pre-cast artificial stone sets. Mr. Barry Tennyson who was called in evidence on behalf of the second named Defendant, told the court that from an examination of the colours and textures revealed by the photographs taken by Mr. Karl Searson on 6th October 1999, - Mr. Tennyson himself was not retained in this matter until about 12th April 2006, - he could identify 5 different placements of tarmacadam at this part of the public footpath, all of which were unravelled in various widths and depths.

7. In cross examination Senior Counsel for the first named Defendants ascertained that Ms. Brennan had been interviewed by the Solicitor for the Plaintiff about the events of 10th April 1999, only three weeks prior to the hearing of the action, - that is about six years and ten months after those events. She told Senior Counsel for the second named Defendant in cross examination, that the Plaintiff had first contacted her about one month prior to the hearing. In answer to Counsel on behalf of the third named Defendant she accepted that she had not seen the Plaintiff trip and had only seen her falling. She accepted that it was dark at the time. Ms. Brennan said that it was her recollection that the Plaintiff's head was beyond ESB pole 189 after she had fallen. She said that after she had got the Plaintiff to her feet she had looked around to see if she could locate whatever it was that might have caused the Plaintiff to trip. She accepted in answer to Counsel that she was just guessing as to where the Plaintiff had tripped. In answer to Counsel for the second and third named defendants, this witness accepted that she and the Plaintiff had spent very little time examining the path because the Plaintiff was in very considerable pain and could hardly stand even with her assistance. Her overwhelming concern was to get the Plaintiff home and she was in the process of telephoning the Plaintiff's son, Tony, when the taxi happened along and she stopped it.

8. Ms. Brennan told Counsel for the second named Defendant in cross examination, that apart from the months of June and July 2001, when she was in London, she had at all times lived and worked in Dublin since 10th April 1999. She said that she had remained friendly with the Plaintiff's daughter Linda, even if they did not meet as much as formerly and, she was confident that Linda must have known where to get in contact with her. She said that her father continued to live at No. 19 Kilbride Grove, Bray - the Plaintiff resides nearby at No. 69 Kilbride Grove, Bray, - where she had lived on 10th April 1999. Ms. Brennan stated that no one had contacted her about the Plaintiff's fall until she was contacted by the Plaintiff herself about a month prior to the hearing of this action. At a meeting with the Plaintiff's Solicitor about a week later, Mr. Searson being also present, she was shown his photographs of 6th October 1999, for the first time.

9. In cross examination by Senior Counsel for the second named Defendant, the Solicitor for the Plaintiff accepted that he had not sought to interview Ms. Brennan until three weeks prior to the hearing of this action. Asked why he did not request Ms. Brennan in 1999 to point the location of Plaintiff's fall to him, he replied that perhaps he should have done so but he had not done so as he did not wish to trouble Ms. Brennan. The Solicitor for the Plaintiff accepted in answer to Counsel that Ms. Brennan had never mentioned a "stop-cock" and, had always referred to a "drain". The Solicitor for the Plaintiff said that his principal reason for wishing to interview Ms. Brennan prior to the hearing of the action was because of the original confusion as to where on Killarney Road, Bray, the incident had occurred. He told Counsel for the second named defendant that he had never sought to take a witness statement from Ms. Brennan because the Plaintiff had told him that Ms. Brennan had gone to United Kingdom to pursue her nursing career. About two months prior to the hearing, the Solicitor said that he had again asked the Plaintiff where Ms. Brennan might be contacted as he wished to interview her. The Plaintiff had then told him that her daughter knew that Ms. Brennan was back in Ireland. He had then asked the Plaintiff to ask Ms. Brennan if she could pinpoint the cause of the Plaintiff's fall, but the Plaintiff reported back to him that Ms. Brennan could not say exactly what the Plaintiff had tripped over. Ms. Brennan had confirmed this to him at their subsequent meeting in the third week prior to the hearing of this action.

10. Having seen and heard Ms. Brennan giving evidence, I formed the opinion that not alone could she not say exactly what the Plaintiff had tripped over, but that she had little or no clear recollection of the events of 10th April 1999, other than that the Plaintiff had fallen near the "Green House" on Killarney Road, Bray, that night, had injured, in her recollection, her right leg, and she had taken the Plaintiff to her home in a taxi. I have considerable concern that in her genuine attempt to be helpful Ms. Brennan has been influenced in her recollection by subsequent events and in particular by the Searson Associates photographs of 6th October 1999, which she accepted had been shown to her for the first time three weeks prior to her giving evidence and almost seven years after the events in question had occurred.

11. For example, she told the court in describing what she said she calls a "drain", that it was steel and had "Uisce" on it. In my judgment the stop-cock metal cover shown in the photographs taken by Mr. Karl Searson on 6th October 1999, is smooth surfaced and worn looking and has no apparent inscription of any sort left on it, if it ever had any. By contrast however in the photograph taken by Mr. Barry Tennyson on 12th April 2006, the stop-cock surround has been altered and reduced and, has had a new metal cover fitted, now facing east/west rather than north/south and, this obviously new cover has a bold cross hatchured design raised on it, has a keyhole, and the word "Uisce" is clearly embossed in the metal.

12. In a Report dated 29th September 1999, addressed to the Solicitor for the Plaintiff, Searson Associates, - in his evidence Mr. Karl Searson accepted that he was the author of this Report, state as follows:-

"Thanks to your clear description and helpful photographs the accident situs was identified ... This Report is accompanied by a book of photographs illustrating the findings made in this Report."

13. This Report of 29th September 1999, shows the area of concern as being the cobbled public footpath at Killarney Road, Bray, adjacent to the Eastern Health Board Offices on that road. At para. 2 the Author states that the photographs show that "unfortunately there is an area beside the wall where the [edge] piping and indeed grey cobbled area itself has come adrift". At para. 3 of the Report, the Author records that:-

"Photograph 3 helps bring this area into perspective and there is a remarkable gap or 'black hole' between the base of the wall and the pink piping cobbles beside same".

14. At para. 6 of this Report Mr. Searson states as follows:-

"The photographs clearly depicts - and indeed your situs - preservation photographs taken shortly after the mishap is congruent in this regard - that this footpath (in this particular area) poses a significant risk of a trip/stumble and fall accident event occurring. The likelihood of such a trip/stumble event translating into full blown fall with concomitant injury is high."

15. The circumstances, which I believe I may justifiably categorise as quite extraordinary, surrounding the provision of this Report by Searson Associates and, the ensuing developments, are best considered in the context of the evidence given at the hearing of this action by the Solicitor for the Plaintiff.

16. He told the court that he had been consulted by the Plaintiff about this claim in the second half of June 1999. This was about ten weeks after her fall and, on the evidence of Mr. Eamon Kelly, the Plaintiff was then weight bearing on two crutches. This recollection of the Solicitor is corroborated by the terms of a letter which he sent to Mr. Karl Searson of Searson Associates, dated 8th July 1999, and proved in evidence by him, in which he refers to having visited the site on 25th June 1999. In cross examination by Senior Counsel for the first named Defendants, the Solicitor accepted that his first written record of an Attendance on the Plaintiff is dated

8th July 1999, following which he wrote the above letter to Mr. Karl Searson, stating *inter alia* as follows:-

"We confirm we visited the site on the evening of 25th June last and it appears that there has been a re-instatement of the path .... We have requested our client to take photos of the exact *locus* of the accident."

17. A letter of equal date and in similar terms was sent by the Solicitor to the Plaintiff herself. It is therefore clear that the site which the Solicitor for the Plaintiff visited on 25th June 1999, was not the location at which the Plaintiff now claims that she fell because the evidence and, in particular the photographic record, clearly establishes that no changes were made at this location until late 2002 or early 2003 when the new metal ESB pole was installed replacing the wooden pole which was present on the site on 10th April 1999, and until 2006, when the footpath itself was resurfaced in pre-cast sets.

18. In a typewritten Attendance dated 8th July 1999, the Solicitor for the Plaintiff records that the Plaintiff advised him that she had tripped on a broken path at a drain located at Killarney Road. It was like a hole and the path was in bad repair and she fell over and injured her foot. This was just beyond the Health Centre. On the evidence, I find that this Health Centre, is on the northern side or the side nearest the Main Street of Bray, of the "Green House", properly "Ardcairn". I find that in no proper sense could the area where the Plaintiff told this court she fell be described as "just beyond the Health Centre".

19. The Solicitor for the Plaintiff told Senior Counsel for the first named Defendants, that he told the Plaintiff that he would need a photograph of the exact location of her fall for the Engineer. This is corroborated by the terms of his letter to the Plaintiff dated 8th July 1999, to which I have already adverted. He said that the Plaintiff agreed to get photographs and to drop them in to this office. He informed the court that the Plaintiff's daughter, Linda, (then aged fifteen years), had left an envelope containing photographs at the Reception Desk of his Offices some days later. He told the court that he had sent these photographs to Mr. Karl Searson under cover of a letter dated 4th September 1999, - which he proved in evidence - and, which contained the following passages, *inter alia*:-

"We refer to our above client who was involved in an accident at Killarney Road, Bray, Co. Wicklow, outside Eastern Health Board Clinic. We enclose herewith a photograph in relation to the *locus* of the accident. We trust the picture is self-explanatory ... (etc.)."

20. On receipt of this letter Mr. Karl Searson visited the location and prepared the Report of 23rd September 1999, and the Booklet of Photographs accompanying it, to which I have previously referred.

21. In cross examination by Senior Counsel for the first named Defendants, the Plaintiff stated that her younger daughter, Linda, had taken the photographs and had arranged to have them developed and had herself delivered them to the Solicitors Offices. The Plaintiff told the court that she was not present when Linda had taken the photographs and did not see them after they had been developed and before they were delivered by Linda to the Solicitor's Offices. She did not know where Linda had the photographs developed. Linda did not give evidence at the hearing of the action. No evidence was laid, nor was the issue raised in cross examination, as to what instructions were given to Linda to enable her to locate the relevant area. The Plaintiff had been instructed, both orally and in writing by her Solicitor, that a photograph of the exact location of the accident was required for the Engineer. I find on the evidence, that the entire area of Killarney Road, Bray, must have been well known to the Plaintiff and to the other members of her family. If the Plaintiff did not go to the location with Linda - and, on the evidence there was no reason why she could not have gone at this time, as on the evidence of Mr. Eamon Kelly, she was then fully weight bearing without crutches and, on her own evidence and on the evidence of her Solicitor was a regular visitor to his offices, which were then located approximately 200m from the Eastern Health Board Clinic, on business unconnected with this claim, - then I must infer that she very carefully and exactly identified the location for Linda. I find it very difficult to accept the evidence of the Plaintiff that she did not see or insist on seeing the photographs which were taken by Linda, before they were handed over by Linda to the Solicitor. When asked by Senior Counsel for the first named Defendants why he had not confirmed the photographs with the Plaintiff before sending a photograph or photographs to Mr. Karl Searson, the Solicitor for the Plaintiff replied that perhaps he should have but he felt that Mr. Searson was anxious to deal with the matter very promptly.

22. It was put to this witness by Senior Counsel for the first named Defendants and, subsequently by Senior Counsel for the second named Defendant that the photographs taken by Linda and the Searson Associates photographs of 23rd September 1999, showed an area corresponding fully with the description of the location of her fall given to him by the Plaintiff and contained in his Attendance of 8th July 1999. The Solicitor for the Plaintiff agreed that this was so and also agreed that this was the same location which he had visited himself on 25th June 1999.

23. The Solicitor for the Plaintiff gave three different accounts of what next occurred and, I am driven to the conclusion that he has no clear recollection of this occurrence. He first told the court that he had sent a copy of the Searson Associates Report of 23rd September 1999, and the accompanying photographs to the Plaintiff and that she had come in to his offices and had told him that this was the wrong place. Later he said that the Plaintiff had come into his offices in connection with rent arrears and bank borrowings and had seen the Searson Associates Report on his desk and had told him that this was the wrong place. Later again he said that the Plaintiff had arrived at his offices without an appointment but that as she was there he had showed her the Searson Associates Report and photographs and she had said that this was the wrong place. No documentary evidence was offered nor was any oral evidence given by the Solicitor for the Plaintiff as to what then transpired. The Solicitor told the court that the Plaintiff had sent him a handwritten note of apology for having sent him the wrong photograph. By a letter dated 4th October 1999, proved in evidence by him, the Solicitor for the Plaintiff wrote to Mr. Karl Searson stating:-

"Please contact us immediately as the wrong *locus* of the accident was furnished to us by our client."

24. The matter then becomes even more extraordinary. The Solicitor told the court that on 6th October 1999, he and Mr. Searson, unaccompanied by the Plaintiff or by Ms. Emma Brennan went to what he said, "he knew was the *locus* at Killarney Road, Bray, Co. Wicklow". His explanation as to why he did not in the absolutely unique circumstances insist that the Plaintiff be present was that she still had difficulty with her leg. If the Plaintiff had at this time some residual difficulty with her leg, I find on the evidence of Mr. Eamon Kelly and even on the Solicitor's own evidence of her frequent visits to his offices, that it would not have prevented her in any way from going to or being brought to Killarney Road, Bray. The Solicitor for the Plaintiff made no attempt whatever to contact Ms. Emma Brennan because, as he told the court, the Plaintiff had said that she was in the United Kingdom pursuing her nursing career. This was, on the evidence of Ms. Brennan to which I have already adverted, entirely incorrect. As a result of this visit by the Solicitor and Mr. Karl Searson to the "*locus*", Mr. Searson prepared his Report of 24th November 1999, and took the photographs on which it is based on 6th October 1999, or at 5.45 am the following morning.

25. By an initiating letter dated 10th January 2000, the Solicitors for the Plaintiff notified this claim to the first named Defendants.

This letter stated, *inter alia*:-

"We act on behalf of our above client who sustained personal injury as a result of a defective pathway and badly maintained and defective footpath at or near Eastern Health Board Offices at Killarney Road, Bray, Co. Wicklow ... (etc.)," [the emphasis is mine]

26. By a letter dated 24th January 2000, the first named Defendants acknowledged receipt of this letter and requested that the Solicitors for the Plaintiff forward photographs to them. All of this correspondence was proved in evidence by the Solicitor for the Plaintiff. The Solicitors for the Plaintiff responded to this request from the first named Defendants, on 25th February 2000, stating as follows:-

"We enclose herewith photographs to be held by yourselves in trust and returned to us when finished as they are the only photographs that we have on our files presently in relation to the same.

The accident occurred at the intersection of the houses Ardcairn and Hamilton on Killarney Road, Bray, Co. Wicklow."

27. The Solicitor for the Plaintiff accepted that the photographs sent to the first named Defendants by the letter of 25th February 2000, were not the photographs taken by Mr. Karl Searson on 6th October 1999, but were in fact photographs of the same location taken by the Plaintiff's son, Tony, on some date unknown to the Solicitor. The Solicitor for the Plaintiff was unable to explain why this letter referred to, "the only photographs that we have on our files presently in relation to the same", in these circumstances. Tony did not give evidence, so the court is entirely unaware as to when or at whose request or in what circumstances Tony took these photographs, or how he knew what area of Killarney Road, Bray, to photograph.

28. By a letter dated 2nd March 2000, the first named Defendants wrote to the Solicitors for the Plaintiff as follows:-

"Many thanks for the photographs. However I am returning same to you and should be obliged if you would indicate by 'X' the exact trip hazard.

Please return marked photographs to me at your earliest convenience."

29. The Solicitor for the plaintiff accepted that no reply was given to this letter probably because he considered that the first named Defendants knew where the trip had occurred.

30. In response to a question in cross examination from Senior Counsel for the second named Defendant, the Solicitor for the Plaintiff accepted that he had never, at any time, nor had Mr. Karl Searson, visited any part of Killarney Road, Bray, with the Plaintiff or with Ms. Emma Brennan. He accepted that he did not know and, had not enquired, how either Linda or Tony had come to photograph the areas of Killarney Road, Bray, which they had. The Solicitor accepted that at all times both the Plaintiff and Ms. Brennan had referred to a "drain", but he said that he had realised that it was a "stop-cock" they were referring to. The Solicitor for the Plaintiff told the court that he had given the address, 69 Kilbride Grove, - which is in fact the Plaintiff's address, - as the address of Ms. Emma Brennan in the Replies to Particulars of 30th January 2004, to the first named Defendants and 14th March 2005, to the second named Defendant because he believed she was in the United Kingdom and he had no address for her. He accepted that the description contained in the Medical Report of Dr. Gaffney (deceased prior to the hearing of this action), that the Plaintiff's foot had slipped into a hole; the area of Killarney Road, Bray, photographed by Linda and, the Searson Associates Report and Photographs of 23rd September 1999, were all entirely consistent with the account of her fall given to him by the Plaintiff and recorded in his Attendance of 8th July 1999.

31. However, and despite the fact that neither the Plaintiff nor Ms. Brennan had at any time over the entire period of seven years since 10th April 1999, gone with him to Killarney Road, Bray, and positively identified the area where the Plaintiff had tripped and the object which had caused her to trip, the Solicitor for the Plaintiff said that he had gone to the area of Killarney Road, now claimed to be the location where the Plaintiff had tripped because he "knew" that the cause of the trip had been the stop-cock identified to the court by the Plaintiff at the hearing of the action. He accepted that this had not been marked with an "X" in response to the request in that behalf contained in the letter of 2nd March 2000, from the first named Defendants. He told the court that when he showed Mr. Karl Searson's photographs of 6th October 1999, to the Plaintiff, three weeks prior to the hearing of this action, she had said, "I think I tripped in that drain." He interpreted this reply as referring to the stop-cock. In reply to Counsel for the third named Defendant the Solicitor for the Plaintiff accepted that when the error with regard to the *locus* had been pointed out, in his recollection by the Plaintiff, he had not insisted that the Plaintiff then and there go the short distance with him from his offices to Killarney Road, Bray, and point out to him once and for all exactly where she had tripped and over what she had tripped. When asked why this was not done the Solicitor stated that he believed that he knew the correct *locus*. I find this answer most disconcerting because the location visited by the Solicitor on 6th October 1999, was clearly a different location to that visited by him on 25th June 1999. The Solicitor for the Plaintiff accepted in reply to Counsel that the Searson Associates photographs of 6th October 1999, showed no drain at the location photographed which location is now claimed to have been the area where the Plaintiff had fallen.

32. In the Statement of Claim (and in the subsequent amended Statements of Claim), the most specific particularisation of negligence, nuisance, breach of duty and breach of statutory duty pleaded is that the defendants or some of them caused or permitted an abrupt variation in level to form in the footpath. In a Notice for Particulars dated 5th November 2003, the first named defendants sought particulars of the following:-

"14(b) The precise and exact location of where the alleged accident occurred, furnishing photographs of the alleged *locus* if possible.

(c) The exact dimensions, shape and situation of the alleged structure the cause of the alleged accident.

(d) The exact location of the alleged structure the cause of the alleged accident.

33. The following Replies were delivered on behalf of the Plaintiff on 30th January 2004:-

"14(b) The precise and exact location of where the accident had occurred has been furnished to Bray Town Council together with copies of photographs. We enclose herewith copies of photographs of Searson Associates.

(c) The exact dimensions shape and situation of the structure is depicted in the said photographs.

(d) The exact location of the structure has been located and stated and set out in the Engineer's Report of Karl Searson enclosed herewith."

34. Similar Particulars were sought by the second named defendant on 3rd December 2004 and similar replies furnished on behalf of the Plaintiff on 14th March 2005. In addition, the second named defendant asked that the plaintiff kindly state what caused her to fall on the occasion,- para. 3(e). In Replies it was stated that, "the plaintiff fell as a result of the difference in level of ground due to a re-instatement on the path".

35. Having regard to the foregoing findings and to the indicated evidence, and having very carefully observed and evaluated the witnesses and in particular the plaintiff and Staff Nurse Brennan in giving their evidence before this court, I am quite satisfied and I so find, that the plaintiff has no reliable recollection of where the relevant fall occurred, other than that it was somewhere in the vicinity of the "Green House". Additionally, I am satisfied for the foregoing reasons and I so find that she has no reliable recollection of what it was that caused her to trip and fall. Since the onus of proof is on the plaintiff and, as I am not satisfied on the balance of probabilities that she has discharged that onus, I am compelled to dismiss her claim.