# THE COURT OF APPEAL

## UNAPPROVED
## NO REDACTION NEEDED

**Neutral Citation Number [2021] IECA 267**
**Record Number: 2019/305**
**High Court Record Number: 2015/9346P**

**Noonan J.**

**Faherty J.**

**Collins J.**

**BETWEEN/**

**EDWARD O'RIORDAN**

**PLAINTIFF/RESPONDENT**

**- AND -**

**CLARE COUNTY COUNCIL AND RESPONSE ENGINEERING LIMITED**

**DEFENDANTS/APPELLANTS**

**JUDGMENT of Mr. Justice Noonan delivered on the 19th day of October, 2021**

**1.** Liability for dangers on the highway has been the subject of litigation for centuries. It has given rise to the well-known and long settled distinction between misfeasance and non-feasance. In cases of the former, the highway authority may be liable, but in the latter, it is not. This appeal concerns the liability of the highway authority, in this case the appellant, Clare County Council ("the Council"), for such a danger on the highway which caused injury to the respondent ("the plaintiff"). The High Court held that the Council was liable and awarded damages to the plaintiff.

**Relevant Facts**

**2.** The facts and evidence are set out in considerable detail in the judgment of the High Court and a brief synopsis will suffice for the purposes of this judgment. The plaintiff was, at the relevant time, 64 years of age and lived in Shannon. As described by the trial judge, Sunday the 3rd of August, 2014 was a fine summer's day and sometime around mid-day, the plaintiff went out for a leisurely cycle which took him down a public road known locally as the "Diamond Road", so called because a facility owned by the DeBeers company was located at the end of the road. There were several cattle grids along the road and as the plaintiff cycled over one of these, he fell from his bicycle and suffered a serious injury to his left ankle.

**3.** The cattle grid in question was different from the others on the road in that, as one approached it as the plaintiff did, it was preceded by a concrete ramp, something akin to a small speed bump, although its actual purpose was never established during the course of the five day hearing in the High Court. The cement ramp appears to have been laid immediately adjacent to the cattle grid so that some of the concrete overlapped the first bar of the grid. At some unknown time, part of the overlapping concrete broke away leaving behind a 1 inch drop from the ramp onto the cattle grid. This was found by the judge to be the cause of the plaintiff's fall.

**4.** It was common case that neither the ramp nor the cattle grid was constructed by the Council. In fact, the Council first acquired the roadway from a public entity known as Shannon Development which transferred all its assets to the Council in 2004. Those assets apparently included land, roads, footpaths, open spaces, waste water treatment plants, pumping stations storm and foul water systems among more. The transfer was described in

evidence as the largest property transfer in the history of the State. It appears that the road in question together with the cattle grid and ramp was constructed by Shannon Development.

**5.** As I have said, the transfer took place in 2004 but in what manner it was effected was never established in evidence in the High Court. This court was informed at the hearing of the appeal that the transfer appears to have taken place by way of formal deed as opposed to by statute or statutory instrument, though no such deed was put before the High Court or this court. Ultimately nothing turns on that. Some years subsequent to the transfer, in 2011 the road was designated a public road by the Council which appears to have been done pursuant to s.11 of the Roads Act, 1993.

**6.** The evidence established that where private property is taken in charge by a local authority, for example the roads and footpaths in a housing estate constructed by a private developer, it is normal for the relevant council to carry out a survey of the property prior to it being taken in charge. In the present case, none of the witnesses who gave evidence for the Council were in a position to confirm that such a survey had been carried out and rather surprisingly, it emerged that no real effort appears to have been made to establish that fact. There was, however, no issue about the fact that from the time of the transfer in 2004, nothing was none by the Council to the cattle grid or concrete ramp. It is also relevant to note that while the identified hazard was the 1 inch drop created by the breaking away of the concrete that overlapped the cattle grid, the evidence never established when this event occurred. Thus, it could have happened prior to 2004, between 2004 and 2011, or at any time after 2011 up to the time of the plaintiff's accident.

**Decision of the High Court**

**7.** The judge first set out the evidence on liability from both sides. He then set out his findings of fact on the liability issues. He accepted fully the plaintiff's evidence and found

him to be an honest and truthful witness. The plaintiff was cycling slowly and in a cautious manner when the accident occurred. The sudden and unexpected drop from the ramp to the cattle grid caused the plaintiff to lose control of his bicycle and fall. The judge was satisfied on the evidence that the cattle grid and concrete surround were likely to have been constructed or installed by Shannon Development, the Council's predecessor in title.

**8.** He accepted the evidence of the plaintiff's engineer that laying concrete over the metal bar of the cattle grid is a defective and inappropriate method of construction. This rendered the concrete liable to be broken up with the passage of vehicular traffic over it, which was an entirely foreseeable consequence. The judge also considered that the ramp should have been set back a distance from the grid. He concluded that, both in respect of the defective manner of construction and the failure to locate the concrete feature a distance from the cattle grid, the concrete surround was defectively designed and constructed and created a danger or hazard to cyclists such as the plaintiff.

**9.** The judge also held that it was likely that prior to the transfer of assets from Shannon Development to the Council, an inspection or survey of the condition of those assets had been carried out but it was possible that it did not go into the level of detail which would have picked up the defective features of the concrete surround of the cattle grid. He also expressed surprise that no one on behalf of the Council appeared to have undertaken a search of the archives to determine if a survey report existed.

**10.** He found on the evidence that the Council was aware that people regularly walked and cycled, as well as drove motor vehicles, on this road, both for work and recreational purposes. He found it difficult to conclude other than that the Council was or must have been aware of the state of the cattle grid and, in particular, the concrete surround. He noted

that prior to the plaintiff's accident, the plaintiff and many others had cycled over this cattle grid without apparent difficulty.

**11.** The court then turned to a consideration of the legal issues arising, noting that the plaintiff's claim was advanced under two principal headings, first, that the Council was liable in its capacity as a road authority for misfeasance in respect of the condition of the cattle grid and secondly, that it was liable because the cattle grid amounted to a public nuisance. The judge noted that alternative and subsidiary claims were advanced both on foot of the Occupiers Liability Act, 1995 and the Roads Act, 1993.

**12.** In considering these issues, the trial judge first turned to an analysis of the law relating to negligence and in particular misfeasance versus non-feasance. He described the Council's "immunity" from liability in the case of non-feasance, noting that this was abolished by s. 60(1) of the Civil Liability Act, 1961 but that section was never commenced. The immunity was preserved by s. 2(3) of the Roads Act, 1993. He then turned to an analysis of the authorities to which I will come in due course. On the issue of negligence, I think it is fair to summarise the trial judge's finding of liability against the Council as arising from the fact that they were the successors in title to Shannon Development who were negligent in constructing the cattle grid and concrete ramp.

**13.** He held that this deprived the Council of the defence of non-feasance. He further based this conclusion on the fact that a survey at the time of transfer ought to have revealed the defect in the road. Although recognising that this might appear unfair to the Council, he noted that it was open to the Council to obtain an indemnity from Shannon Development at the time of the transfer and this mitigated any perceived unfairness. He considered that as a matter of "common sense", liability should rest on the Council in respect of the negligence of its predecessor.

**14.** Having found the Council liable to the plaintiff on the basis of negligence, the judge then considered the alternative claim advanced concerning a public nuisance on the highway. He was satisfied that in addition to being liable to the plaintiff in negligence in its capacity as road authority, the Council was also liable for the tort of nuisance. He referred to a number of cases in this respect from which he concluded that there was ample authority for the proposition that where a private individual could show particular or special damage arising from such public nuisance, he could bring a claim in respect of it against the relevant highway authority.

**15.** The cases referred to by the judge, which I will shortly examine, were in his view sufficient to defeat the contention of the Council that it could it have no liability in public nuisance. As for the Council's argument that it could not have a liability in public nuisance where it neither created the nuisance nor had knowledge of it, the judge's view was that this ignored the fact that it was the Council's predecessor in title that created the nuisance and the Council had the means of knowledge of that nuisance. Since the Council failed to use reasonable care to discover the existence of the nuisance, it was liable. Such liability also flowed from the fact that the nuisance was continued and adopted by the Council. The Council therefore, failed in its duty to remedy the nuisance either when the assets were transferred in 2004 or when it was designated a public road in 2011.

**16.** Having made those findings, the judge found it unnecessary to express a final view on liability under the Occupiers Liability Act, 1995 or arising under the Roads Act, 1993. He did however express misgivings as to how the 1995 Act could apply in circumstances where the Council could not exclude the public from using the road. He found it difficult to see how the Council could be regarded as the occupier of the road in those circumstances.

**17.** As regards the plaintiff's claim pursuant to s.13(2) of the Roads Act, 1993 which provides that it is a function of the roads authority to maintain and construct all local roads within its relevant area, he noted that this claim was not being pushed strongly by the plaintiff and felt it unnecessary to consider it further.

**18.** Finally, on the issue of contributory negligence the court's view was that the plaintiff was guilty of contributory negligence to the extent of 25%. Having considered the medical evidence in detail, the court assessed general damages in the sum of €140,000. Special damages were agreed at €11,206.50 resulting in a net decree in favour of the plaintiff of €113,404.87.

**Misfeasance and Non-feasance**

**19.** The distinction between misfeasance and non-feasance is one that has been recognised by the common law of England since at least the 18th century. Its first express adoption in Ireland seems to have occurred at the start of the 20th century in *Harbinson v. County Council of County Armagh* [1902] 2 I.R. 538. The plaintiff was travelling over a bridge by horse and cart when the horse put his foot into a hole, throwing over the cart and seriously injuring the plaintiff. The principal issue was whether the common law rule had been modified by the passage of the Local Government (Ireland) Act, 1898 which, in section 82, imposed new obligations concerning the maintenance and repair of highways on the County Council.

**20.** Lord O'Brien L.C.J. summarised the law in the following terms (at pp. 543 *et seq*): -

> "It remains then to deal with the course of judicial decision upon this subject, and to consider the question whether the Act of 1898 has in any way altered the law by imposing an additional liability upon the defendants. It has been established by a long line of authorities, extending over one hundred years, that road authorities are

not responsible in damages at the suit of an individual in an action founded on non-feasance by them. The cases range from *Russell v. The Men of Devon* 2. T.R. 667 down to the case of *Saunders v. Holborn District Board of Works* [1895] 1 Q.B. 64 in 1895.

The various decisions on the subject down to the year 1892 have been succinctly examined by Lord Herschell in his judgment in *Cowley v. Newmarket Local Board* [1892] App. Cas. 345, at 353. He says:-

> 'It was held as long ago as the case of *Russell v. The Men of Devon* that an action could not be maintained at common law by one of the public in respect of an injury sustained through a highway being out of repair. This decision was no doubt largely, but it was not exclusively, founded on the fact that the inhabitants of the county are not a corporation, and cannot be sued collectively. In the subsequent action of *M'Kinnon v. Penson* 8 Ex. 319; 9 Ex. 609, brought against the county in the name of their surveyor for a similar cause, it was urged that the 43 Geo. 3, c. 59, s. 4 which enacted that the county might be sued in the name of their surveyor, had removed the only difficulty in the way of the plaintiff. It was held, however, that the effect of the statute was not to create a new liability, but only a more convenient method of enforcing existing rights. And in *Young v. Davis* 2 H & C. 197 it was held in the Exchequer Chamber that a surveyor of highways was not liable to an action for injuries resulting from the breach of his duty to keep the highways in repair…'...

The principle upon which this long course of authority rests is thus very clearly stated by Lord Halsbury in the same case. He says at p. 349 of the report:-

‘The question appears to resolve itself into whether the public authorities in whom the highways are vested by the statute can be held liable in an action for any defect in the repair. I think in this case the liability would have to put upon the ground that there was default in the construction of the highways through which an accident happened to a passenger. The wide consequences of the existence of such a right of action would be very serious.

As long ago as 1788 a question of an analogous character was raised in the Court of King’s Bench; and the argument then, as now, was that where one person received an injury by reason of any other person or persons omitting to do that which by law he or they are bound to do, he may maintain an action in the circumstances to recover satisfaction for the damage he has received in consequence of that omission.

In that case it was said (which seems to me to be decisive of this case) that the principle which decides against this kind of action is accurately stated in Brooke’s Abridgment, tit. Action on the Case, pl. 93, where it is stated that ‘if a highway be out of repair by which my horse is mired no action lies, *car est populus et surra reforme per presentment*’, which must be understood to mean that as the road ought to be repaired by the public no individual can maintain an action against them for any injury arising from their neglect: *Russell v. The Men of Devon*.’ ”

**21.** Lord O'Brien cited, at p. 546, a further passage from the judgment of Lord Hannen from the same case to like effect, namely that the imposition of a duty by statute to maintain and repair the highway on a public body did not give rise to a cause of action for damages at the suit of a private individual. He also cited the following passage from the unanimous judgment of the Judicial Committee of the Privy Council in *The Municipality of Pictou v. Geldert* [1893] App. Cas. 524 where Lord Hobhouse said: -

> "By the common law of England, which is also that of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair and liable to indictment for a breach of this duty, were, nevertheless, not liable to an action at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair…The latest English case is *Cowley v. Newmarket Local Board* [1892] App. Cas. 345, decided in the House of Lords. It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable in an action in respect of mere non-feasance. In order to establish such liability, it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed."

**22.** Two concurring judgments were delivered in *Harbinson* . That the rule concerning non-feasance is not confined to negligence, but embraces public nuisance also, is evident from the judgment of Johnson J. who said (at pp. 550-551): -

> "In this action the plaintiff sues the defendants (the County Council of County Armagh) for damages for injuries he sustained in consequence of a public county road, which, where the occurrence out of which the alleged cause of action arose, crossed a small stream by an old stone bridge or culvert, part of the structure of the high road, was out of repair and <u>a public nuisance,</u> by the neglect and breach of duty

on the part of the County Council (since the Local Government (Ireland) Act, 1898, came into operation) to maintain and keep this public highway in a state of repair, reasonably safe for public traffic. The county council had given this road and bridge into the charge of the county surveyor because no sufficient contractor could be had. From whatever point of view the consideration of this case is approached, in the result, it is an action by an individual for damages against the county council, the public authority, whose duty it is to keep this highway in repair, not for misfeasance in anything they have done in or about such repair, but for non-feasance in omitting to maintain and keep the highway in a proper state of repair, and I think it is clear and settled law that a public road authority, unincorporate or corporate, whose duty by the common or statute law is to keep a public highway in repair, and who may be compelled to do so by the appropriate proceedings for this purpose, is not liable to such an action as the present one, even though their omission is a public nuisance." (my emphasis)

**23.** In his judgment, Gibson J. noted (at p.563): -

"In England and Ireland alike, in case of acts of comission, the person or corporation guilty of the wrong could be impleaded by anyone thereby injured.

This being the existing state of the law, had it been the intention of Parliament to make a radical change by giving a right of action to individuals where none existed before, the obvious course would have been (as Pollock, C.B., remarks in *M'Kinnons Case* 8 Ex. at p.329) to recite the grievance and provide for the remedy in express terms. The statute, however, does nothing of the kind. It operates by way of transfer: *Cowley's Case*."

**24.** *Harbinson* provides clear authority for the proposition that even the imposition by statute of a duty to repair and maintain a highway did not, in the absence of express words, operate to upset the long established common law rule.

**25.** In *Gallagher v Leitrim County Council* [1955] 89 ILTR 151, the non-feasance principle was restated by Kingsmill Moore J.: -

> "The principle is that the local highway authorities are not liable for leaving public roads or footpaths in improper repair; they are not liable for failing to take steps to restore these roads or footpaths to a proper state of repair. If, however, they do anything and do it in such a way as to create a danger they are liable."

**26.** An authoritative statement of the principle in more modern times is to be found in the judgment of the House of Lords, subsequently followed in this jurisdiction, in *Gorringe v. Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. There, Lord Hoffman said (at p. 1062): -

> "10. My Lords, the general rule is that even in the case of occupiers of land, there is no duty to give warning of obvious dangers: see the recent case of *Tomlinson v Congleton Borough Council* [2004] 1 AC 48. People must accept responsibility for their own actions and take the necessary care to avoid injuring themselves or others. And a highway authority is not of course the occupier of the highway and does not owe the common duty of care. Its duties (and those of its predecessors, the inhabitants of the parish) have for centuries been more narrowly defined, both by common law and statute.
>
> 11. At common law it was the duty of the inhabitants of a parish to put and keep its highways in repair. A highway had to be, as Diplock LJ said in *Burnside v Emerson*

[1968] 1 WLR 1490, 1497, 'in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition.'

12. The inhabitants appointed a surveyor of highways to carry out this duty on their behalf and the expense was met by levying a rate. By various statutes culminating in the Highways Act 1959, the duty was transferred from the inhabitants to statutory highway authorities. It is now contained in section 41(1) of the Highways Act 1980; a highway authority is 'under a duty…to maintain the highway'. But the common law duty to repair was the only duty of the inhabitants. In all other respects the public had to take the highway as they found it. Furthermore, the duty of the inhabitants was a public duty which was enforceable only by a prosecution on indictment. It could not be relied upon by an individual to found a claim for damages. I expect it was thought burdensome enough for the inhabitants to have to pay the highway rate. There was no reason why they should have also to pay damages for injuries caused by the deficiencies of the surveyor in carrying out repairs. The users of the highway were expected to look after themselves.

13. This remained the law when the duty was transferred to highway authorities. An individual who had suffered damage because of some positive act which the authority had done to make the highway more dangerous could sue for negligence or public nuisance in the same way as he could sue anyone else. The highway authority had no exemption from ordinary liability in tort. But the duty to take active steps to keep the highway in repair was special to the highway authority and was not a private law duty owed to any individual. Thus it was said that highway authorities were liable in tort for misfeasance but not for non-feasance. Sometimes it was said that the highway

> authority was 'exempt' from liability for nonfeasance, but it was not truly an exemption in the sense that the authority had a special defence against liability. The true position was that no one had ever been liable in private law for non-repair of a highway..."

**27.** As Lord Hoffman explains, the rule has never been that the highway authority enjoys a special form of exemption or immunity from suit in respect of nonfeasance. In fact, there is not, and never has been, a liability at common law on any party for failure to maintain the highway. Thus, as was said in argument, when the inhabitants of the parish dedicated a highway to the public, the public took it warts and all. The position in the United Kingdom changed in 1961, but our Civil Liability Act of the same year was never fully implemented in this respect.

**28.** These authorities also demonstrate that the rule concerning liability for non-feasance extends to all forms of civil liability and is not confined in its operation to causes of action founded on negligence as distinct from public nuisance. The rule is often seen as anomalous, as indeed it was by the trial judge here, unfair and perhaps even unconscionable in some respects. It sits ill with modern concepts of negligence and culpability. Thus, for example, even in circumstances where a highway authority not only knows, or ought to have known, of a danger on the highway but has been repeatedly and explicitly informed of it, it remains the position that it has no liability for a failure to intervene, assuming of course it did not create the danger in the first place. Nor does a highway authority have any duty to warn. As Lord Rodgers put it in *Gorringe* (at para 80), "travellers had to look out for themselves".

**29.** The rule is so firmly entrenched in our law that nothing short of statutory intervention of the kind contained in s. 60 (1) of the Civil Liability Act, 1961 can dislodge it. The fact that sixty years have passed without the section being commenced speaks to its huge

significance for the Exchequer. Indeed, far from being reversed by statute, it is expressly preserved by s. 2 (3) of the Roads Act, 1993: -

> "(3) Nothing in this Act affects any existing rule of law in relation to the liability of a road authority for failure to maintain a public road."

**30.** In his judgment in *McCabe v. South Dublin County Council* [2014] IEHC 539, Hogan J. commented on the "illogical distinction" between non-feasance and misfeasance, describing the rule as being "blunt and indiscriminate" and at odds with general principles of tort law. Despite that, he observed that the distinction still retains "its ancient purity in this jurisdiction" and felt constrained to apply it, notwithstanding these misgivings, having regard to the fact that the rule remains embedded in the fabric of our common law undisturbed for over two hundred years. He expressed the view that the rule now probably lies beyond the capacity of the courts to repair or amend, despite it being unsatisfactory and anomalous.

**31.** The difference between misfeasance and non-feasance is sometimes equated with the difference between doing something or doing nothing, between act or omission. That approach does not always yield satisfactory results. In *"Rediscovering the Law of Negligence"* (Hart Publishing, Oxford: 2007), Beever, in his commentary on the distinction observes (on p. 209): -

> "The general point is this. Deciding not to act is itself an action. When I stay in bed all day I act, and the fact that my body does not move makes no difference to this conclusion. Similarly, I act when I decide to hold my breath and when I decide to start breathing again. All omissions are also actions. Hence, arguing over whether

> something is an action or omission is like arguing over whether something is coloured or blue."

**32.** Counsel for the Council posited the distinction in terms of the difference between making things worse and not making things better, an attractive formulation in my view. Fortunately, the necessity to wrestle with concepts bordering on the metaphysical is avoided by the fact that on any view of the matter here, the Council did not make things worse but merely failed to make them better.

**The Approach of the Trial Judge**

**(i) Inherited defect**

**33.** The trial judge referred to a number of relevant authorities, including some I have mentioned above, and concluded that Shannon Development had negligently constructed the cattle grid and concrete ramp and that this amounted to misfeasance. He went on to say (at p. 47, para. 70): -

> "…I accept that submission. It is not possible to decide whether the concrete surround was installed at the same time as the cattle grid. However, it matters not. While the Council itself did not carry out the works, its predecessor in title, Shannon Development, did. The works were, therefore, carried out in a defective manner by the Council's predecessors in title. I agree with the plaintiff that the Council cannot distance itself from those defective works on taking a transfer of the road and associated works and lands in 2004 and when designating the road as a public road in 2011. While the parties were not in a position to identify any case in which a predecessor in title of a road or highway authority negligently constructed a road or

> a feature on a road, it seems to me that it follows from first principles that the Council must have a liability for the negligent acts of its predecessor in title in the construction of the concrete surround at the cattle grid and that it is not entitled to rely on the doctrine of non-feasance in respect of the defective construction or installation of that feature."

**34.** The judge thus decided that the Council was liable for the negligence of its predecessor in title. As he noted himself, there is no authority for such a proposition but contrary to the judge's view, the reason for that is that it is simply incorrect. The notion that liability can be acquired for an inherited defect in a highway is one that runs counter to the settled rule that on dedication, the public takes the highway as it finds it, defects and all. Apart from an appeal to common sense, the judge identifies no legal basis for the imposition of liability in negligence in such circumstances and the authorities are to the contrary effect.

**35.** In *Nash v. Rochford Rural District Council* [1917] 1 KB 384, the plaintiff was riding his pony on a highway in respect of which the defendant was the authority. The horse put his foot through the crust of the highway, throwing and injuring the plaintiff. The cause was the negligent construction of a drain under the road. The drain was not constructed by the defendant but by its predecessor in title. The curial part of the judgment as reported in the headnote to the law report is as follows:

> "Held by the Court of Appeal, that, as there was no right of action for damages against a highway authority unless actual damage had accrued, the preceding highway authorities were not under any liability which could be passed on to their successors; and, further, that, on the true construction of the Acts of Parliament creating the successive highway authorities, there was nothing to make any such authority liable for acts of misfeasance committed by its predecessors."

**36.** The claim was accordingly dismissed.

**37.** *Nash* was subsequently applied in *Baxter v. Stockton-on-Tees Corporation* [1958] 2 All ER 675. There, a county council constructed a road between 1938 and 1940 which included a dangerous feature comprising an unlit island approaching a roundabout. In 1941 a different body, a county borough council, became the highway authority pursuant to statute. In 1955, the plaintiff's husband, while riding his motorcycle at night, collided with the kerb of the approach island and was killed. His widow brought proceedings against the borough council. Her claim was dismissed by the Court of Appeal. In giving the judgment of the court, Jenkins L.J. noted the facts which have echoes of the present case (at internal p.7): -

> "From the time when they took over the road until the time of the accident of the deceased the defendants did not make any alterations to the roundabout or its approaches or the lights and traffic lights to which we have referred. They simply took over the road, roundabout, islands, lights, traffic signs, and all, from the Durham County Council and left them as they were. They were no doubt doing what was necessary in the way of maintenance."

**38.** The headnote records the court's determination: -

> "Held- (i) the action failed in limine because the borough council had merely kept the island as they found it when they took over the road.
>
> (ii) Moreover, (a) even if the county council had so negligently constructed the island and road as to be liable for injuries caused by the danger so created while the county council remained in charge of the road (which the court did not find to be the case)

> yet any such liability would not have been transferred to the borough council; and (b) if the county council had been under a duty to protect the public from danger from the island, viewing it as an obstruction placed on the highway by the county council, any such duty would have flowed from misfeasance in creating the obstruction and would not have been inherited by the borough council."

**39.** Jenkins L.J. considered that there was authority for the proposition that a highway authority constructing a road for the public for public use under statutory powers owes a duty to the public to take reasonable care to construct the road properly, so that it will be reasonably safe for the purposes for which it is intended to be used. Thus, if the deceased had been injured while the county council was still in charge of the road, it may have been liable on this principle. However, he continued (at p. 684): -

> "Be that as it may, we fail to see how the defendants could be held liable on this principle, inasmuch as they were not the constructors of the road."

**40.** He also said (at p. 685):

> "It appears to us that the real answer to the submission of counsel for the plaintiff is that failure to light or give some other form of warning of an obstruction on the highway by a highway authority who themselves created the obstruction is taken out of the category of mere non-feasance and brought within the category of misfeasance by their positive act of creating the obstruction giving rise to the need for lighting or other means of warning. But no positive act in relation to the approach island was done by the defendant. They merely kept the island as they found it when they took over the road. The theory that the defendants inherited from the county council the duty to light or provide some other form of warning of the presence of the approach

> island appears to us (with respect to the learned judge) to be untenable in view of *Nash v. Rochford RC* [1917] IKB 384."

**41.** A similar issue was considered by the High Court in this jurisdiction in *Gaye v. Dublin County Council* (Unreported, High Court, Morris J., 30th July, 1993) in which the plaintiff fell on a defective footpath in an estate that had been privately constructed but subsequently taken in charge by the local authority. In the course of his judgment, Morris J. noted the plaintiff's argument that when the local authority took over the estate, they assumed responsibility for any already existing nuisance (at p. 6): -

> "It is argued on behalf of the plaintiff that even when the defendants took the estate in charge in 1963 they assumed full responsibility for the nuisance which existed in the estate which may have been created by the builder. Again the validity of any such submission depends entirely upon establishing that the nuisance alleged did in fact exist at the time when the estate was taking in charge. As has already being pointed out, there is no evidence before the court that at the time when the estate was taken in charge the nuisance, if it be a nuisance, existed, and, accordingly, the argument that the defendants must be taken to have adopted the nuisance and assumed responsibility for it must fail."

**42.** As appears from this passage, the court did not have to, and did not in fact, decide whether the local authority could have assumed responsibility for a pre-existing defect in the absence of evidence as to when the nuisance originally occurred. Notably however, the same factual position obtains in this case and logically, the same consequence follows. This case was referred to but distinguished by the trial judge on the basis that in the present case, it is accepted by the Council that the cattle grid and concrete surround were present when the

assets were transferred by Shannon Development. While that is true, it does not assist in relation to when the nuisance occurred by virtue of the breaking up of the concrete ramp and the formation of the 1inch drop.

**(ii) Duty to inspec**t

**43.** An additional ground for imputing negligence, and thus misfeasance, to the Council appears to have been the conclusion of the trial judge that the Council was under a duty to survey and inspect the road at the time of transfer and had this been done, the hazard ought to have been detected. Thus he said (at p. 48): -

> "…If there was a survey and report prepared at the time of the transfer, this hazard ought to have been picked up. If there was none, then that was the responsibility of the Council and it had the opportunity of carrying out such a survey. I am conscious that it might appear somewhat unfair to the Council to saddle it with the liability for works done by Shannon Development. However, it acquired the lands and the road from Shannon Development and it was presumably open to the Council to provide for an indemnity from Shannon Development under the terms of the transfer… In those circumstances, I do not believe that it is unfair on the Council to find it liable in respect of the defects in the construction and installation of the concrete surround at the cattle grid by its predecessors in title."

**44.** The proposition that a highway authority is bound to inspect a highway and ensure defects are remedied on, or prior to, transfer and/or dedication to the public, is novel, far reaching and contrary to authority. The implications of such a duty for local authorities would be simply enormous. It runs directly counter to the ancient rule that the public take

the highway as they find it on dedication. Contrary to what I have already held, they would become liable for inherited defects that they failed to detect by inspection. Highway authorities would become liable for every defect in every footpath and road in every estate taken in charge by them.

**45.** The trial judge points to the fact that it was open to the Council to seek an indemnity from Shannon Development and that may well be so, assuming that the Council has a discretion to decline the transfer absent such indemnity. As was pointed out to us in argument, a discretion does not always arise. Thus, for example, s. 180(2) of the Planning and Development Act, 2000 was enacted to provide for local authorities compulsorily taking in charge the many ghost housing estates that littered the country following the financial crash of 2008. On the trial judge's reasoning, each local authority thereby became liable for every defect in every such unfinished estate.

**46.** That this is not the law is illustrated in a further passage in the judgment of Morris J. in *Gaye* (at p.6): -

> "Moreover, circumstances may arise in which a local authority given the particular circumstances of the case may deem it expedient and proper to take an estate in hand notwithstanding defects. Such a situation might well arise in the event of the builder becoming insolvent. The local authority, adopting the lesser of two evils, may well be prepared to take the estate in charge fully aware of defects. In such circumstances no negligence in failing to inspect would arise."

**47.** The proposition also appears to run counter to the intent of the Roads Act, 1993 which as I have already noted expressly preserves the non-feasance rule. Further, it does not provide for any obligation to inspect and remedy defects before taking a road in charge

pursuant to s. 11 any more than it provides that a roads authority will be liable for such defects subsequent to the road being taken in charge..

**48.** The mere fact that a local authority has the power to inspect, and frequently and perhaps even routinely does so, cannot of itself result in the imposition of a liability. In *Flynn v. Waterford County Council* [2004] IEHC 335, the plaintiff was involved in an accident at a road junction where there was a warning sign that had become obscured by vegetation which the plaintiff claimed constituted a breach of the road authority's statutory duty to him as embodied in s. 95(3)(a) of the Road Traffic Act, 1961, as amended, which provides: -

> "The road authority may provide for public roads in their charge such information signs and warning signs as they consider desirable."

**49.** In his judgment, Finnegan P. noted that the word "may" in the section was to be contrasted with the word "shall" in a subsequent section and said (at 4088-9): -

> "I cite the last provision in which the word 'shall' is used as opposed to 'may' in s. 95(3)(a). On this basis I find that s. 95(3)(a) confers a discretionary power on a road authority and not an obligation. Applying the principles enunciated by the Supreme Court in *Glencar v. Mayo County Council & Anor* [2002] 1 IR 112 to s. 95(3)(a) I am satisfied that it was not the intention of the legislature in enacting that provision to confer on an individual an entitlement to claim for damages. Where a statutory provision does not give a private right to sue it would be most unusual that it should nevertheless give rise to a duty of care at common law: *Gorringe v. Calderdale Metropolitan Borough Councils* [2004] 2 All ER 326. Lord Hoffman at p. 336 said: -

> 'In the absence of a right to sue for breach of the statutory duty itself, it would in my opinion have been absurd to hold that the council was nevertheless under a common law duty to take reasonable care to provide accommodation for homeless persons whom we could reasonably foresee would otherwise be reduced to sleeping rough. And the argument would in my opinion have been even weaker if the council, instead of being under a duty to provide accommodation merely had a power to do so.'

In the present case, the defendant merely has a power to erect signs. I am satisfied that that power does not give rise to a cause of action in a person who suffers injury because of their failure to do so as a breach of statutory duties. Neither can the failure to do so give rise to an action for negligence of common law.

The Roads Act 1993 I am satisfied does not alter the common law save and except that it includes within the duty to maintain a road a duty to provide and maintain public lighting. The failure of a road authority to maintain a public road does not confer upon an individual a right to civil redress for damages: *Brady v. Cavan County Council* [2000] 1 ILRM 81 and *Harbinson v. Armagh County Council* [1902] 2 IR 538."

**50.** It is clear to my mind therefore that the Council here had no statutory obligation to carry out an inspection of the road prior to taking a transfer from Shannon Development, less still an obligation at common law to do so. Even if such a statutory obligation, as distinct from discretionary power, to inspect existed, such an obligation would not operate to modify the common law non-feasance principle unless expressly so provided in the statute or arising by necessary implication. As we have seen, even a statutory obligation to repair does not give rise to a private law remedy, absent express words to that effect in the statute.

**(iii) Public Nuisance**

**51.** Every danger on the highway is a public nuisance. As stated by His Honour Judge O'Briain in *Hassett v. O'Loughlin* [1943] 78 ILTR 47:

> "A nuisance is not confined to an obstruction on the highway; it may consist of anything which makes use of the highway unsafe or dangerous to the public."

**52.** The trial judge gave separate consideration to the Council's liability in public nuisance as distinct from negligence. Although perhaps not entirely clear, the judge appears to have considered that the doctrine of misfeasance/non-feasance is applicable to negligence but not necessarily nuisance. Referring to McMahon and Binchy's *Law of Torts* (4th Ed, Bloomsbury 2013), the judge said it is open to a private individual to maintain civil proceedings where that person had suffered "particular" or "special" damage as a result of a public nuisance.

**53.** He referred to a number of cases where damages were recovered for dangers on the highway amounting to a public nuisance. However, many of the cases referred to by the trial judge were claims for a public nuisance on the highway created by third parties such as adjoining land owners, rather than claims for public nuisance against a highway authority where that authority was not the creator of the nuisance. The distinction is critical because the non-feasance rule has no application to parties other than the highway authority.

**54.** In equating the two, the trial judge in my view fell into error. The non-feasance rule would effectively be set at naught if it only applied to claims in negligence but not in public nuisance. Such a limitation is quite inconsistent with the passages in the judgments I have

already highlighted. Although the High Court judgment in this case contains a consideration of whether negligence is a necessary ingredient to the establishment of liability in public nuisance, that can only be relevant here if the non-feasance rule is inapplicable to nuisance.

**55.** Thus, in *Hassett*, the defendant placed a heap of stones on the highway which caused the plaintiff's horse to shy and the defendant was liable for the consequences even though he had not been negligent. *Mullen & Ors. v. Forrester* [1921] 2 IR 412 was another case involving the liability of the owner of land adjoining the highway for causing a danger amounting to a public nuisance on the highway.

**56.** The judge also referred to *Skilton v. Epson and Ewell Urban District Council* [1936] 2 All ER 50. That case was brought against the highway authority for public nuisance and was relied upon by the plaintiff both in the High Court and in this court. There, the defendant council in the exercise of statutory powers under the Road Traffic Act 1930 inserted a stud or "cat's eye" in the highway. It subsequently became dislodged and as the plaintiff was cycling nearby, a passing car threw up the stud which knocked the plaintiff from her bicycle. The Court of Appeal held that the insertion of the stud was not done as part of the defendant's duty as highway authority to maintain the highway but that it amounted to a public nuisance for which it was liable.

**57.** I find it difficult to see how this case assists the plaintiff. Unlike in the present case, the defendant in *Skilton* created the nuisance by inserting the cat's eye which subsequently became dislodged. In fact, if anything the judgment is supportive of the Council's position here as it expressly recognises that the non-feasance rule applies to nuisance. Thus, Slesser L.J. says (at pp 53-54): -

> "The question which has to be decided by the court is this, essentially. Have the defects caused a nuisance in the highway? If they have caused a nuisance in the

highway, it may be that they are responsible to that individual who has been injured as a consequence of that nuisance; but there is an important exception to the general principle for nuisance in an action. In the case of the maintenance of highways, for a very long time indeed - in fact the law knows no view to the contrary - it has been held that a local authority who are the highway authority are not responsible for the mere non-repair of the highway. It is not necessary for this purpose, though the matter appears in some of the older abridgments, to go further back than the case of *Russell v. Men of Devon*, in which I think the side-note expresses accurately the view of the court:

> 'No action will lie by an individual against the inhabitants of a county, for an injury sustained in consequence of a county bridge being out of repair.' "

**58.** Slesser L.J. therefore, explicitly recognises that the non-feasance rule applies to nuisance. *Skilton* was referred to by Finnegan P. in *Flynn* where the plaintiff, as here, relied upon it as authority for the proposition that the defendants were liable for creating a danger on the highway by permitting the sign to be obscured. He said (at pp. 4090-4091): -

> "… I am satisfied that the Plaintiff cannot bring himself within the principle upon which [*Skilton*] was decided - that a common law liability might arise from acts done on or around the highway that have created a source of danger to users of the highway. In the circumstances giving rise to this claim the existence of the obscured sign does not constitute a nuisance.
>
> If no sign had been erected this could not give rise to a claim by an individual for damages for breach of statutory duty: *Glencar v Mayo County Council and Another* [2002] 1 IR 112**.** If the failure to erect a sign cannot give rise to liability can the Road Authority be liable if having erected a sign they fail to maintain the same by

ensuring that it remains visible? In *Gorringe v Calderdale MBC* **[**2004] 2 All ER at 334 Lord Hoffmann said: -

> 'If the Highway Authority at common law with no duty other than to keep the road in repair and even that duty was not actionable in private law, it is impossible to contend that it owes a common law duty to erect warning signs on the road. It is not sufficient that it might reasonably have foreseen that in the absence of such warnings, some road users might injure themselves or others. Reasonable foreseeability of physical injury is the standard criterion for determining the duty of care owed by people who undertake an activity which carries a risk of injury to others. But it is insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates the risk nor undertakes to do anything to avert it.' "

**59.** Here, the Council did nothing to create the risk nor did they do anything to avert it. They did not make things worse but merely failed to make them better. In commenting on *Flynn,* the trial judge noted that Finnegan P. did not suggest that the defendant could have no liability in nuisance by reason of the fact that it was the road authority. That is true up to a point. A road authority may be liable for a nuisance it creates but *Flynn* is certainly not authority for the proposition that a road authority is liable for a nuisance it merely inherits.

**60.** Consistent with that is the decision of the Supreme Court in *Kelly v. Mayo County Council* [1964] IR 315, also cited by the trial judge. Lavery J. considered that if the highway became damaged and a source of danger to users as a result of the passage of the local authority's lorries over it, that might amount to an actionable nuisance but on the facts, the Supreme Court was of the view that this had not been established. That again appears to be

no more than a statement of the principle that if the highway authority creates a public nuisance on the highway, it may be liable for it. That does not aid the plaintiff herein but more importantly, it says nothing to the applicability of the non-feasance rule to nuisance, which remains the law in Ireland

**61.** Thus, the trial judge's observation at para. 79, having analysed these authorities, that "[i]t seems to me that these cases are sufficient to defeat the contention made on behalf of the Council in the present case that the Council could have no possible liability in public nuisance and that, as the relevant road authority, its only liability would be in negligence, in the case of misfeasance" is not sound and does not follow from the authorities said to support it. The Council here is not contending that, *qua* roads authority, it has no possible liability in public nuisance. Its contention is a much narrower one, namely that it is not liable in public nuisance where the alleged danger was not created by it but was present when the road and lands were transferred to it and when the road was taken in charge.

**62.** The judge also referred to *O'Shaughnessy v. Dublin City Council and Others* [2017] IEHC 774 where the High Court held the defendants liable in respect of a piece of stone which jutted out from the foot of the wall of a Luas bridge constituting a public nuisance over which the plaintiff tripped. There, it appears that liability was imposed on the owners and operators of the Luas as adjoining landowners for adopting the nuisance created by its predecessor in title, which again is consistent with the earlier authorities.

**63.** At para. 82, the judge noted the Council's contention that it could have no liability in nuisance in circumstances where it had not created the alleged nuisance and had no knowledge of it and its reliance on the judgment of the High Court in *Dempsey v. Waterford Corporation* [2008] IEHC 55 in that regard. Having set out the facts of that case, the judge said (at p. 56): -

> "83. The Council seeks to rely on this decision to support its contention that it can have no liability in nuisance to the plaintiff in respect of the condition of the concrete surround at the cattle grid as it had neither created nor continued the state of affairs which existed there. However, this completely ignores the fact that it was the Council's predecessor in title, Shannon Development, who constructed or installed the cattle grid and concrete surround…"

**64.** The judge therefore, appears to again impute liability to the Council for the wrong of its predecessor in title, which I have already held to be erroneous. He appears to consider that the trigger for this liability was either the transfer in 2004, or the designation as a public road in 2011, or both. Neither had that effect, in my view, as already explained. He then returned to the theme of the failure to carry out an inspection: -

> "83. …I am satisfied that the Council did have the means of knowledge of the existence of the public nuisance created at that location in that it either carried out a survey and prepared a report on the road together with the other assets being transferred or, if it did not cover this road in any such survey or report, or if the road was for some reason excluded from the surveyor report, the Council nonetheless had the means of knowledge of the nuisance. In the event that the Council was unaware of the nuisance created by the condition of the concrete surround at the cattle grid, notwithstanding that Council witnesses were well aware of the cattle grid and that people including cyclists used it, such lack of knowledge was, in my view, due to the omission to use reasonable care to discover the true factual position."

**65.** I have already dealt with this conclusion and the reasons why I believe it to be incorrect. The knowledge or otherwise of the Council was entirely immaterial to its liability. The evidence established that from the acquisition of the assets by the Council in 2004, it

did nothing in relation to this cattle grid and concrete ramp. It follows from this, by the application of the non-feasance rule, that it can have no civil liability to the plaintiff, irrespective of the category or classification of such liability. Perhaps counterintuitively, even if the Council had full knowledge of the danger by being repeatedly warned about it, that is, as already explained, *nihil ad rem*.

**66.** Nor is that conclusion in any way affected by whether the nuisance was continued or adopted by the council. The trial judge considered that his conclusion was supported by the judgment of the House of Lords in *Sedleigh-Denfield v. O'Callaghan* [1940] AC 880 on which the plaintiff places reliance. That case did not involve a nuisance on the highway at all.

**67.** A trespasser put a pipe on the defendants' lands for carrying off rainwater. The defendants subsequently became aware of it and continued to avail of it. It became blocked and flooded the lands of the adjoining owner. The defendants were held liable even though they had not created the nuisance originally. The plaintiff relies on the following passage in the speech of Lord Atkin as support for its contention that the Council assumed liability for the nuisance in this case, even if they did not create it (at p. 899): -

> "In the present case, however, there is as I have said sufficient proof of the knowledge of the defendants both of the cause and its probable effect. What is the legal result of the original cause being due to the act of a trespasser? In my opinion the defendants clearly continued the nuisance for they come clearly within the terms I have mentioned above. They knew the danger, they were able to prevent it and they omitted to prevent it. In this respect, at least, there seems to me to be no difference between the case of a public nuisance and a private nuisance and the case

of *Attorney General v. Tod-Heatley*, is conclusive to show that where the occupier has knowledge of a public nuisance, has the means of remedying it and fails to do so, he may be enjoined from allowing it to continue. I cannot think that the obligation not to 'continue' can have a different meaning in 'public' and in 'private' nuisances."

**68.** The trial judge extrapolated from this that liability in public nuisance could still arise in circumstances where the nuisance was continued and adopted by the Council in this case, as he found. I cannot agree with that conclusion for the reasons I have already given. The judgment in *Sedleigh-Denfield* contains no implications for the non-feasance rule and is simply irrelevant to it. The fact that it has been followed in this jurisdiction in cases such as *Larkin v. Joosup* [2006] IEHC 51 and *UCC v. ESB* [2015] IEHC 598 does not advance matters.

**69.** At para. 86 the trial judge said: -

"As I have indicated earlier, in my view the Council is liable to the plaintiff in public nuisance as the nuisance was created by its predecessor in title but was continued or adopted by the Council in circumstances where the Council failed to do anything about it at the time of, or subsequent to, the transfer in 2004 and the designation of the road as a public road in 2011. The Council, therefore, failed without undue delay to remedy the nuisance when with ordinary reasonable care it ought to have become aware of the situation had it addressed it."

**70.** This conclusion by the trial judge is as radical as it is novel. With respect, I do not believe that any of the authorities to which the judge refers can be taken to support this proposition, which is contrary to centuries of jurisprudence. A duty to remedy a nuisance not created by the Council simply cannot co-exist with the non-feasance rule.

**(iv) Occupier's Liability/Council as owner of the soil**

**71.** It is, as I have said, not entirely clear if the trial judge based his conclusions on liability on the asset transfer in 2004 or the subsequent designation as a public road in 2011. He did, however, recognise that there were potential difficulties with the concept of occupier's liability where a public highway is concerned, although he found it unnecessary to decide that point in the light of his previous determination on negligence and nuisance. I agree with the views he expressed concerning the Occupiers Liability Act, 1995. The highway authority is not the occupier of the highway. That is evident from the fact that the public has the right to pass and repass over the highway and cannot be excluded by the owner of the soil.

**72.** In *McGeown v. Northern Ireland Housing Executive* [1995] AC 233, the plaintiff tripped on a dangerous hole in the footpath of a housing estate where she lived, which was owned by the defendant. The plaintiff brought a claim for damages, inter alia based on an alleged breach of the Occupiers Liability Act (Northern Ireland) 1957. The House of Lords held that a person using a public right of way did so by right and could not be the visitor of the owner of the land over which the way passed for the purposes of the Occupiers Liability Act. Accordingly, the landlord was not liable to the user of a public right of way for negligent non-feasance.

**73.** In the passage of Lord Hoffmann's judgment in *Gorringe* to which I have already made reference, he also expresses the view that the highway authority is not the occupier of the highway and does not owe the common duty of care.

**74.** A similar conclusion was arrived at by the High Court in this jurisdiction in *Stephenson v. Sligo County Council* [2019] IEHC 617. The plaintiff was caused to slip and fall on a public access road to Aughris Pier in County Sligo. She pleaded, *inter alia*, a breach of s. 4(4) of the Occupier's Liability Act, 1995. The plaintiff's complaint was that the defendant

had failed to properly remove slippery material from the surface of the road, relying in effect, on non-feasance. It should be noted that this judgment post-dates the High Court judgment in the present case.

**75.** In a section of his judgment, Haughton J. considered the application of the Occupier's Liability Act, 1995 to a road authority. There was no direct evidence as to the ownership of the road but Haughton J. was satisfied that the evidence pointed to it being part of a public roadway, which was probably constructed by the Grand Jury along with the pier to which it afforded access. While there was no evidence that the road was formally taken in charge by the defendant, he was satisfied that it was a public road within the meaning of the Roads Act, 1993. This was also clear from the fact that the defendants had undertaken works on the road some years earlier.

**76.** He concluded therefore that the claim against the defendant council was in their capacity as road authority. Interestingly, he noted at para. 71 that "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 Occupiers Liability Act 1995…"

**77.** He went on to say (at para. 72): -

> "…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. Christie sought to rely on s.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] IR84 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.
>
> 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."

**78.** Accordingly, Haughton J. concluded that the Occupier's Liability Act, 1995 had no application and that the common law rule concerning non-feasance applied.

**Evidence concerning the danger**

**79.** For completeness, I should refer to this point, described by counsel for the Council as very much a secondary point. Although the trial judge held that Shannon Development was negligent in constructing this cattle grid and concrete ramp in the manner it did, it is clear that the danger and hence, the public nuisance, only eventuated when the concrete edge broke away. As the trial judge remarked, when this occurred was never established. If it could be said that the Council had any liability arising from its failure to inform itself of the danger, whether by inspection or otherwise, there was, in fact, no evidence to establish that it could have done so.

**80.** As I have already noted above, the concrete could have broken away at any time, even in theory on the morning of the plaintiff's accident, and thus an inspection in 2004 or 2011 might have revealed nothing. That is true as far as it goes, but the counter-argument to that point is that even in the absence of the broken concrete, an inspection ought to have disclosed that the ramp was defectively designed and liable to disintegrate at any time. However, in my judgment, nothing really turns on this in the circumstances already outlined.

**Conclusion**

**81.** It is impossible not to feel considerable sympathy for the plaintiff in this case. He was engaging in a harmless and healthy leisure pursuit when an accident befell him, largely not of his making, which has had permanent and serious repercussions for him. One instinctively feels that a remedy ought to be available for someone like this plaintiff who falls victim to the negligence of a public body, albeit not the defendant in this case. The ancient non-feasance rule which originated in England has long since been abolished there but still holds sway in this jurisdiction. Perhaps it is time for it to be re-evaluated, but such is now beyond the competence of the courts.

**82.** It is with some regret therefore that I would allow this appeal, set aside the Order of the High Court and dismiss the plaintiff's claim.

**83.** My provisional view with regard to costs is that as the Council has been entirely successful in this appeal, it should be entitled to its costs in this court and the court below. The point of principle at issue in this case is a very important one, not just for the parties to these proceedings but many other public authorities. This judgment will undoubtedly be of assistance to such bodies. In the light of that fact and the comments I have already made, I would strongly urge on the Council that it might reasonably consider not seeking its costs in these proceedings against this unfortunate plaintiff. If the plaintiff wishes to contend for an alternative form of order, he will have liberty to apply to the Court of Appeal Office within fourteen days of the date of this judgment for a short supplemental hearing on costs. In default of such application, an order in the terms proposed will be made unless within the same period the court is informed by the parties that an accommodation has been reached.

**84.** As this judgment is delivered electronically, Faherty and Collins JJ have indicated their agreement with it.