[2019] IEHC 330

THE HIGH COURT

[2015 No. 9346 P]

BETWEEN

EDWARD O'RIORDAN

PLAINTIFF

AND

CLARE COUNTY COUNCIL AND RESPONSE ENGINEERING LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice David Barniville delivered on the 21st day of May, 2019

Introduction

1. On Sunday 3rd August, 2014 in the late morning or early afternoon, the plaintiff, who was then aged 64 years, and living locally in Shannon, was out for a leisurely cycle on a bicycle his adult children had purchased for him about three years previously in anticipation of his pending retirement at age 65. It was a fine summer's day and the plaintiff having set out in a particular direction from his home in Shannon decided to change course and to head on his bicycle towards an area outside Shannon known as Clonmoney South, which was well known in the locality as a beauty spot frequented by generations of families from the area and by walkers, runners and cyclists of varying ages and abilities. The plaintiff proceeded down the public road at Clonmoney South which in addition to being a public road is also under the ownership of the first defendant, Clare County Council (the "Council"). The road is known locally by some as the "Diamond Road" (as the diamond company, DeBeers, operates or operated a facility at the end of the road). The road leads to a waste water treatment plant operated by the second defendant, Response Engineering Ltd ("Response"), and a cul-de-sac at the end of the road. As the plaintiff attempted to negotiate his bicycle over a cattle grid which had been constructed or installed on the road, he fell from his bicycle suffering a very serious injury to his left ankle which has left the plaintiff with permanent damage to the ankle and requiring a fusion of the ankle or a replacement of the ankle joint. The cause of and responsibility for the plaintiff's fall and consequent serious injuries are at the heart of this case which was heard by me in the High Court in Limerick over five days in February 2019.

2. While the facts of the case are relatively straightforward, the case gave rise to a number of difficult legal issues on which counsel made very helpful oral legal submissions and provided me with numerous cases in support of their respective positions at the conclusion of the evidence. The legal issues required careful consideration. Having done so, I have concluded that for the reasons set out in this judgment, the plaintiff is entitled to succeed in his case against the Council in negligence and nuisance. It has not been necessary for me to resolve other difficult legal issues which arise under the Occupiers' Liability Act, 1995 (the "1995 Act") or under the Roads Act, 1993 (as amended) (the "1993 Act (as amended)"). I have also concluded that the plaintiff must bear some responsibility for the accident and I have concluded that the plaintiff is guilty of contributory negligence to the extent of 25%. Having regard to the very serious injuries sustained by the plaintiff and the impact of those injuries on him, I have assessed general damages for pain and suffering to date at €95,000 and into the future at €45,000 giving a total for general damages in the sum of the €140,000. Special damages were agreed at €11,206.50. Taking account of the plaintiff's contributory negligence, there will, therefore, be an award in favour of the plaintiff of €113,404.87.

Structure of judgment

3. I will adopt the following structure in this judgment. First, I will provide a summary of the plaintiff's claim against the Council and the Council's defence to that claim. I will then consider the liability issues, outlining first the evidence and then my findings of fact in relation to liability. I will then consider the legal issues which arise before setting out my conclusions on those legal issues and on the liability issue. I will then proceed to consider the question of quantum, looking first at the evidence relating to quantum and then the relevant legal principles applicable to quantum before setting out my conclusions on quantum. I will then summarise my overall conclusions and the award which I propose making.

Summary of claim and defence

4. In summary, the plaintiff contends that his fall and consequent injuries were caused by the negligence, nuisance and breach of statutory duty on the part of the Council and/or Response, their respective servants or agents, by reason, principally, of the condition of the cattle grid where the plaintiff fell and, in particular, by reason of the state of the concrete area surrounding the grid. The plaintiff claims that the state of the concrete surround (or "ramp" or "dome" as it was described on behalf of the plaintiff) was such that there was a rise and then a sudden drop from the concrete surround onto the metal bars of the grid which was unexpected and caused the plaintiff to lose control of his bicycle as he proceeded cautiously from the paved surface of the roadway over the concrete surround or ramp and onto the start of the metal bars of the cattle grid itself. The plaintiff claims that the Council and/or Response, their respective servants or agents, were responsible for the condition of the concrete surrounding the grid and the grid itself and that it was caused to be in the condition it was in at the time of the accident with a drop of about one inch (25mm) from the concrete surround or ramp onto the first of the metal bars of the grid as a result of the defective and negligent design, construction and installation of the grid and, in particular, the concrete surrounding it. In the alternative, the plaintiff claims that the concrete surround or ramp immediately before the grid which led to a sudden drop of the type referred to amounted to a danger to the users of the public roadway and, therefore, a public nuisance. The plaintiff advanced additional claims under the 1995 Act to the effect that he was either a "visitor" or a "recreational user" within the meaning of those terms in the 1995 Act and that the Council/Response are liable to him under the relevant provisions of that legislation. Additional or alternative claims were advanced (but not really pursued with any vigour) under the 1993 Act (as amended).

5. The proceedings were defended by the Council on its own behalf and on behalf of Response and it is appropriate, therefore, to refer only to the Council in terms of the liability and other issues in the case. The Council denies liability under each of the heads of claim advanced by the plaintiff. The Council rejects the contention that the concrete surround was or could properly be classified as a "ramp" or that it posed a danger to the users of the road, such as the plaintiff. The Council contends that the plaintiff ought not to have had any difficulty in negotiating the cattle grid on his bicycle and that, if he felt that there was any difficulty in doing so, he should have dismounted his bicycle prior to the cattle grid and walked around the cattle grid through a gap between a pillar and a number of boulders to the left side of the pillar. The Council disputes the description of the accident given by the plaintiff and contends that it must have occurred in some other way to that described by the plaintiff. On the legal issues, the Council contends that in its capacity as the highway authority or road authority it could have no liability to the plaintiff in negligence having regard to the doctrine of nonfeasance. The Council asserts that it took over the road in question including the cattle grid and its concrete surround from Shannon Development when it took a transfer of assets of Shannon Development including roads, footpaths, open

spaces, waste water treatment plants, pumping stations, storm and foul water systems and other assets in 2004. It did not carry out any works to the roadway in question and, in particular, to the cattle grid and concrete surround following its acquisition in 2004 or subsequent to its designation of the road as a public road in 2011. It claims, therefore, to be entitled to rely on the doctrine of nonfeasance. In response to the claim in nuisance, the Council claims that it can have no liability by reason of its status as the highway or road authority and that as the cattle grid and concrete surround is not a danger to the public and was not installed by the Council, it can have no liability to the plaintiff in nuisance. As regards the claim under the 1995 Act, the Council contends that in the event that the 1995 Act has any application, the plaintiff was a "recreational user" and that having regard to the duty owed by an occupier towards a recreational user of premises not to injure the person intentionally and not to act with reckless disregard for the person, the Council can have no liability to the plaintiff under the 1995 Act. Further, the Council relies on the duty on a person using a public road to take reasonable care for his or her own safety and to take all reasonable measures to avoid injury to himself as well as the duties at common law in order to defeat the plaintiff's claim or, alternatively, to support a finding of contributory negligence against the plaintiff.

6. In brief response, with regard to the negligence claim, it is contended on behalf of the plaintiff that his claim is for misfeasance and not nonfeasance by reason of the defective and negligent construction of the concrete surround or ramp at the cattle grid and that the Council must bear responsibility for the negligence of its predecessors in title. With regard to the nuisance claim, it is contended that the Council is liable for maintaining the nuisance created by its predecessor in title from whom the Council acquired the road and cattle grid and that it cannot escape responsibility by reason of the fact that the cattle grid and its concrete surround or ramp constituted a danger to those using the road by reason of the fact that its predecessor in title constructed or installed the grid and its concrete surrounds.

A. Liability

The evidence: liability

(1) The Plaintiff's Evidence
7. On the plaintiff's side, the witnesses called on behalf of the plaintiff on the question of liability were (a) the plaintiff himself, (b) Inspector Tom Kennedy of An Garda Síochána, (c) Mr. Gerry McIntyre and (d) the plaintiff's consulting engineer, Mr. Michael Flynn.

(a) The Plaintiff
8. The plaintiff gave evidence as to his personal circumstances. He was born on 13th May, 1950 and is a married man with three adult children. The plaintiff was employed as an accountant in the finance department of the HSE in Co. Clare and retired on 13th May, 2015, on his 65th birthday. This was after the accident the subject of the proceedings. The plaintiff lives with his wife in Shannon, Co. Clare. He explained that about three years before the accident, his three adult children clubbed together and bought him a bicycle with the intention that he would take up cycling in anticipation of and following his retirement. The bicycle was a Falcon Shadow Terrain mountain bike. Photographs of the bicycle were attached to the report of the Council's consulting engineer, Mr. Brendan Twomey. The bicycle is in the mountain bike style, with the wide wheels and tyres characteristic of that style of bicycle and with enhanced suspension at the front and rear wheels. In the two years or so prior to his accident the plaintiff would go for a bicycle ride about two or three times per week, normally for about ten miles (16 km). The plaintiff explained that on Sunday 3rd August, 2014 he decided to go out for a cycle in the late morning. It was a lovely August day. The plaintiff left his house and was cycling for about half an hour when he decided he would alter his course and instead head towards the road at Clonmoney South. He was familiar with the area since the early 1960's and explained that it was a place where families and other people from the locality of Shannon would go during fine weather as it was close to the Shannon Estuary and about fifteen minutes walk from Shannon town. There is a good view of the Shannon River Estuary and the mountains in the distance from the road. At the end of the road there is a water treatment plant which is now operated by Response. There is also a facility on the road owned by DeBeers. I interject here by noting the fact that it is agreed that the road came into the ownership of the Council in 2004 when it was transferred with other assets to the Council by Shannon Development. It is also agreed that the road is a public road. The Council's evidence was that it was so designated in 2011 albeit that the mechanism by which it was designated was not clarified or explained in evidence. The road is classified as a local tertiary road and was given the number L73481 in 2011 by the Council as the relevant road authority.

9. The plaintiff explained that he entered the road from the top and proceeded down the road at a "*leisurely*" pace. He encountered a gateway and cattle grid (being the first of a number of cattle grids on the road). There were pillars on either side of the gateway and cattle grid and a gate which was open. There was subsequent evidence that the gate remained open at all times and indeed the only person that ever saw the gate closed was the Council's consulting engineer, Mr. Twomey. As of the date of the accident, there was a sign on the left hand pillar containing the words "*Private Road: Access to Authorised Personnel Only: This gate may be locked at any time*". There was a gap to the left of the left hand pillar, between the pillar and a series of boulders. The plaintiff explained that as he entered onto the cattle grid on his bicycle, the front of the bicycle dipped down dramatically and in an unexpected fashion causing him to lose control of the bicycle. The plaintiff fell to the left and the bicycle to the right. The plaintiff attempted to save himself with his left foot and described his ankle as being crushed in the fall. He fell onto the metal or steel bars of the cattle grid towards the left of the grid. He explained how he fell by reference to a series of photographs taken by the plaintiff's consulting engineer, Mr. Flynn on 17th June, 2015. Mr. Flynn's photograph 1 showed the sightline which the plaintiff had as he approached the gate and cattle grid. Photograph 2 is a photograph taken from the same direction but closer to the gate and cattle grid. The plaintiff indicated that he was cycling towards the left side of the grid. It is Photographs 5 and 6 were taken from the far side of the cattle grid towards the direction from which the plaintiff was travelling. Photograph 7 is a close up of the sign on the left hand pillar and the gap between the pillar and one of a number of boulders. The plaintiff explained that the sign was always there and that the gate was never closed as far as he was concerned.

10. The plaintiff was assisted by a member of the local model aircraft club which operated close by. He had suffered a serious injury to his left ankle and was weak and in a lot of pain. The man telephoned the plaintiff's wife and the ambulance. Both came without delay. The plaintiff was taken to University Hospital Limerick where he was initially seen in the Emergency Department, treated for his pain and operated on the following day for a very serious fracture of his left ankle. I will return to the plaintiff's injuries and the effect they had on the plaintiff later in the judgment. Suffice to say at this stage that the plaintiff continues to suffer from the effects of the injuries he sustained in the accident.

11. The plaintiff was extensively (but appropriately and courteously) cross examined on behalf of the Council. He was challenged over the circumstances and mechanism of his fall. It was put to him that the account given by him of the circumstances of the accident differed in the various descriptions given by the plaintiff such as in his application to the Personal Injuries Assessment Board, in his personal injury summons, in the report of Mr. Byrne, his consulting engineer, and in the hospital notes. The plaintiff was entirely consistent in the evidence which he gave in relation to the circumstances of his fall. He consistently explained in his direct evidence and under cross examination, that as he was cycling towards the grid and over the concrete surround or ramp, his bicycle dropped or dipped "*dramatically*" and in a sudden and "*unexpected*" fashion causing him to lose control and fall on the cattle grid. I am satisfied

that there is nothing in the plaintiff's application to the Personal Injuries Assessment Board (which stated, at para. 5, that as he was cycling over the cattle grid, he was caused to come off his bicycle and hit the ground violently), in his personal injury summons (which stated that he was caused to be thrown off his bicycle by reason of a "*sudden drop at or on approach to a cattle grid on the …roadway"*) or in the report of Mr. Flynn (which recorded the plaintiff's account of the accident as being that "*having left the concrete surface of the roadway onto the metal cattle grid area, there was a sudden drop which caused the front wheel of his bicycle to drop down causing him to lose his balance, fall forward and receive personal injuries*") which was inconsistent with the evidence the plaintiff gave in evidence. Any minor differences were, in my view, completely insignificant.

12. There was a difference between what was recorded concerning the circumstances of the accident in the case notes in the Emergency Department of the Hospital where it is suggested that while cycling his bicycle over a "*cow grate*", the tyres "*got stuck*" and the plaintiff fell from his bicycle and suffered a "*twisting injury to the left ankle*". The plaintiff disagreed with that recorded account of the accident and noted that the record was entered by a member of staff at the hospital at 19:40 on the evening of his accident. The plaintiff disagreed that the record accurately described how the accident occurred and was not in a position to explain how the staff member had interpreted the circumstances of the fall in that way. The hospital staff member was not called to give evidence to explain the circumstances in which the information recorded in the case was taken from the plaintiff and, specifically the condition of the plaintiff when the account of the accident was given by him. The plaintiff said in evidence that by that stage he had been given "*copious amounts of morphine*". I do not believe that there is any significance to the slight difference between the account given by the plaintiff in evidence and what was recorded in the case notes in the hospital. I am satisfied that the account of the accident given by the plaintiff in the other documents to which reference was made by the Council is entirely consistent with the evidence which the plaintiff gave in his direct evidence and under cross examination.

13. The plaintiff accepted under cross examination that he had cycled down the road once before and had cycled over the cattle grid without any difficulty. He accepted that he knew the cattle grid was there.

14. It was suggested to him that he should have dismounted from his bicycle before negotiating the cattle grid, or at least should have slowed down. In response, however, the plaintiff explained that he was proceeding with "*tremendous caution*" and that he was a "*cautious man*". He stated that he was proceeding at a "*leisurely pace*" and mentioned that he was proceeding at approximately walking pace. He slowed down before approaching the cattle grid. He said that he had taught his children how to ride bicycles and was riding this bicycle very carefully. When, somewhat inconsistently with previous questions, it was put to the plaintiff that he may have fallen because he was going too slowly, the plaintiff rejected that suggestion. He explained that he approached the cattle grid on the assumption that he could navigate it properly on his bicycle. He decided that he did not need to dismount from his bicycle as he assumed that the terrain ahead was safe to cycle over on the basis of what he could see. He could see that there was a cattle grid but did not see the drop from the concrete surround or ramp onto the metal bars of the grid until it was too late. He confirmed that as he entered onto the cattle grid, the front of his bicycle dipped dramatically and in an unexpected fashion causing him to lose control and fall. He reiterated his explanation that as he fell, the bicycle went to his right and frame of his body went to the left and that he came down heavily on his left ankle. He confirmed that his bicycle did not skid and stated that he was going very slowly and had come down in the gears on his bicycle as he approached the cattle grid. The plaintiff rejected the suggestion that he had either driven too quickly or too slowly over the cattle grid. While he had cycled over the grid, on one previous occasion, he had not experienced the sort of sudden and dramatic drop which he had on this occasion. He rejected the suggestion put to him on behalf of the Council that the accident could not have occurred in the manner in which he described and that his bicycle had not slid or slipped on the metal bar as was suggested by the Council's engineer. He did not agree that the front wheel of his bike had gone down between the metal bars of the grid and that that had caused him to fall. It was put to him that if he had dismounted from his bicycle and walked through the gap between the left hand gate pillar and the boulders, the accident would not have happened. However, it was also put to him as part of the same sequence of questions that many people had been able to cycle over the cattle grid without any difficulty at all. It was not, therefore, really suggested to the plaintiff that it was not appropriate for him to cycle over the cattle grid and that it was absolutely necessary for him to walk his bike through the gap between the left pillar and the boulder. I assume that the Council backed off taking the absolute position that the plaintiff ought to have dismounted and walked his bicycle through the narrow gap in light of the significant evidence available that people did regularly cycle over the cattle grid.

(b) Inspector Kennedy

15. The next witness who gave evidence on behalf of the plaintiff was Inspector Tom Kennedy who was stationed in the Shannon area for more than 23 years, 20 of them as inspector. He was familiar with the road on which the plaintiff had his accident and confirmed that the road served as an amenity for the people of Shannon over the years attracting walkers (with or without dogs) and cyclists because of its sylvan setting and Estuary views. He confirmed that he himself had met walkers and cyclists on the road and that he could see no impediment to people using the road. He accepted that there was a sign on the left pillar (as described earlier) but it was noted that it was quite obstructed with peeling paintwork. Inspector Kennedy had not taken any notice of that sign before and that he had not realised that there was a gate there and had never seen it closed. He understood that the road served as a public amenity to which members of the public had access. While he had met cyclists on the road, he had not himself seen them cycling over the grid.

(c) Gerry McIntyre

16. The next witness to give evidence on behalf of the plaintiff was Mr. Gerry McIntyre. He is a physiotherapist by occupation and a member of a local cycling club. He grew up in the Shannon area and became very familiar with the road over the years. He himself regularly runs, walks and cycles on the road in both winter and summer. He explained that this could be four or five times per week. He described it as a "leisure area" for the people of Shannon. He cycled his bicycle down the road, mainly in the summer months. He cycled over the cattle grid and not dismounting. He did not have the difficulty in doing so. He was unaware that there was a gate at the cattle grid.

(d) Michael Flynn

17. Mr. Flynn, the plaintiff's consulting engineer, then gave evidence. He went through the photographs he had taken. Photographs 1 – 7 were taken at the time of Mr. Flynn's inspection at the locus of the accident on 17th June, 2015. Photographs 8, 9 and 10 were taken in the days preceding the hearing in February 2019.

18. In his report, Mr. Flynn described the grid and its dimensions (3.8 m wide x 1.35m long). On approach to the cattle grid he explained that there is 500mm of concrete on each side of the grid with a large pothole just before the concrete on the side from which the plaintiff was travelling. There is a drop between the concrete and the steel bars of approximately 1 inch (25mm) and 1¼ inch (32mm) (from the concrete onto the metal bar) which he stated would not have been visible to a cyclist on approach (from the plaintiff's direction). The report then described the left hand pillar or pier of the gate which was some 400mm x 400mm with a 500mm gap between the pillar and a boulder (to the left) which he stated "*may be suitable for pedestrians to walk slowly through…*" but would not be suitable for a cyclist as both the width of the gap and also the condition of the ground would not be suitable for a bicycle. He stated in the report that a drop of 1 inch (25mm) and 1¼ inch (32mm) down from the concrete on to the metal bars

would not have been clearly visible to the plaintiff as he approached the grid and that it would be considered a "*hidden trap or a hazard*". He also stated in the report that there was little evidence of maintenance in the area of the cattle grid as grass was growing through the grid and large potholes were evident on both sides of the grid. He concluded his report by stating that the condition of the cattle grid and particularly having regard to the drop between the concrete surround and the metal bars would be a potential hazard as the drop of 1½ inches (sic) would cause a cyclist to lose his or her balance and fall. His opinion was that the concrete surround area should have been maintained or a suitable passing area should have been provided for pedestrians and cyclists. Further he stated in the report that instruction could have been given to cyclists to dismount prior to crossing the cattle grid.

19. When asked in his direct evidence about the purpose of the concrete surround or "*ramp*" or "*dome*", as it was variously called on behalf of the plaintiff, Mr. Flynn stated that he could not understand why it was there. The cattle grid itself was visible to users of the road and he also noted that there are other grids on the road (Mr. Flynn said there are two others and Mr. Twomey on behalf of the Council said there are three) which do not have this concrete surround or ramp or dome. He described the concrete surround as creating a hump which comes down onto the cattle grid itself. It was an "*unusual feature*". If it was intended to be a speed bump he would have expected it to be placed remotely from the cattle grid and also that it would have been highlighted like speed bumps in carparks. The purpose of highlighting it would be to give an early warning to users of the road of this change or rise and fall in the level of the roadway. He explained that the concrete surround effectively creates and accentuates a drop on to the cattle grid. In terms of its installation, his opinion was that the dome of concrete was installed and poured over the steel bars and demonstrated this by reference to his photograph 6 which he stated showed that the concrete had been poured onto the first steel or metal section of the grid and that that portion of concrete had been broken off when cars travelled over it. He explained that the concrete should have been tapered down and should not have left an edge or lip created by the concrete breaking up with vehicles travelling over it. He also demonstrated this "*lip*" and what he called a "*sheer edge*" by reference to his photograph 10 (taken in the days prior to the hearing) which he said clearly demonstrated that the concrete had broken away where it had been laid over the metal bar of the grid. He further demonstrated this "lip" or "sheer edge" by reference to a €2 coin which he said demonstrated a drop of approximately 1 inch (25mm) from the concrete on to the first of the metal bars of the grid which he described as a "*sudden drop".*

20. His evidence was that there were a number of defects in the manner which the concrete surround or ramp or dome was installed. The first was that the concrete was poured over the first of the metal bars of the grid which made it inevitable that the concrete would break up with vehicles travelling over it, creating the lip or drop referred to. Second, it should have been set back from the grid creating a distance between the concrete surround and the grid itself. Third, if its purpose was as a speed ramp, it ought to have been highlighted.

21. He explained by reference to the plaintiff's account of the accident given to him (which is consistent with the plaintiff's evidence at the hearing) that the plaintiff approached the cattle grid to the left of the centre of the grid and concrete surround, being where the 1 inch drop existed and that the plaintiff would not have seen that drop on his approach. He explained this by reference to his photographs 2, 3 & 4. He also stated that he had never seen such a concrete edge or surround like this in other grids. In commenting on Mr. Twomey's photographs, he described the area as being not as overgrown when Mr. Twomey photographed it (in March 2016). He also expressed a view that the gap between the left hand pillar and the boulder (approximately 500mm) was not wide enough to enable cyclists to walk side by side with his or her bicycle and that the bicycle would have to be thrown or pushed ahead of the cyclist. If it had been intended that this was to be the route to be taken by cyclists, he would have expected that it would have been of sufficient width and also that there would have been some signage requesting cyclists to dismount and to use the gap to the left to get past the cattle grid.

22. Under cross-examination, Mr. Flynn accepted that the area was not a specially designated amenity area but stated that it was, and is, used as an amenity for people within the locality. He agreed that the road had been acquired by the Council in 2004 from Shannon Development and that it had also been taken in charge by the Council as a public road. It was put to him that the cattle grid in question was present when the Council took it over in 2004 and that the Council had done no works to it since then. Mr. Flynn explained that in his view the concrete surround or dome was installed after the cattle grid but he could not say when it was done. At that stage there was some uncertainty as to whether the Council owned the road. However, it was subsequently clarified that the Council does own the road and also designated the road as a public road. Mr. Flynn's evidence was that if the Council took over the road, there was an onus upon it to ensure that it did not contain a feature or features which posed a risk to users of the road. When it was pointed out to him that Mr. Twomey did not accept that there was a "*sheer drop*" or that the concrete had been poured onto the metal bar of the cattle grid, Mr. Flynn disagreed and again referred to his photograph 6 (taken at the time of his inspection in June 2015) and his photograph 8 which he said demonstrated the concrete covering the first of the bars of the cattle grid and that the concrete had broken away at that point. When it was put to him that Mr. Twomey's view was that this was merely a "*deflection*" and not a "*drop*", Mr. Flynn strongly disagreed stating that one would not expect a deflection of 1 inch (25mm). He reiterated that, in his view, if a dome was installed at the cattle grid, it should have been tapered down so as to ensure no leading edge or drop. In contrast to a pothole where a cyclist could prepare himself or herself for a change in road level, the plaintiff was unable to do so here as he was faced with a sudden drop for which he was unprepared. Mr. Flynn confirmed that the plaintiff had shown him that the route he had taken was over the left side of the concrete surround and of the cattle grid which was where the 25mm/1-inch drop was present. Mr. Flynn clarified the dimensions of the concrete dome or surround by indicating that the height from the top of the concrete surround to the metal bar was in total 2¾ inches (70mm) with the last 25mm (1 inch) being the drop from the concrete onto the metal. Mr. Flynn stressed the fact that this drop was unexpected and could not be seen by an approaching cyclist who would not therefore be in a position to prepare himself or herself for the drop. He also explained that the concrete surround had "*all the characteristics*" of a speed ramp or bump. When it was put to him that the concrete surround could have been installed in order to prevent water getting into the cattle grid, Mr. Flynn did not agree stating that if that had been its intention, he would have expected the surround to have be of uniform height across all sides of the cattle grid. Mr. Flynn also explained that he himself had felt the impact of the drop when driving across the cattle grid in his car. He experienced a rise and they a clunking sound as the car passed over the concrete surround and onto the cattle grid. He did so to stress the impact of the drop and to demonstrate how that would have been experienced by a person cycling over the ramp and on to the grid.

23. Mr. Flynn was satisfied that the accident could well have occurred in the way in which the plaintiff described it and rejected the alternatives posited on behalf of the Council (such as the front wheel of the bicycle being caught between the gaps in the metal bars of the grid, which he said would not have occurred unless the front wheel was perfectly parallel with the bars).

24. As regards the gap between the pillar and the boulder to the left of the cattle grid, he accepted that a cyclist could shove his or her bike through the gap but could not cycle through it. However, it was again not forcefully suggested to Mr. Flynn that cyclists ought to proceed through this gap as, almost in the same breath, it was put to Mr. Flynn that cyclists can cross the cattle grid without any problem (and reference was made to Mr. McIntyre's evidence in that regard). Mr. Flynn explained that if cyclists cycled their bicycles over the centre of the grid then they would not experience the drop or lip which caused the plaintiff to fall. Mr. Flynn concluded by explaining that the cattle grid and its surround was an integral part of the road which posed a danger to users of the road such as the plaintiff who are unable to see the drop or the height of the ramp as they approach it.

(2) The Council's evidence
25. The Council called four witnesses on the liability issue. They were:

(a) Mr. Michael Healy (an executive engineer with the Council),

(b) Mr. Eugene O'Shea (a retired senior executive engineer with the Council),

(c) Mr. Aidan O'Rourke (a senior executive engineer with the Council), and

(d) Mr. Brendan Twomey, a consulting engineer engaged by the Council.

(a) Michael Healy
26. Mr. Healy commenced working as an executive engineer with the Council in 1999 and still does. He worked in the Shannon area from 2004-2012. He explained that in 2004, the Council took over several assets and services from Shannon Development including the road which is the subject of these proceedings and the waste water treatment plant at the end of the road. He agreed that the Council was responsible for maintaining the road under the Road Acts. He confirmed that the cattle grid at which the plaintiff had his accident was there when the Council acquired the road in 2004 and that the Council carried out no work during his time with responsibility for the Shannon area (up to 2012). He further stated that the Council maintained a register of complaints and could not recall receiving any complaints in relation to the cattle grid and surrounding concrete area. He did not consider the concrete surround or ramp or dome to amount to a hazard to users of the road.

27. Under cross-examination, Mr. Healy confirmed that he was not involved in the transfer of the assets (including the road) from Shannon Development to the Council in 2004. He accepted that when assets were being transferred to or acquired by the Council (such as when it takes a housing estate in charge) it is normal that it would carry out an inspection or survey to assess whether there were any defects in the roads or other assets being transferred or taken in charge and, in the event that there were, the Council would go back to the developer and require those defects to be rectified before the estate or road was taken in charge. It would also be normal for a report to be prepared in respect of such an investigation. However, Mr. Healy was not in a position to confirm whether an inspection or survey was carried out or report prepared in respect of the transfer of the assets from Shannon Development to the Council as he was not involved. It was a very significant takeover of assets (one of the largest if not the largest transfer of assets in the history of the state). Mr. Healy believed that MCOS, Consulting Engineers were engaged by the Council at the time and did prepare reports although he did not believe that those reports dealt with cattle grids in general or the particular grid at issue. Mr. Healy confirmed that he had never come across a ramp beside or adjacent to a cattle grid although he was familiar with speed ramps on roads which would be marked or highlighted. These, he said, were totally different to the cattle grid in question. He did not believe that the purpose of the concrete surround was to act as a ramp and that it was "possibly" to divert water from the cattle grid. He accepted that the normal purpose of a ramp was to reduce speed by impeding the progress of vehicular traffic. He also accepted that ramps needed to be highlighted or signalled in advance. While disagreeing that the concrete surround was designed to act as a speed ramp, he agreed that if he had designed a ramp or other measure for traffic calming he would always have ensured that they were highlighted so as to warn people of their existence. It had never occurred to him that the concrete surround was in fact intended to act as a speed ramp and he described it as a "*concrete base*" or "*concrete reinstatement around a cattle grid*". He thought its purpose may have been to secure the cattle grid in place although he could not answer what feature of the concrete surround led to his view that it was not a ramp. It did not strike him as a speed ramp although he accepted that there was a drop or, as he described it, a "*vertical difference*" between the concrete surround and the cattle grid. He said that it was not like any ramp which he had designed or installed during his time as an engineer. He confirmed that if it was a ramp, he would not have permitted it to be constructed or installed so close to the cattle grid and that if he had been designing it as a speed ramp, he would have located it some distance in advance of the grid although he stated that there was no real set distance specified. He would not have located it right beside the grid and confirmed that if it were a speed ramp (which he did not think it was), it ought to have been located at least one car length away from the grid. He also agreed that if he designed the cattle grid it would have been level and that he would not have allowed a drop in level of 25mm /1 inch to occur so as to avoid any possible lip or trip or fall hazard and to improve the "*ride-ability*" of the route for vehicles and bicycles.

28. Mr. Healy further confirmed that in the case of speed ramps (although he did not accept this was such) it is good practice to highlight them and to use signage. He further stated that he would not condone a drop of 25mm (1 inch) or see that as good practice in the case of a ramp. He then stated it was "*not desirable*" to have a drop of that type coming off a ramp. He could not answer the question as to why (if it be the case) the concrete feature at the cattle grid in question was not picked up in any report when the road was taken in charge (or the assets acquired).

29. On re-examination, Mr. Healy stated that he was unaware as to who had installed the cattle grid and that the Council had not carried out any works to it following the transfer. He further stated that the Design Manual for Roads and Bridges (DMRB) guidelines were only applicable to new roads and bridges and that this is not a new road. It is a local road providing access to the waste water treatment plant generally carrying local traffic only. On further questioning on behalf of the plaintiff, Mr. Healy was unable to answer at that stage whether the road was in the ownership of the Council as distinct from being a public road (that issue was subsequently clarified).

(b) Eugene O'Shea
30. The next witness for the Council was Mr. Eugene O'Shea (formerly a senior executive engineer with the Council with responsibility for the Shannon Municipal District ("SMD")). Mr. O'Shea retired in 2018. He stated that the SMD contained at least 300 kilometres of roads comprising regional, local primary, local secondary and local tertiary roads. The road in question here is a local tertiary road which he described as being on the lowest rung of roads and which attracted the lowest priority in terms of the allocation of resources. He stated that he assumed that the road and cattle grid were constructed and installed by Shannon Development, but he was not certain of that. He was not aware as to who designed the cattle grid and was not aware of any works being done by the Council on the cattle grid.

31. Under cross-examination, he confirmed that the road was transferred as part of a transfer of assets from Shannon Development to the Council in September, 2014. He further confirmed that the road was both a public road and within the ownership of the Council and that, therefore, the Council was both the land owner and the road or highway authority in respect of the road and had duties in both capacities. He stated that the Council treated the road as it would any public road. He did not recall seeing any order designating the road as a public road.

32. He agreed that normally when a road is taken in charge, an assessment would be made of the state of the road and a report

prepared. He was not aware as to whether any such assessment was carried out or report prepared referring to the road in question here. He stated that it was possible that such a report was done but noted that the transfer of assets was the largest transfer in the history of the State and included roads, footpaths, open spaces, waste water treatment plants, pumping stations and storm and foul water systems. He confirmed that he was aware that the road was used as a local amenity for the public and that he himself had availed of the amenity and had travelled the road for recreational purposes and for work. He confirmed that the Council was aware of the fact that the road was used by members of the public (along with all of the other public roads within the Shannon area). He confirmed that if an assessment or survey had been carried out and a report prepared, it would have looked at the condition of the road and considered issues such as whether the drainage system was functioning and whether the road surface was in good condition. It would also have considered whether there were any particular dangers or hazards on the road such as potholes. While not coming under the heading of a "risk assessment", it would have a similar purpose. Such an assessment or survey would not necessarily have been carried out by someone walking the road and could have been done by means of a "windscreen" survey. If anything unusual had been picked up on such a survey, it would have been reported on. If such a report existed in respect of the road or cattle grid contained on it, he would expect that it would be in the Council's archives. When asked whether anyone had checked the archives for the purpose of the case, he stated that he was not aware whether that had been done.

33. Mr. O'Shea confirmed that he was aware of the presence of the cattle grid on the road but was not aware of any particular risks associated with it. He had not noticed the 25mm/1 inch drop from the concrete surround or ramp onto the cattle grid (shown in photograph 6). He did not consider the concrete surround or structure to be a ramp. When asked if it was a ramp whether he would he accept that it should be highlighted, Mr. O'Shea agreed with Mr. Healy and confirmed that, if its purpose had been as a ramp and if it were newly constructed or installed, there would have been signage and it would possibly have been highlighted. He agreed that it would be a good idea to mark or highlight a ramp to signal a change in the surface or level of the road for cyclists and vehicles if one was aware that such a change or difference in level existed. He further confirmed that he was aware that cyclists cycled down the road, that some cycled over the cattle grid and some walked around the grid through the gap to the left of the gate pillar, although he then stated that he could not recall seeing people cycle over the cattle grid himself. He did not consider the drop from the concrete surround to the cattle gird as constituting a significant risk to someone cycling a bicycle of the type the plaintiff was cycling. He accepted that the structure of the concrete surround to the cattle grid was not "*run of the mill*" and was abnormal. He posited the possibility that the purpose of the concrete surround was to divert water away from the grid (although it was clear that he did not have any direct knowledge of this). He accepted that the drop from the concrete surround to the cattle grid created a "*lip*" and that if the Council was aware of this, it would consider highlighting it. When asked whether the Council was aware of it and whether anyone within the Council had looked at whether a report existed in relation to the condition of this cattle grid, Mr. O'Shea responded by referring to the large number of roads within the SMD area and made the point that this road was a low priority road and that resources were allocated by the Council depending upon the priority of the road. He did state that if the Council had received a complaint in relation to the condition of the road, it would endeavour to deal with that issue but that no such complaint had been received in respect of this cattle grid whether from the operators of the water treatment plant or from anyone else using the road. He further confirmed that there was no similar concrete surround or ramp at the other cattle grids on the road.

34. When asked whether a person carrying out an assessment of the road (such as prior to its transfer to the Council) would have noticed the concrete surround or ramp, Mr. O'Shea responded that it was possible that they might have but that he could not say. He further responded that it was possible that had someone noticed it that it would be possible to address the issue relatively inexpensively by signage or marking and that it would not significantly impact upon the Council's budget. Mr. O'Shea accepted that it was not good practice to lay concrete over the metal bars of a cattle grid and that that would not be in accordance with current standards. However, he stated that it was not possible to go around with a microscope picking up every issue that may have existed in relation to the assets being transferred. He accepted that in an "*ideal world*", somebody carrying out a survey or inspection of the road and preparing a report in respect of the road would have noticed the defective engineering at the cattle grid but made the obvious point that we do not live in an "*ideal world*" and that the transfer of assets had to be completed within a certain timeframe and could not "*go on forever*". He was unable, however, to refer to any particular time constraints which existed, although he made the point that the transfer process went on over a number of years. He stated that he imagined that an assessment and report would probably have been carried out and that it should have been done but that he was not actually aware as to whether it had been done.

35. On re-examination, Mr. O'Shea stated that he was unaware that the cycling club was using the road but that no complaint had been made by anyone. He noted that many people used the road every day without complaint including members of the Gardaí, the fire service, owners of land down the road and members of the public. He felt that this cattle grid was not in any worse condition than others and posed no more of a risk than other grids.

(c) Brendan Twomey

36. The next witness to give evidence on behalf of the Council was the consulting engineer, Mr. Twomey. Mr. Twomey's report was produced which appended the photographs taken by him in March 2016.

37. In his report, Mr. Twomey considered the cattle grid in question as well as the other cattle grids on the road (he identified three other grids whereas other witnesses referred only to two). He stated in the report that the other cattle grids were of the same construction as the cattle grid at issue and that they also had concrete bands on either side of the approaches. However, I observe that it is clear from all of the photographs that none of the other cattle grids had a concrete surround of the type present at the cattle grid at issue and none had the sort of drop which can be seen in photographs (particularly those of Mr. Flynn). Mr. Twomey noted in his report that the cattle grid is located on a public road which is frequented by leisure walkers and cyclists. He observed that there is nothing unusual about this particular grid and he could not locate the "*sudden drop*" about which the plaintiff was complaining. He reported that there was no reason why the plaintiff could not have walked around the cattle grid using the pathway (to the left of the left-hand pillar). While he was unable to inspect the bicycle, in his view this was an area in which an experienced cyclist ought to have been able to traverse (without difficulty). He stated there was no reason why the plaintiff could not have dismounted from his bicycle in advance of the cattle grid "*if he was not confident to pass over it*" and that there were "*adequate sight lines*" (leading up to the grid).

38. In his direct evidence, Mr. Twomey observed that the cattle grid in question is at a low point in the road and is preceded by a noticeable slope. He observed that the area is prone to flooding. He went through the dimensions of the cattle grid and the concrete band or surround which more or less accord with those given by Mr. Flynn on behalf of the plaintiff. He did not consider the concrete band or surround to be a "*ramp*" or "*speed bump"* but merely a concrete band that defined the cattle grid. He accepted that he was unaware of the design function of the concrete surround but felt that it was probably to define the cattle grid itself. He felt that the gap between the left-hand pillar and the boulders (which he accepted was 500mm wide) was such as would enable a person to pass through with a bicycle and that the pathway at that point was worn and trodden, indicating that people used it. He accepted that people use the area as a recreational or amenity area, although it is not formally designated as such.

39. Mr. Twomey commented upon the bicycle being used by the plaintiff at the time of the accident and felt that it was a good sturdy bicycle with wheels of sufficient width such that it could manage the sort of drop seen in Mr. Flynn's photograph 6 (and Mr. Flynn's photograph 10 showing the €2 coin). He stated that he could not locate a "*sudden drop*" at the approach to the cattle grid and when Mr. Flynn's photographs were put to him, he felt that the cyclist should have no difficulty in getting over the grid of that point as the wheels of the bicycle would be in constant contact with the ground transitioning from the concrete surround to the metal bars of the grid.

40. He could not understand how the plaintiff found the drop "*sudden*" or "*unexpected*" as the plaintiff had cycled over the cattle grid before. He could not see how the plaintiff could be thrown off his bicycle in the manner outlined although he accepted that a cyclist could lose control of a bicycle on a cattle grid. There was nothing unusual about this cattle grid. He thought that a cyclist approaching the cattle grid had adequate sightlines and could see where he was going. He felt that the plaintiff took a risk in going over the cattle grid on his bicycle and there was no reason why he could not have dismounted and gone around the pathway to the left of the pillar. He did not believe that the concrete surround amounted to a particular hazard or risk for cyclists and referred to the evidence by Mr. McIntyre about members of the cycling club cycling over the grid. He indicated that, if the plaintiff was not confident enough to pass over the cattle grid, he could have dismounted from his bicycle and walked around the grid. He explained that the DMRB guidelines had no application.

41. Under cross-examination, Mr. Twomey was asked whether he had closed the gate (as shown in his photographs). He confirmed he had. He accepted that on the evidence, no one else had ever seen the gate closed. He accepted that the public had access to this area and used it for amenity purposes. He also accepted that it would be very simple and inexpensive to erect a sign informing those approaching the cattle grid of the presence of the grid and of the change in the level of the road. He accepted that if this were a ramp, it would be very simple to warn users of the roadway of its presence but thought that the cattle grid could be seen in any event. He also felt that people could see the concrete surround (which he denied was a ramp). He did not agree that it would be prudent to warn people of the drop from the top of the concrete surround to the metal bars of the cattle grid of 2¾ inches or the final drop of 1 inch from the concrete to the metal bar. He felt the drop was more subtle and referred to his photograph 6. When Mr. Flynn's photograph 6 was shown to him, he did not accept that the concrete had been laid over the first of the metal bars of the grid. He felt that the photographs demonstrated bits of grass, silt and debris and not an indication that concrete had been laid on the metal bars. Mr. Twomey accepted that this cattle grid had a wider section of concrete surrounding it than the other grids on the road. He also accepted that if the concrete surround was flush with the cattle grid there would not be any additional risk to cyclists. He stated that the risk in crossing a cattle grid on a bicycle is the gaps between the metal bars and the risk of the wheels of the bicycle getting caught between the bars.

42. He accepted that if the concrete surround was smooth, had no rise or no lip, there would be no issue for cyclists although he stated that a cattle grid had to be slightly below the level of the road. He also accepted that it would have been simple to install the cattle grid and concrete surround with the concrete abutting against the first of the steel bars giving a degree of continuity in levels.

43. Mr. Flynn's photograph 10 (showing the €2 coin) was put to him. It was suggested that that photograph showed that the concrete had been laid on the metal bar and had broken up. Mr. Twomey did not agree that the photograph showed the concrete laid on the steel and he thought it showed silt and debris. He could not comment as to whether any change had taken place in the structure of the concrete surround in the period since construction. He was adamant that the photograph (photograph 10) did not demonstrate that the concrete had been laid on the metal bar and was unable to comment on whether the photograph showed that the concrete had broken up in the period since its installation. He did not believe that the drop at issue was such as to create a particular difficulty for a person on a bicycle. However, he agreed that he would not design the cattle grid and surround in that way although he reiterated that he had not seen evidence that the concrete had been poured onto the steel bars (accepting that if it had been, it would not have been an appropriate method of construction). He stated that it was inevitable that there would be a gap or joint in transitioning from one surface (the concrete surface) onto another surface (the cattle grid). He did not believe that the 25mm/1 inch drop was dangerous and did not agree that it was a hazard.

44. On re-examination, Mr. Twomey was asked to compare the drop evident in Mr. Flynn's photograph 10 with pothole. He stated that potholes could contain more significant drops or depressions and he had never seen signs warning people of potholes.

(d) Aidan O'Rourke

45. The final witness to give evidence on behalf of the Council was Mr. Aidan O'Rourke, a senior executive engineer with the Council with responsibility for the Shannon area since October 2018. He produced a photocopy of a screengrab from the Council's pavement management system showing the road at issue which has been allocated the code L73481. He identified the road as a local tertiary road and explained that such a road falls within the lowest classification of road within the national system which ranges from motorways down to local tertiary roads. He confirmed that it is a public road.

46. Under cross-examination, Mr. O'Rourke confirmed that the road became a public road in 2011 when it was added to the register. He was unaware as to how this had been done and could not confirm whether an order designating the road as a public road was made. He stated that when a road on land owned by a private owner was being taken in charge by the Council, it would be required to be brought up to standard by the developer or owner or alternatively a bond would be required. He confirmed that he was not aware whether a bond had been obtained from Shannon Development at the time of this transfer. He explained that normally a survey would be carried out which would determine what works would be required to remedy any defects in the road prior to it being taken in charge. He accepted that sometimes a report would be prepared but that it might not always be done. If works needed to be done before the road was taken in charge, funding would be sought from the developer or private owner. He was not aware as to whether a survey had been carried out in respect of the road in question but accepted that it would be normal that such a survey would be done. Certainly in the case of housing estates, a survey and report would be prepared. In relation to the roads in such estates, the survey would consider whether works were required to bring the road up to an acceptable standard. He was unaware as to whether a report had been prepared in the case of the road at issue in this case. He accepted that the road was both a public road and was also within the ownership of the Council.

Findings of fact on liability issues

47. I have carefully considered the evidence as summarised in the previous section of this judgment and I make the following findings of fact based on my assessment of the evidence given by the witnesses called on behalf of the plaintiff and on behalf of the Council.

48. I completely accept the plaintiff's account of the circumstances in which he fell from his bicycle on 3rd August, 2014. The plaintiff struck me as a very cautious and careful man. He was an honest and truthful witness. The account which the plaintiff gave in his evidence as to the circumstances of the accident was entirely consistent throughout his evidence. I reject the suggestion made by the Council that the plaintiff gave inconsistent accounts of the circumstances of his accident in the various documents and pleadings referred to earlier. While I accept that the description of the accident recorded in the hospital case notes was not entirely consistent

with the circumstances of the accident as described in evidence by the plaintiff, I am satisfied that the likely explanation for this is that the member of the hospital staff responsible for making the entry in the case notes did not fully understand or appreciate the explanation given by the plaintiff of the circumstances of his accident. The plaintiff may also have been somewhat confused at that stage having regard to the severe pain which he was in and the fact that he had been administered with a significant dose or doses of morphine. The account given by the plaintiff in his direct evidence and under cross-examination was unwavering. I accept the plaintiff as an entirely truthful and accurate historian as to the circumstances of his accident.

49. The plaintiff was engaged in the commendable pursuit of cycling his bicycle. He was, as befits the character of the plaintiff as revealed to me in the course of the plaintiff's evidence, cycling in a very cautious manner at or about walking pace as he approached the cattle grid. He was as far from a "boy racer" as it is possible to be. The plaintiff was familiar with the cattle grid and had cycled over it on one previous occasion without difficulty. However, on this occasion, the plaintiff cycled his bicycle towards the left side of the grid. As he cycled over the concrete surround or ramp or dome on the left side, he experienced a sudden and unexpected drop from the concrete onto the metal bars of the cattle grid. While the plaintiff could see the cattle grid as he approached it, from some considerable distance before the grid, the plaintiff could not see the drop from the concrete surround or ramp or dome onto the cattle grid until it was too late. I accept that the drop from the top of the concrete surround to the metal grid was the order of 2¾ (70mm) and that the final drop from the bottom of the concrete surround to the metal grid (where the concrete had broken away) was in the order of 1 inch (25mm).

50. I accept the evidence given by the plaintiff and by his engineer, Mr. Flynn, that this was a sudden and unexpected drop and that this is what caused the plaintiff to lose control of his bicycle and to fall to his left in a manner which caused a very serious injury to his left ankle. I accept that the plaintiff was cycling his bicycle at a leisurely pace and had slowed down to an appropriate pace when attempting to negotiate the cattle grid. I do not accept that the plaintiff was either cycling too quickly or too slowly (being the two propositions put to him on behalf of the Council). Nor do I accept that the plaintiff ought to have dismounted his bicycle and walked around the gate pillar in order to negotiate the cattle grid. I am satisfied on the evidence that the plaintiff having successfully negotiated the grid on one previous occasion, felt sufficiently confident to do so again. However, he did not expect to encounter the sudden and unexpected drop which caused him to lose control of his bicycle and which led to his fall. I am also satisfied on the evidence that cyclists regularly cycle over the cattle grid and do not routinely dismount from their bicycles and go around the left hand gate pillar. People do undoubtedly walk around the pillar and it is likely that some cyclists do dismount from their bicycles at that point and shove or pull their bicycle either ahead of or behind them going around the pillar. However, many do not. The plaintiff was entitled to feel confident that he would be able to manage to cycle over the cattle grid by reference to his previous experience. The fact that he did not experience this drop on the previous occasion and the fact that others may not have done so may well be explained by the fact that he and they cycled over the middle or to the right of the cattle grid rather than over the left side of the grid. I am also satisfied on the evidence that the Council was aware that people cycled over the cattle grid.

51. The evidence establishes that the road in question and the features on it, including this cattle grid and the two or three other cattle grids on the road, are within the ownership of the Council and, in addition, form part of the public road. The Council acquired ownership of the road and the cattle grid when they were transferred to the Council by Shannon Development in 2004, as part of a large transfer of assets. The road and cattle grid were, therefore, been within the ownership of the Council since 2004. I also accept that the road has been a public road bearing the code L73481 since 2011, although the precise circumstances in which and the manner in which the road was designated a public road have not been fully explained by the Council. I accept that the road is a local tertiary road which is at the lowest level in the order of hierarchy of roads within the national road system.

52. I am satisfied on the evidence that the cattle grid and the concrete surround were likely to have been constructed or installed by Shannon Development, the Council's predecessors in title. I find on the evidence and, in particular, on the evidence of the engineers and the photographs which they produced, that the other cattle grids on the road do not contain a concrete surround or a ramp or dome of the type found at the cattle grid in question. While concrete can be seen around one or more of the other cattle grids, it is not of the width or of the height or gives rise to the type of drop that is to be found in the cattle grid at issue here. I do not have to decide whether the concrete surround was installed at the same time or subsequent to the cattle grid. The fact is that it is there and does contain the features referred to earlier and, in particular, the sudden drop of 25mm (1 inch) from the concrete onto the metal bars of the cattle grid. The purpose of the concrete surround or ramp or dome is unclear. If it was for the purpose of defining the cattle grid, then it would not have needed to be raised or to contain this type of drop or fall present. No witness on behalf of the Council could state with any degree of certainty what the purpose of this feature was other than to speculate that it was either to define or delineate the cattle grid or to prevent water from getting into the grid. This is all pure speculation. If its purpose was to define or delineate the cattle grid from the roadway, then it is difficult to see why it was raised or domed and contained the sort of drop that is found as part of the feature. Its purpose may have been to prevent water getting into the cattle grid, as surmised by Mr. Twomey and by one of the Council's witnesses, however, this was just speculation on their part. It is possible that the purpose was to slow down traffic going over the cattle grid. However, if that were so, it is not clear why similar features are not found in the other cattle grids (with the rise or dome and then sudden drop or fall onto the cattle grid itself). I am not in a position to reach any definitive conclusion as to what the purpose of the feature was. It may have served no purpose at all.

53. I accept the evidence of the plaintiff's consulting engineer, Mr. Flynn, as to the manner of construction of the concrete surround. I conclude on the basis of Mr. Flynn's evidence and the photographs taken by him in June, 2015, and in particular photographs 5 and 6, and in February, 2019, in particular photographs 9 and 10, that during the construction or installation of the concrete surround, the concrete was laid over at least the first of the metal bars of the cattle grid. I am satisfied that Mr. Flynn's photographs clearly demonstrate this. Indeed, this is also evident from Mr. Twomey's photograph 6 (taken in March, 2016). Insofar as there is a conflict between Mr. Flynn and Mr. Twomey on this issue, I accept Mr. Flynn's evidence and reject that of Mr. Twomey. I agree with Mr. Flynn that laying concrete over the metal bar of the cattle grid is a defective and inappropriate method of construction. This is particularly so in circumstances where the concrete surround is raised, giving rise to a dome, and where there is a drop or fall from the top of the concrete to the metal grid of in the order of 2¾ inches (70mm) and as part of that, a sudden drop or fall of 25mm (1 inch). Laying the concrete on the metal bar of the cattle grid rendered the concrete liable to be broken up with the passage of vehicular traffic over it. This was an entirely foreseeable consequence of this manner of construction. I am satisfied that the breaking up of the concrete laid over the first of the metal bars of the cattle grid in this defective manner is what caused the sudden drop of 25mm (1 inch) from the concrete onto the first of the metal bars of the grid on the left side of the grid. I am also satisfied that such a drop was a hazard or danger to cyclists, such as the plaintiff, who sought to cross the cattle grid at that point on their bicycles. I conclude that a cyclist approaching the cattle grid from the road (in the direction which the plaintiff was travelling) would not see this drop until it was too late. I accept that the drop was sudden and unexpected and that this is what caused the plaintiff to lose control of his bicycle and to fall.

54. I also accept Mr. Flynn's evidence that, whatever its purpose, whether it be to induce approaching vehicles to reduce speed before crossing the cattle grid, a concrete structure amounting in effect to a ramp or dome ought to have been set back some distance from the cattle grid itself. While there is no set distance for doing so, I accept that at least one vehicle's length from the

cattle grid would have been appropriate, as stated by Mr. Healy. I note that Mr. Healy and Mr. O'Shea, both experienced engineers with the Council, accepted that if they were designing a ramp at this location, they would have designed and ensured its construction or installation at a distance back from the cattle grid itself, although I am not overlooking the fact that both took the view that the purpose of this concrete structure at the cattle grid was not to act as a speed ramp. In my view, if a raised concrete structure such as that found at this location was installed then it ought to have been placed a distance back from the cattle grid. I also accept Mr. Flynn's evidence that some notification ought to have been given to cyclists approaching the cattle grid of the presence of the ramp or hump created by reason of the manner of construction of the concrete surround. This could have been done at very little expense by way of signage or highlighting, although I accept that the guidelines or regulations applicable to speed humps on new roads and bridges did not have any application to this road.

55. I conclude that in those two respects, 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 approaching that cattle grid.

56. I am satisfied on the evidence that it is likely that prior to the transfer of assets from Shannon Development to the Council, there was an inspection or survey of the condition of the assets. The assets being transferred included roads of various types including the local tertiary road at issue here. My impression from the evidence given by the Council witnesses is that it is likely that such a survey was carried out and a report prepared but it is possible that it did not go into the level of detail which would have picked up the defective features of the concrete surround at this cattle grid. However, it may have done. I am surprised that the Council witnesses were not in a position further to assist the court by giving evidence as to the nature and extent of the survey or investigations carried out and the nature of any report which emerged from that as part of the transfer process. It is particularly surprising that they were unable to state with any degree of confidence whether a survey or investigation including this road was ever undertaken as part of that transfer process. Mr. O'Shea stated that if a survey was carried out and a report prepared, he would expect it to be in the Council's archives. However, no person on behalf of the Council appears to have undertaken a search of the archives. No one from the Council was in a position to inform the court as to what steps would need to be taken to try to identify whether a survey was carried out or a report prepared which may have included the road and cattle grid in question. If a survey was undertaken and report prepared which referred to this road, it may or may not have picked up the defective manner of construction and condition of the concrete surround or dome or ramp at the cattle grid. However, it may have done. This is all information within the peculiar knowledge of the Council. It is unfortunate that the Council did not fully address this issue in its evidence to the court.

57. I am satisfied on the evidence that the Council was aware that people used this road and had to cross this cattle grid for a whole range of purposes including the need to obtain access to the water treatment plant at the end of the road as well as for recreation or amenity purposes. It is clear on the evidence that the Council was aware that people regularly walked and cycled down the road. It is clear on the evidence that at least one of the Council witnesses himself was regularly up and down the road for recreational and work purposes. That was Mr. O'Shea. The Council was, therefore, well aware of the fact that people including cyclists used this public road on a regular basis. It is 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. The legal significance of this is a different question and I will consider that shortly.

The plaintiff could undoubtedly have dismounted from his bicycle and taken it through the gap between the left hand pillar and the boulders to the left of the cattle grid. It would have been an awkward operation in light of the width of the gap (approximately 500mm) and his bicycle would have had to have been pushed ahead or pulled behind him. However, the plaintiff had successfully negotiated the cattle grid on his bicycle in the past and others had done so without difficulty. It was not forcefully suggested to him that he was wrong to have cycled over the cattle grid but rather that, if he felt unable or not confident enough to do so, then he should have dismounted his bicycle and taken it around the cattle grid. It is clear on the evidence, therefore, that the plaintiff was entitled to go over the cattle grid on his bicycle. I accept, however, that an issue of contributory negligence does arise and I address that later in my judgment.

Legal issues: Liability

58. The plaintiff's claim is advanced under two principal or primary headings and under a number of other subsidiary or secondary headings. The principal or primary claims advanced by the plaintiff are that the Council is liable in respect of his accident on the basis that the condition of the cattle grid and, in particular, the concrete surround was caused by reason of the negligence of the Council in its capacity as a road authority and that such negligence amounts to misfeasance as opposed to nonfeasance. Another principal or primary claim advanced by the plaintiff is that the condition of the cattle grid and its concrete surround amounts to a nuisance on the public highway, which is a public nuisance, which was created or maintained by the Council or its predecessors in title, Shannon Development. Alternative subsidiary or secondary claims are advanced under the 1995 Act and under the 1993 Act (as amended). There are significant legal issues in relation to each of these heads of claim. I will address each of them in turn and set out my conclusions below.

(a) Negligence: misfeasance v. nonfeasance

59. I have found that as a matter of fact that the concrete surrounding the cattle grid was defective in terms of its design and construction for the various reasons as set out above. What are the legal consequences of that finding? Is the Council entitled, as it seeks to do, to rely on the defence of nonfeasance on the basis that it carried out no works to the road and that such works as were carried out were done by its predecessor in title, Shannon Development, with no intervention by the Council following its acquisition of the road in 2004, and the designation of the road as a public road in 2011? Or does the Council have a liability in misfeasance?

60. It is unnecessary to set out at any length the source of the effective immunity of road or highway authorities in the case of nonfeasance. It is well established at common law. The statutory attempt to remove that immunity in s. 60(1) of the Civil Liability Act 1961, was never implemented in that no ministerial order giving effect to that provision was ever made. Moreover, s. 2(3) of the Roads Act 1993 effectively preserved the immunity by stating:-

> *"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."*

61. In his leading text on *The Law of Local Government* (1st ed., Round Hall 2014), Browne describes nonfeasance as follows:-

> *"8-33 Nonfeasance involves cases of pure omission where the roads authority fails to take measures to construct or repair. The roads authority has traditionally been immune at common law from liability for nonfeasance where it fails to carry out its duty to repair and maintain public roads and is consequently not liable for any injury or damage* [citing *Convery v. Dublin County Council* [1996] 3 IR 153 and *Flynn v. Waterford County Council* [2004] IEHC 335] ... *As a result of the principle of nonfeasance, local authorities have been held not to be liable for injuries caused to users of a public road where there was a hole in the road arising from the failure to repair the highway or for the failure to clear out*

ditches or gullies or for the failure to cut branches overhanging a highway or for the failure to level off a drop in the highway [citing *Cowley v. Newmarket Local Board* [1892] AC 345] ..." (*Browne* at para. 8-33, pp. 294-295).

62. Browne describes misfeasance as follows:-

> *"8-34 Although a local authority is generally protected for liability under the doctrine of nonfeasance, if it performs its duties of repair and maintenance in a negligent manner it may be liable for damages or injury arising therefrom (misfeasance). For example, liability has been held in instances where the local authority failed to properly guard or light materials left on a road or use proper machinery or proper materials* [citing *Breen v. County Council of the County of Tyrone* [1908] 42 ILTR 250] *and where it removed a protective fence along a highway. A roads authority cannot necessarily escape liability on the basis that it engaged an independent contractor to do the work."* (*Browne* at para. 8-34, p. 295).

63. In Keane on Local Government (3rd ed., Bloomsbury Professional 2015) examples of nonfeasance and misfeasance are set out. In explaining misfeasance, Keane states:-

> *"If a local authority do in fact carry out their duty to construct or repair a road and do so negligently, they are guilty of misfeasance and, not non-feasance, and are liable damage or injury arising. The failure gives rise to liability, whether it arises by commission or omission."* (*Keane* at p. 77).

64. While the distinction between misfeasance and nonfeasance remains part of our law, albeit an anomaly, it is important to appreciate the parameters of that distinction and to ensure that it is not applied to confer immunity for nonfeasance in a case which is in truth one of misfeasance dressed up as nonfeasance. The doctrine of nonfeasance must not be extended beyond its established boundaries. The distinction between nonfeasance and misfeasance was concisely explained by Costello J. in the High Court in The State (*Sheehan) v. Government of Ireland [1987] IR 550 where he stated:-*

"There [at present] exists in the law relating to the liability of road authorities for defects in public roads and footpaths a distinction between misfeasance and nonfeasance. If an authority commits a positive act of negligence in the construction of a footpath or in its maintenance (that is, an act of misfeasance), it is liable to a person injured thereby. But if it merely fails to maintain a footpath so that it falls into disrepair (that is, guilty merely of nonfeasance) it is not liable to someone injured due to its lack of repair." (per Costello J. at 554).

65. In the earlier case of *Kelly v. Mayo County Council* [1964] IR 315, Lavery J. in the Supreme Court stated to similar effect as follows:-

> *"Defendants are the highway authority charged with the repair and maintenance of roads and particularly of the road upon which the plaintiff's accident occurred. As such authority they are liable in damages for injuries suffered by a road user if they have been negligent in doing repairs or in interfering with the road. They are not liable for injuries suffered or caused by the want of repair of a road. This is the familiar distinction – they are liable for misfeasance but not for nonfeasance."* (per Lavery J. at pp. 318-319)

66. It will be readily apparent from these passages that if the local authority acting in its capacity as a road authority is negligent in the manner in which a road is constructed, that is a case of misfeasance and not nonfeasance and the immunity does not apply. The immunity applies essentially to the failure (or omission) to maintain and repair a public road and not the failure properly to design and construct it in the first place. That distinction was considered and applied by Cross J. in the High Court in *Loughrey v. Dun Laoghaire County Council* [2012] IEHC 502. In that case the plaintiff tripped on a public footpath where there was a slight differential (of 6mm) between two paving slabs. The court had to consider whether the differential was caused by weathering or aging or by poor specification and design or faulty construction at the outset. If the court found as a matter of probability that the cause of the differentiation was poor specification and design or faulty construction, Cross J. stated that the court would be obliged to conclude that the differential was caused by the fault of the local authority and amounted to misfeasance rather than nonfeasance. He concluded that as a matter of probability the differential between the two slabs was caused by either faulty construction or poor specification and design or by a combination of those two causes and, therefore, amounted to misfeasance rather than nonfeasance. The local authority was, therefore, liable.

67. These cases were considered by Hogan J. in the High Court in *McCabe v. South Dublin County Council* [2014] IEHC 529. In that case, Hogan J. found that the failure by the road authority to repair an opening in the surface of a footpath or, if it had been repaired, the subsequent tampering by persons unknown with the opening, constituted nonfeasance and not misfeasance and meant that the authority was not liable to the plaintiff. This was a classical application of the misfeasance/nonfeasance distinction.

68. In support of its contention that the Council can have no liability to the plaintiff in negligence arising from the state of the cattle grid and concrete surround, the Council asserted that there was nothing wrong with the cattle grid and concrete surround and that it did not constitute a danger or hazard to persons such as the plaintiff. I have reached the contrary conclusion, as appears from my earlier findings. The Council went on to contend that, in any event, it could have no liability to the plaintiff on the basis that if the cattle grid and concrete surround did create a danger or was in a defective condition, the Council was entitled to rely on the defence of nonfeasance. The Council relied on the above extract from *Browne* and on some cases. It first relied on *Flynn v. Waterford County Council* [2004] IEHC 335. The issue in that case was whether the defendant, as the relevant road authority, had any liability in respect of a road traffic accident by reason of a failure to erect warning signs and to maintain them. The High Court (Finnegan P.) held that the Roads Act, 1993, did not impose any statutory duty on the defendant to erect and maintain road signs and that the failure to do so did not give rise to an action for negligence at common law either. In the particular factual circumstances of that case, a road sign was in disrepair and was largely obscured by vegetation so that it was not visible to a motorist until the last minute. The court held that there was no liability in negligence. The court held that if no sign had been erected that could not give rise to a claim by an individual for damages for breach of any statutory duty. Further, the court held that had the defendant done nothing, it would not have attracted a common law duty of care and that, having given a warning, even if the warning was less than what might have been desirable, the defendant had nonetheless done more than it was obliged at common law to do and, therefore, no liability at common law arose. However, it seems to me that this case does not really advance the critical distinction between nonfeasance and misfeasance in circumstances where the allegation is that the road or a feature on the road, which forms part of the road, was negligently constructed or installed in the first place or where a material alteration was made to the road following its initial construction. That critical distinction is evident from the dictum of Costello J. in *Sheehan* and from the extracts from *Keane* and *Browne* quoted above and is clear from the application of the distinction by Cross J. in *Loughrey*. *Flynn* is to my mind more significant for its consideration of the circumstances in which a road authority may be liable in civil proceedings in the case of a public nuisance on the highway and I will consider it further in that context.

69. The next case relied upon by the Council was *Cowley v. The Newmarket Local Board* [1892] AC 345. In that case, an owner of land adjoining the public highway, in making an approach or entrance to his land without the sanction or authority of the highway authority, made a drop in the level of the highway and left it in a dangerous condition. The plaintiff who was walking along the highway fell down the drop and was injured. He alleged that the highway authority was liable in that it permitted the highway to be in disrepair and in a dangerous condition. However, he failed on the basis that it was a case of nonfeasance and not misfeasance by the authority. Again this appears to be a classic case of nonfeasance where there was no question of any defect in the roadway as constructed and where there was no intervention on the road by the authority or by its predecessors in title. The Council noted that the decision in Cowley was approved of by the former Supreme Court in *O'Brien v. Waterford County Council* [1926] IR 1 ("*O'Brien*") and the Council also relied on that case. However, while noting the "*anomalous rule*" that a road authority is not liable for nonfeasance and only for misfeasance, the court in *O'Brien* held that what was at issue in that case was misfeasance and not nonfeasance. There, the road authority made repairs improperly so as to make the repaired structure dangerous to persons using the road. The court held that the doctrine of nonfeasance could not be invoked to absolve the road authority from the consequences of negligence in making the repairs. The court further held that it was not correct to say that because the authority was under no obligation to light the bridge, there could, therefore, be no obligation on it to light an obstruction placed by it on a partially repaired bridge erected by it if the works in that state would be a source of danger. Delivering the judgment of the court, Murnaghan J. stated:-

> *"The true rule of law is that if the defendants rebuilt the bridge so improperly as to make it unsafe for the public to use it at night, and if they did not take such steps as the jury might consider reasonable in order to neutralise the danger arising from using the bridge, they are guilty of acts of misfeasance for the consequences of which they are responsible in damages to any person injured"* (at p.9).

This, therefore, was a case of misfeasance and not nonfeasance and it does not seem to me to be of any assistance to the Council in this case.

70. The Council further relied on the extract from *Keane* quoted above. However, in the examples of misfeasance given by *Keane*, it is made clear that if the local authority carries out its duty to construct a road and does so negligently, that is misfeasance not nonfeasance. The plaintiff argues that that is what happened in this case. It contends that the cattle grid and concrete surround were negligently constructed in the first place, both by reason of the location of the concrete surround or dome or ramp right at the cattle grid and by reason of the defective method of constructing or installing the cattle surround by laying the concrete onto the metal bars and that this amounts to misfeasance and not nonfeasance. 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's 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 nonfeasance in respect of the defective construction or installation of that feature.

71. The Council did draw my attention to the decision of the High Court in *Gaye v. Dublin County Council* (Unreported, High Court, Morris J., 30th July, 1993) in a different context. However, one of the issues in that case was whether the local authority could be liable in negligence and nuisance in respect of defects on a footpath in a housing estate built by a developer and taken in charge by the authority some years later. It was alleged that when the authority took the estate in charge, a defect which amounted to a trip hazard was already in existence and ought to have been picked up by the authority when it took the estate in charge. The court concluded that there was no evidence that at the time the estate was taken in charge the trip hazard existed and held that, on the contrary, it was a flaw which would have developed over a protracted period. In those circumstances, the court was not prepared to conclude that it was in existence when the estate was taken in charge and was, therefore, not prepared to assume that there was negligence on the part of the authority. In the present case, however, it is accepted by the Council that the cattle grid and concrete surround was present at the time the road and relevant lands were acquired by the Council in 2004 and when the road became a public road in 1993. I have concluded that the concrete surround did pose a danger or hazard to persons such as the plaintiff. 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. I was not given any evidence as to the terms of the transfer or as to whether provision was made for an indemnity for the Council in that transfer. I see no reason why it would not have been open to the Council to provide for such an indemnity. 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.

72. In reaching my decision on liability, I have also borne in mind the admonition of the Court of Appeal in *Byrne v. Ardenheath Company Limited* [2017] IECA 293 that in considering the question of liability, where the court is not dealing with a complex specialist field of activity, the trial judge is required:-

> "*not only to consider the expert evidence tendered by the parties but to bring ordinary common sense to bear on their assessment of what should amount to reasonable care."* (per Irvine J. at para. 32).

73. I am satisfied that as a matter of common sense, notwithstanding the fact that the works were carried out by the Council's predecessors in title and acquired by the Council on foot of the transfer referred to with the Council subsequently designating the road as a public road, and notwithstanding its status as a local tertiary road in the hierarchy of roads, having regard to the danger or hazard posed by the concrete surround at the cattle grid to persons such as the plaintiff who are known by the Council to use the road for amenity and other purposes, liability should rest on the Council in respect of the negligence of its predecessor. I am also satisfied, for the reasons outlined earlier, that the negligence in question amounts to misfeasance and not nonfeasance. In those circumstances, I conclude that the Council is liable to the plaintiff in negligence.

(b) Public nuisance on the highway

74. The plaintiff also maintains a claim in nuisance against the Council alleging that the sudden drop from the concrete surround onto the cattle grid constituted a danger or trap amounting to a nuisance. The Council asserts that it can have no liability in nuisance and that the only possible basis on which it would have any liability at all to the plaintiff is in its capacity as a road authority (arguing unsuccessfully as I have found, that no such liability can arise in this case on the grounds of nonfeasance).

75. However, I am satisfied that in addition to being liable to the plaintiff in negligence in its capacity as road authority, the Council is also liable to the plaintiff for the tort of nuisance. The nuisance in question is a public nuisance on the highway by reason of the construction or installation of the concrete surround at the cattle grid which incorporated the sudden drop onto the cattle grid and which, in my view, constituted a danger or hazard to persons such as the plaintiff which was created by the Council's predecessor in title, Shannon Development, and maintained in place by the Council following the transfer of the road and lands to the Council in 2004. While a public nuisance is a crime, covering a wide and multifarious range of situations, it is open to a private individual to maintain civil proceedings where that person has suffered "*particular*" or "*special*" damage (McMahon & Binchy *Law of Torts* (4th Ed, Bloomsbury 2013) paras. 24.23-24.04, pp. 980-981). One type of public nuisance is public nuisance on the highway. That is the type of nuisance at issue in this case.

76. Two issues arise in this context on the facts of this case. The first is whether the concrete surround at the cattle grid amounts to a public nuisance to users of the road. The second is whether, the structure having been constructed and installed by the Council's predecessors in title, the Council can have any liability in public nuisance in respect of it.

77. A public nuisance on the highway can arise in a vast range of circumstances, including where there are obstructions placed on the road or features which make it dangerous to the public using the road. In *Hassett v. O'Loughlin* (1943) 78 ILTR 47, O'Briain J. in the Circuit Court stated that:-

> *"A nuisance is not confined to an obstruction on the highway; it may consist of anything which makes the use of the highway unsafe or dangerous to those using it."* (at p. 48).

In that case, the court found that the defendant was liable to the plaintiff in public nuisance in circumstances where the defendant had placed a small heap of stones on the side of the highway which had caused a horse which was being driven with a cart by a third party to shy across the road and to strike the plaintiff's horse, seriously injuring it. The court found that the pile of stones on the highway was a nuisance as horses were inclined to shy at it. The court was satisfied that the damage in the case flowed from the nuisance. The defendant was held liable for putting the stones on the highway albeit that he did so "*quite innocently and without any negligence". McMahon & Binchy* give this case as an example of public nuisance on the highway caused where the highway is rendered unsafe or dangerous to the public. A host of other examples of dangers to the public using the highway amounting to a nuisance are given by *McMahon & Binchy* at para. 24.17 (pp. 987-988). They include, relevantly for present purposes, "*damaging the road surface or rendering it hazardous or damaging property under it"* and "*placing dangerous materials on or near the highway".*

78. In *Mullan & Ors v. Forrester* [1921] 2 IR 412, a case relied upon by the plaintiff, the King's Bench Division, by a majority, directed a new trial in circumstances where a wall on the defendant's land which abutted the public highway was blown over during a storm killing three people. The court directed a retrial arising from the judge's charge to the jury. The majority of the King's Bench Division held that this could amount to a public nuisance and that it was not necessary to prove that the defendant knew or ought to have known of the defective condition of the wall. Gordon J. (who formed part of the majority) stated:-

> *"Now, a nuisance is something different from, and not to be confounded with, either trespass or negligence, though the wrong is in some respects analogous to trespass, and the two may coincide. If a person erects alongside a public highway upon his own land some structure, or makes some excavation which, as erected or made, is dangerous to persons lawfully using the highway, that is a public nuisance; and if any person lawfully using the highway is injured thereby, he has his cause of action. But I have not found or been referred to any cases of that kind in which any question as to whether defendant knew, or ought to have known, of the dangerous nature or condition of the structure erected, or excavation made by him, has been submitted to a jury or relied on as a defence to an action."* (per Gordon J. at p. 426).

79. That case did not involve a road authority. However, the case of *Skilton v. Epson & Ewell Urban District Counci*l [1936] 2 All ER 50 ("*Skilton*") did. The plaintiff also relied on that case. In *Skilton*, the plaintiff was riding her bicycle along the highway when a traffic stud which had become dislodged was thrown up by a passing car and struck the plaintiff's bicycle causing her to fall from her bicycle and sustain injuries. It was found as a fact that the stud had been loose for a number of weeks. The stud had been inserted into the roadway under certain statutory powers. The English Court of Appeal held that, whether or not the stud formed part of the highway, the insertion of the stud into the roadway was not done as part of the authority's duty to maintain highways and, therefore, the doctrines of misfeasance and nonfeasance did not apply. The court held that the actions of the authority resulted in a nuisance upon the highway and that the authority was properly found liable to the plaintiff notwithstanding the fact that the defendant was also the highway authority. This is an example of a case where the highway authority was found liable for a public nuisance on the highway in circumstances where works were carried out by the authority, not in its capacity as the highway authority but for a different purpose. *Skilton* was considered by Finnegan P. in *Flynn v. Waterford County Council* (referred to earlier). However, Finnegan P. was satisfied that the plaintiff in *Flynn* could not bring himself within the principle on which that case was decided, namely, "*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"*. He held that the existence of the obscured sign in that case did not constitute a nuisance. It may be 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. In *Kelly v. Mayo County Council* [1964] IR 315, the defendant local authority was sued for negligence in its capacity as road authority and also for public nuisance on the grounds that the defendant's lorries had damaged the road by excessive user and created a rut or pothole in the road. It was conceded on behalf of the plaintiff in that case that liability in negligence could not be maintained against the defendant as the road authority. Notwithstanding that the defendant was the road authority, the Supreme Court went on to consider whether it could be liable for creating a public nuisance on the roadway. The Supreme Court held that the evidence was not sufficient to justify a jury finding that the user of the road by the defendant amounted to a public nuisance. However, Lavery J. stated that there were circumstances in which the user of a highway could constitute a public nuisance giving rise to a cause of action to any person who could show particular damage to himself caused by the nuisance (notwithstanding that the defendant was a road authority) but that the user of the road by the defendant in that case was a normal user of the road and not a public nuisance (see p. 321). It 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.

80. The plaintiff also relied on the recent decision of the High Court (Barr J.) in *O'Shaughnessy v. Dublin City Council & Ors* [2017] IEHC 774. In that case, the plaintiff fell over a portion of a stone block which was projecting from one side of the underside of the Luas bridge at the triangle in Ranelagh onto the public footpath. Barr J. considered some of the case law (including *Hassett* and *Stewart v. Governors of Saint Patrick's Hospital* (1939) 73 ILTR 115) and observed that:-

> *"It is settled law that even a small impediment on the public highway can constitute an actionable nuisance"* (per Barr J. at p.14)

The court was satisfied that the piece of stone which jutted out from the foot of the wall of the bridge constituted a nuisance on the public highway.

81. In light of the findings of fact made earlier, and, in particular, my finding that the concrete surround or dome or ramp did constitute a danger or hazard to users of the road such as the plaintiff, I find that the dome or ramp at the cattle grid constituted a public nuisance. I am satisfied, on the basis of the findings of fact which I have already made, that the cause of the plaintiff's loss of control of his bicycle as he negotiated the concrete surround or ramp was the sudden drop from the concrete onto the metal bar. I am also satisfied that this public nuisance on the road was what caused the plaintiff to lose control of his bicycle and it was, therefore, the cause of the fall and the consequent injuries sustained by the plaintiff.

82. The Council maintained that it could have no liability in nuisance in circumstances where it had not created the alleged nuisance and had no knowledge of it. The Council relied on the decision of the High Court (Peart J.) in *Dempsey v. Waterford Corporation* [2008] IEHC 55. In that case, the plaintiffs claimed that damage to their house was caused as a result of water penetration from water entering their premises via an old culvert. The defendant local authority denied any knowledge of the existence of this old culvert and contended that it could have no liability to the plaintiff in negligence or otherwise as it was completely unware of its existence and could not have foreseen that it was there. The plaintiff's claim was based primarily on negligence and nuisance. Peart J. dismissed the claim in negligence holding that the defendant did not owe a duty of care of the type alleged. The court went on to consider the claim in nuisance. It might be noted in passing that the claim was for private and not public nuisance. Peart J. concluded that the defendant could not have been expected to foresee or anticipate that the culvert might exist without digging up the entire street and that led to the inevitable conclusion that the defendant was not liable in nuisance either. Peart J. referred to a passage in *Clerk and Lindsell on Torts* (18th ed.) where it was stated (at para 19-66):-

> *"As the general rule is that no one is liable for nuisance unless he either created it or continued it after knowledge or means of knowledge, it follows that it is a defence to prove ignorance of the facts constituting the nuisance, unless that ignorance is due to the omission to use reasonable care to discover the facts."*

The court held that the clear evidence in the case was that the defendant was unaware that the culvert existed and that it did not appear marked on any maps in the defendant's possession. The court found that the defendant had no knowledge of the culvert. Nor did it have reasonable means of being aware of it since:-

> *"speculative excavation of the entire street on a 'just in case' basis is an unreasonable burden to impose on a local authority."*

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. The state of affairs this created continued to exist after the transfer of the road and lands to the Council in 2004 and after the road was designated a public road in 2011. In addition to the fact that the cattle grid and surround which had given rise to the hazard or danger to users of the road, including the plaintiff, when constructed or installed by the Council's predecessor in title, the Council continued it after the transfer in 2004 and after the road was designated a public road in 2011. 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 survey or 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. In my view, therefore, the decision of Peart J. in *Dempsey*, far from assisting the Council, is of assistance to the plaintiff in the present case and undermines the defence of the Council to the public nuisance.

84. It is in my view significant that the concrete surround and cattle grid were constructed and installed by the Council's predecessor in title, Shannon Development, and not by some third party with no connection to the Council or who carried out works at the cattle grid without authority. However, even if the nuisance was created by a third party and was created without the knowledge or consent of the Council or its predecessor in title, liability in public nuisance could still arise in circumstances where the nuisance was continued and adopted by the Council. This issue arose for consideration in *Sedleigh-Denfield v. O'Callaghan* [1940] AC 880. That was not a case involving a public nuisance on a highway. The nuisance involved the placement of a pipe or culvert on the respondents' land by a trespasser without the knowledge and consent of the respondents. The respondents subsequently became aware through their servants of the existence of the pipe and used the pipe for draining their fields. The pipe ultimately became blocked with leaves causing water to overflow onto the appellant's premises causing damage for which he sought damages in nuisance. The House of Lords held that the respondents had to be taken to have had knowledge of the existence of the pipe notwithstanding that it was placed there by a trespasser and consequently they were responsible in nuisance for the damage caused to the appellant. The respondents were found to have continued and adopted the nuisance. Stating that there was no difference between the case of a public nuisance and a private nuisance, Lord Atkin observed 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. …if an individual could have proved special damage caused by the nuisance… he could surely have recovered damages."*
>
> (per Lord Atkin at p. 899).

85. Lord Wright in the same case stated:-

> *"…An occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it. This rule seems to be in accordance with good sense and*

> *convenience… if the defendant did not create the nuisance he must, if he is to be held responsible, have continued it, which I think means simply neglected to remedy it when he became or should have become aware of it…"*
>
> (per Lord Wright at pp. 904-905).

This case has been referred to and applied in numerous Irish cases including *Larkin v. Joosub* [2006] IEHC 51 and *University College Cork v Electricity Supply Board (ESB)* [2015] IEHC 598.

86. 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.

87. Finally, in this connection I should refer to another public nuisance case which is also relevant. It is the decision of the Supreme Court in *Wall v. Morrissey* [1969] IR 10. In that case it was claimed that the defendant had created a public nuisance on the highway when, with the permission of the local authority, he engaged a contractor to open a trench across the highway, laid water pipes in the trench, refilled the trench and subsequently refilled it the following day to compensate for subsidence which had occurred. The plaintiff was injured when he fell from his bicycle as he crossed the refilled trench. The trial judge withdrew the issue of public nuisance from the jury and the jury found that the defendant had not been negligent. On appeal, the Supreme Court agreed that the trial judge had correctly decided that the issue of public nuisance should not be left to the jury. In the Supreme Court, Walsh J. stated:-

> *"The temporary excavation of the highway is not itself a public nuisance so long as it does not offend by exceeding, in either degree or duration, the temporary requirements of a person whose premises adjoin the highway. A public nuisance is constituted by exceeding this temporary requirement, or by failing to restore the position to the point where it does not operate as a withdrawal of part of the highway from the public, or by leaving the highway dangerous for members of the public using it*." (per Walsh J. at p. 14)

88. Walsh J. continued:-

> *"It is true that the facts giving rise to a public nuisance often ground a cause of action in negligence also, and in many cases it may matter nothing which of these causes of action is relied upon. It is true, however, as has been submitted by counsel for the plaintiff, that negligence is not an essential element in nuisance… However, I am also content to adopt the reasoning of Lord Reid in the same case* [The Wagon Mound (No. 2) [1967] AC 617] *and to accept the conclusion which he arrives at, namely, that, while negligence is not an essential ingredient of nuisance in an action on public nuisance, foreseeability is an essential ingredient. In the present case, the defendant created a danger on the highway which did amount to a public nuisance, but before the plaintiff can establish his right to damages he must satisfy the jury that the injury which he suffered was a reasonably foreseeable event on the part of the defendant."* (per Walsh J. at pp. 14-15)

It can be seen, therefore, that while an action for public nuisance does not require negligence to be established, foreseeability must be established. In other words, the plaintiff must establish that the injury suffered by him was a reasonably foreseeable consequence of the public nuisance. I am satisfied in the present case that on the facts found by me, it was reasonably foreseeable by the Council that a person such as the plaintiff cycling over the concrete surround at the cattle grid could lose control of his bicycle, fall from the bicycle and sustain an injury. That is precisely what happened to the plaintiff.

89. In those circumstances, on the basis of the facts as I have found them, I am satisfied that the Council is also liable to the plaintiff for the tort of public nuisance.

(c) Other bases of liability

(i) Occupiers' Liability Act, 1995

90. The plaintiff also claimed that the Council was liable under the provisions of the 1995 Act. He contended that the Council was an "*occupier*" of "*premises*", which he claimed included the public road on which the concrete surround and cattle grid were located, and that the Council was liable to him either as a "*visitor*" or "*recreational user*". While it was contended on behalf of the plaintiff that he was a "*visitor*" in the sense of being an "*entrant as of right*" under the 1995 Act to whom the common duty of care under s. 3 of the 1995 Act was owed, it was accepted that the plaintiff was more likely to be regarded as a "*recreational user*" to whom the duty provided for under s. 4 was owed (namely a duty not to injure the person intentionally or not to act with "*reckless disregard*" for the person).

91. The Council contended that it could have no liability to the plaintiff under the 1995 Act by reason of its capacity as a road authority. Alternatively, the Council contended that if the 1995 Act did apply, the plaintiff was a "*recreational user*" and that the only duty owed to it was not to act with "*reckless disregard*" for the person of the plaintiff.

92. Both parties relied on a considerable body of case law under the 1995 Act in support of their respective positions. However, in light of the conclusions which I have reached in relation to the plaintiff's claims in negligence and in public nuisance, I do not find it necessary to deal with the plaintiff's claim under this heading. I am reluctant to do so in circumstances where I have a considerable doubt as to whether the provisions of the 1995 Act can apply in the case of an action brought against a road authority in respect of an accident which occurred on the public roadway. I find it difficult to see conceptually how the road authority can be regarded as an "*occupier*" of a road (and features on a road, such as the cattle grid and concrete surround at issue in this case) in circumstances where the road is a public road. That is so notwithstanding that in the present case the Council, as the relevant road authority, is also the owner of the road. Once the road was designated as a public road (as the road here was so designated in 2011), I find it difficult to see how the Council could exclude or prevent members of the public from using the road. This inability to exclude persons from using the road, in my view, sits uncomfortably with the Council being an "*occupier*" of the road, notwithstanding that it is also the owner of the road. I note in passing that the position in England and Wales is that a highway authority is not regarded as the occupier of a public road or footpath (*Clerk & Lindsell on Torts* (22nd ed., 2018) at para. 12-14). The case cited by the editors is *Whiting v. Hillingdon LBC* (1970) 114 S.J. 247. In Sydenham, *Public Rights of Way and Access to Land* (Jordans, 2013), the author states that "*because the public have a legal right to use the public right of way and neither the authority nor the land owner can exclude them",* the highway authority is not regarded as the occupier of the public road. The case cited for that proposition is Gautret v. Egerton (1867) L.R. 2 CP 371. In *Stovin v. Wise* [1996] AC 923, the House of Lords stated:-

> *"The position of the highway authority has no resemblance to that of an occupier of premises who is liable to persons who are invited or allowed to come onto the premises. The authority has no control over who uses the highway and the public use it as of right: McGeown v. Northern Ireland Housing Executive [1995] 1 AC 233. The authority is not an occupier of the highway: Whiting v. Hillingdon London Borough Council…"*

93. It seems to me that a similar approach is likely to be taken by the courts in this jurisdiction and that once the road is designated as a public road it is difficult to see how the road authority can be regarded as an occupier of that road for the purposes of the 1995 Act. However, I am not making any definitive finding on that issue. It is best left to a case in which a decision on the point is necessary for the outcome of the case. That is not so here.

(ii) Roads Act, 1993 (as amended)
94. Nor do not find it necessary to consider the claim made by the plaintiff arising from the alleged breach by the Council of s. 13 of the 1993 Act (as amended). Section 13 provides that the maintenance and construction of all national regional roads in an administrative county is the function of the relevant local authority for that county. Section 13(2) provides that it is a function of the relevant road authority to maintain and construct all local roads within its relevant area. This head of claim was not pushed strongly by the plaintiff and it is unnecessary for me to consider it any further in light of the conclusions which I have reached earlier.

(d) Contributory negligence
95. It is undoubtedly the case that the plaintiff had a duty to take reasonable care for his own safety when approaching the cattle grid on his bicycle. The plaintiff was under that general duty at common law. He was also subject to the duty arising under s. 67 of the 1993 Act (as amended). That section provides as follows:-

> *"67- (1) It shall be the duty of a person using a public road to take reasonable care for his own safety and for that of any other person using the public road.*
>
> *(2) It shall be the duty of a person using a public road to take all reasonable measures to avoid–*
>
> *(a) injury to himself or to any other person using the public road,*
>
> *(b) damage to property owned or used by him or by any other person using the public road."*

As a user of the public road at the time of the accident, the plaintiff was subject to the duty of care provided for in s. 67. However, it seems to me that this section does no more than restate the ordinary duty to take reasonable care for his or her own safety for which every adult member of society is subject for (see for example: *O'Flynn v. Cherry Hill Inns Ltd. t/a The Oliver Plunkett Bar* [2017] IECA 211, per Irvine J. at para. 37; see also *O'Donnell v. South Tipperary County Council* [2017] IEHC 705, per Twomey J. at para. 9).

96. The Council has pleaded contributory negligence on the part of the plaintiff. Among the matters alleged by the Council to amount to contributory negligence by the plaintiff are his failure to dismount from his bicycle and to walk around the cattle grid and his failure successfully to negotiate the cattle grid. I have already concluded that the plaintiff was entitled to proceed on his bicycle over the cattle grid having done so successfully before. I have also concluded that the accident did not occur by reason of the plaintiff cycling either too quickly or too slowly over the cattle grid. However, while in my view the cause of the plaintiff's accident was the sudden and unexpected drop encountered by the plaintiff as he cycled over the concrete surround or ramp or dome leading onto the cattle grid, I accept that it would have been open to the plaintiff to dismount and walk around the cattle grid in the small gap between the left hand pillar and the boulders and that if the plaintiff had cycled his bicycle over the middle or over the right side of the cattle grid, he would not have had to negotiate the sudden drop. It seems to me that in those circumstances there was an element of contributory negligence on the part of the plaintiff. I would assess the level of contributory negligence on the part of the plaintiff at 25%. It is certainly no more than that and there may be an argument for being slightly less than that. However, the justice of the case in the particular circumstances persuades me that the appropriate level of contributory negligence in the case is 25%.

B. Quantum

The Evidence: Quantum
97. The plaintiff himself gave evidence in relation to his injuries and the effect they have had. In addition, evidence was given by Mr. Lester D'Souza, consultant orthopaedic foot and ankle surgeon, who has been responsible for the ongoing care and treatment of the plaintiff in respect of his ankle injury and by Dr. Aideen Henry, consultant physician in orthopaedic and sports medicine. In addition to providing a number of reports, Mr. D'Souza and Dr. Henry gave evidence and were cross-examined on behalf of the Council. No medical expert was called to give evidence on behalf of the Council. However, the Council provided two medical reports from Prof. Eric Masterson, consultant orthopaedic surgeon, who examined the plaintiff on two occasions on behalf of the Council. Prof. Masterson was not called to give evidence.

(a) The Plaintiff
98. In brief, the plaintiff gave evidence that he was taken by ambulance to the Emergency Department of University Hospital Limerick following his accident. He was in extreme pain. He sustained a very serious fracture of his left ankle as well as ankle ligament rupture. He had screws and a plate inserted in his ankle. He remained in University Hospital Limerick for two days. He was in severe pain during that period. He was moved to Croom Orthopaedic Hospital for ten days. He was under the care of Mr. D'Souza. He was in a plaster cast and then a boot. The plaster cast remained in place for approximately three months. He required further surgery in late October 2014, to remove the screws and plate. He had several scars on his ankle from the surgical procedures. He was on heavy pain medication and in a lot of pain. He was on crutches and found using the crutches challenging and hurt his shoulder as a result. He was discharged home from Croom Orthopaedic Hospital after about ten days. He was looked after at home by his wife. However, he was unable to manage the stairs and his wife arranged a sleeping area for him in the sitting room on the ground level of their home. He remained there for several months and intends to make permanent changes to the layout of his house to enable him to continue sleeping downstairs.

99. Following the removal of the cast and subsequently the screws and plate, the plaintiff was left with some scarring which remains visible to date. He was required to attend the fracture clinic in the hospital every three weeks for a number of months. He underwent between ten and twelve sessions of physiotherapy in Ennis General Hospital for his ankle. About four or five months after the accident he moved from crutches to using two walking sticks. About a month or so later, he moved from two walking sticks to one stick. He found it necessary to use one walking stick to assist his movement for about two years thereafter. However, he still requires to use his walking stick occasionally.

100. The plaintiff was anxious to get back to work after his accident and did so in November 2014, while he was still using two walking sticks. He was given sedentary duties following his return to work and until his retirement in May 2015. He is still in pain, has difficulty sleeping and requires ongoing pain medication and medication to help him sleep. He has received a number of injections into his ankle joint carried out by Mr. D'Souza. They have not resolved his pain. He explained that even in court while awaiting to give evidence and while giving his evidence, his left ankle was throbbing and felt hot and he found it necessary to take pain medication. He continues to walk with a slight limp. I observed this myself during the course of the trial.

101. The plaintiff explained that he had many and varied plans for his retirement in May 2015 (almost four years ago). He hoped to travel extensively with his wife including visiting his brother in Thailand. He hoped to continue with his cycling and to undertake mountain walking and trekking. He also hoped to pursue his interests in fishing and birdwatching. He has been unable to fulfil these ambitions for his retirement as a result of the ongoing symptoms of his ankle injury. He remains on painkillers and sleeping tablets to assist him sleeping.

102. While accepting that he had a complicated medical history, having had heart trouble in the past, (and other medical issues which are listed at para. 3 of the plaintiff's replies to particulars dates 20/6) the plaintiff explained, under cross-examination, that he had been able to cope with all of those issues throughout his life, that he had held down a good job and had reared his family. He had made retirement plans despite his medical issues and was confident that they would not prevent him from pursuing those plans, were it not for the accident. He described being in "*reasonably good health*" at the time of the accident. I accept the plaintiff's evidence in its entirety. I had the opportunity of observing the plaintiff during the course of his evidence and during the five days or so of the hearing. I am satisfied that the plaintiff is a completely honest and truthful witness, that his life has been severely affected as a result of the injuries sustained in the accident and that he continues to suffer from the effects of the injury and will do so for the foreseeable future.

103. The plaintiff explained that he had been advised that it would be necessary for him to undergo further surgical intervention as conservative methods of treatment (namely, the ankle joint injections which he has received from Mr. D'Souza) have not been successful. The plaintiff has been advised that he will require either a fusion of his ankle joint or an ankle joint replacement. He has been unable to decide which of these two options to take as he has been putting off what he has found to be a very difficult decision. These issues were addressed in further detail in Mr. D'Souza's evidence.

(b) Dr. Aideen Henry

104. Dr. Henry gave evidence on behalf of the plaintiff. She prepared reports for the plaintiff's solicitors on 31st August 2015, 24th September 2015, 15th August 2016 and 3rd September 2018. She also wrote to Mr. D'Souza on 15th August 2016, referring the plaintiff back for further review in light of the plaintiff's ongoing difficulties. She sought Mr. D'Souza's views on a possible fusion or ankle joint replacement for the plaintiff's persistent symptoms. Dr. Henry, in her reports and in her evidence, described the plaintiff's fracture as being a "*nasty fracture"* which required open reduction and internal fixation. Following her review of the admission notes and the plaintiff's records, she described the plaintiff's ankle injuries as being *"a fracture of the posterior malleolus along with a rupture of the syndesmosis with talar shift and a fracture of the proximal fibula".* This type of fracture is known as a maisonneuve fracture (named after the French surgeon, Jules Germain François Maisonneuve). The fracture involves several of the bones in the ankle as well as ligament rupture. When the plaintiff saw Dr. Henry in August 2015, he had deep pain in the outer aspect of his left ankle. He had pain on ascending and descending stairs and after a short walk. He had pain on trying to cycle. He had pain using the clutch of his car and was told that he may have arthritis in the joint. He was continuing to take painkillers on an ongoing basis. When Dr. Henry examined the plaintiff, she noted that he was walking with a slight limp. She also noted the surgical scars. On the lateral ankle there was a 6cm by 0.3cm surgical scar over the lateral malleolus. On the medial ankle, there were two 0.3cm circular scars. The range of motion testing showed that dorsiflexion was normal but that plantarflexion was reduced to 50% of normal. The plaintiff had tenderness all along the anterior and lateral joint line of the ankle joint. Dr. Henry opined that the plaintiff was continuing to suffer from ongoing pain and restricted movement from the fracture of his left ankle. She referred him for x-rays to establish which bones were fractured and to establish whether osteoarthritis was present.

105. In an addendum to her report dated 24th September, 2015, Dr. Henry outlined the details of the plaintiff's fracture as noted earlier. She further stated that those details indicated that the ankle injury was "*quite severe and that the ankle joint was disrupted with a fracture"*. She explained that the fracture was treated with internal fixation to realign the joint and to immobilise the fragments to enable healing to take place. She noted that there was no current evidence of osteoarthritis. Her belief was that because the ankle joint was disrupted by the accident and required internal fixation to realign it, the plaintiff was at an increased risk of osteoarthritis in the future.

106. Dr. Henry saw the plaintiff again on 15th August, 2016. She noted that at that point the plaintiff could walk up to 200 metres before the pain and the swelling in his ankle increased. The plaintiff's complaints at that time were that he felt that his ankle was the same as before. However, the pain was more pervasive and was lateral with a constant ache. The pain was worse if he walked. He reported that he would get a very sharp pain when he used the clutch in his car. The plaintiff's ankle was swollen and it felt hot at night and kept him awake with the pain. The plaintiff was no longer cycling because of the pain and also continued to have pain using the stairs. The plaintiff was on two to four painkillers a day at the time. On her examination of the plaintiff, she noted that the plaintiff walked with a limp. She noted that the scars had faded further so that the lateral 6cm scar was white and very faint by that stage. The medial scars were no longer visible. She further noted that the plaintiff's range of movement in his left ankle had reduced further with reduced dorsiflexion and plantarflexion and the plaintiff had tenderness of the anterolateral joint line. Dr. Henry opined that the plaintiff was continuing to suffer from ongoing pain and restricted movement dating from the fracture of the posterior malleolus of his left ankle. As the plaintiff's pain had increased and his movement had reduced, Dr. Henry felt that an opinion should be sought from the plaintiff's foot surgeon, Mr. D'Souza, with a view to considering a possible ankle joint replacement or ankle joint fusion. She noted that while a joint fusion would restrict the movement of his ankle further and would lock the ankle joint, it would relieve him of pain. Dr. Henry then referred the plaintiff back to Mr. D'Souza in August, 2016.

107. Dr. Henry saw the plaintiff again on 3rd September, 2018. By that stage, the plaintiff had received a number of ankle joint injections from Mr. D'Souza, the first of which gave him some relief but the second made no difference. The plaintiff was still not cycling as his ankle was too sore. He could not walk for more than 300 metres and even then could only do so with the assistance of painkillers. On examination, Dr. Henry noted that the lateral scar was still visible. The plaintiff's left ankle continued to swell and was sore every day. He explained that it was sore at rest and got worse when walking. The plaintiff was continuing to use a stick when walking on steps. His ankle would wake him up at night with the pain. He continued to take pain medication. On her examination, Dr. Henry noted that the plaintiff walks with a limp and had a flat footed gait. His movement was restricted as before, especially dorsiflexion. The plaintiff was tender over the anterolateral joint line and the lateral scar was unchanged from the last time. Dr. Henry's opinion following her examination on that occasion was that the plaintiff continued to suffer from chronic pain and restricted movement from the fracture of his left ankle. She noted that the ankle had not responded to two injections so that it was likely that the plaintiff would need an ankle joint fusion in the future. A joint fusion would restrict his movement further but would reduce the

pain and the plaintiff would also be left with a limp.

108. On cross-examination, Dr. Henry was asked about whether the plaintiff had pre-existing arthritis in the left ankle. She explained that the x-rays which she had seen from September 2015, did not show any arthritis. However, it was put to her that Mr. D'Souza's report from December 2016, indicated that initial radiographs of the plaintiff's left ankle (from August 2014) revealed osteophytic lipping over the anterior tibia and that it was most likely that the plaintiff had asymptomatic early evidence of arthritis in his left ankle. Dr. Henry had not seen those earlier x-rays and felt that the conclusion in relation to the presence of asymptomatic early evidence of arthritis was debatable in that osteophytes on their own did not necessarily indicate the presence of osteoarthritis. Aspects of Prof. Masterson's reports were put to Dr. Henry but she confirmed that the evidence she had given represented what she had found on her examination of the plaintiff with particular reference to the restricted movement which she observed in the plaintiff's left ankle. She confirmed that whenever she saw the plaintiff, he was continuing to complain of ongoing pain and that the plaintiff had a limp. Dr. Henry confirmed that in her view the plaintiff was an honest and accurate historian. I found Dr. Henry's evidence convincing and persuasive.

(c) Mr. Lester D'Souza

109. Mr. D'Souza then gave evidence on behalf of the plaintiff. He provided two reports. The first was dated 8th December, 2016, following his examination of the plaintiff on 5th December, 2016. The plaintiff was under Mr. D'Souza's care in University Hospital Limerick and in Croom Orthopaedic Hospital.

110. In his first report, he described the plaintiff's injury to his left ankle and the surgical procedure to fix the fracture and subsequently to remove the screw and plate. At the request of Dr. Henry the plaintiff was referred back to Mr. D'Souza in September 2016. Mr. D'Souza arranged for the plaintiff to have a steroid injection of the ankle. When the plaintiff saw Mr. D'Souza on 5th December, 2016, he was complaining of constant aching and a swollen left ankle which was affecting the plaintiff's activities in daily living. The plaintiff also had a hot feeling in his ankle at night. On examination of the plaintiff, Mr. D'Souza noted that there was mild swelling of the ankle with good dorsiflexion and plantarflexion and pain on extremes of movement. The tendons were in good working order with no distal neurovascular deficits. Mr. D'Souza commented on the radiographs dated 3rd August, 2014. They revealed a laterally subluxed talus with an increased medial capsular suggesting deltoid ligament injury. There was also high fibular and spiral fracture along with a 10% fracture of the posterior malleolus which was undisplaced. There was a large osteophyte in front of the distal tibia suggesting some degenerative changes in the ankle although the remainder of the ankle itself did not reveal any arthritis. Radiographs on 4th August, 2014 revealed a well reduced ankle. Radiographs on 21st August, 2014 revealed two syndesmotic screws across a three-hole lateral plate with reduced posterior malleolus. Radiographs of the left ankle in September 2016 revealed a normal ankle with evidence of very minimal osteoarthritis. A MRI scan of the left ankle dated 19th September, 2016 revealed degenerative change not only in the ankle but also in the inferior syndesmosis. Mr. D'Souza arranged for the plaintiff to have an injection into his left ankle in the near future. Mr. D'Souza explained that the fracture had healed very well but that the plaintiff had some symptoms suggestive of arthritis. Initial radiographs revealed osteophytic lipping over the anterior tibia but it was otherwise a normal looking joint. He explained that it was most likely that the plaintiff had asymptomatic early evidence of arthritis in his left ankle, sustained a traumatic injury to the ankle and by that stage had symptoms and signs of early arthritis. He recommended a course of intra-articular injections by way of treatment and felt that that should help to control his symptoms in the future.

111. However, in light of the plaintiff's ongoing difficulties, he was seen again by Mr. D'Souza in December 2017. Mr. D'Souza reported on 5th January, 2018. At that stage, the plaintiff was complaining of ongoing pain in his left ankle and swelling. The pain existed at rest as well as on walking and standing. It was affecting the plaintiff's lifestyle and he was unable to walk for any length of time or to cycle or run. He continued to have a difficulty coming down the stairs. On examination, Mr. D'Souza noted that the plaintiff had a puffy left ankle. Dorsiflexion was to ten degrees and plantarflexion was to forty degrees. Mr. D'Souza noted again the radiographs referred to in his earlier report. However, in addition, radiographs dated 19th December, 2017 revealed evidence of mild to moderate osteoarthritis predominately in the tibiotalar joint. Mr. D'Souza decided to arrange for another intra-articular injection of the left ankle. While noting that the fracture itself had healed very well, Mr. D'Souza observed that the plaintiff by that stage had symptoms suggestive of arthritis. The MRI scans of the left ankle from September 2016, revealed degenerative changes in the ankle and syndesmosis. Radiographs dated 30th September, 2016 revealed mild arthritis in the tibiotalar joint. The most up to date radiographs (from December 2017) revealed some advancement of osteoarthritis from a mild to moderate degree. There was sclerosis of the adjacent joint surfaces of the talus and tibia. Mr. D'Souza felt that the plaintiff would benefit from a repeat injection for relief. He explained that it was more likely that the plaintiff had asymptomatic early arthritis in the left ankle and then sustained a traumatic injury leading to symptoms suggestive of early arthritis. He felt that the intra-articular injury sustained at the time of the lateral subluxation of the talus, deltoid ligament injury and syndesmotic injury also contributed to the arthritis in the tibiotalar joint. He explained that while many patients could manage with intermittent intra-articular injections of steroid, with advancement the plaintiff may eventually require an ankle fusion or ankle joint replacement if he continued to have night pain and if his daily activities were significantly affected.

112. In his direct evidence, Mr. D'Souza referred to the development of the degenerative change in the plaintiff's left ankle between September, 2016, and December, 2017. He noted progressive degeneration of the ankle joint. In terms of the options for the plaintiff, given his age, Mr. D'Souza stated that the plaintiff would require either a fusion of his ankle joint or an ankle joint replacement. Fusion would involve stiffening the joint so that it could not move and cause pain. However, one consequence of an ankle fusion could be that other joints could start wearing out because of the stiffness in the ankle. An ankle replacement would allow movement. On balance, Mr. D'Souza's preference would be for an ankle joint replacement. This would remove all arthritic components. However, the downside would be that there is a failure rate of about 20%. In other words, 20 out of 100 ankle joint replacements fail within ten years. The plaintiff would require further pain medication. If the plaintiff did not take one of these options, the ankle would remain painful, he would experience pain in his ankle at night and would be unable to get a good nights sleep. Mr. D'Souza stated that the plaintiff would need to pursue one of these two options.

113. Mr. D'Souza was cross-examined in relation to aspects of Prof. Masterson's report and some differences between their respective reports, particularly, in relation to the range of movement noted by each. There was not a great deal of difference between Mr. D'Souza and Prof. Masterson. However, Mr. D'Souza did not agree with Prof. Masterson's view that the pain level, which the plaintiff would continue to suffer from, would be at a "*nuisance level*" rather than being "*seriously disabling".* Mr. D'Souza stated that he was giving his views as a foot surgeon. Mr. D'Souza confirmed that the plaintiff's normal activities have been significantly affected by his injuries. He confirmed that while there was pre-existing asymptomatic early evidence of arthritis, the nasty ankle injury sustained by the plaintiff had led to the development of the osteoarthritis. He described what he saw in the most recent x-rays of the plaintiff's left ankle as being a "*dead ringer for arthritis*". Mr. D'Souza did not waiver from the views expressed in his reports. Further, he confirmed that he had tried conservative pain management but that that had not succeeded. He was not challenged on his view that the plaintiff required either a fusion or an ankle joint replacement. I accept Mr D'Souza's evidence in full.

Findings of Fact on Quantum Issues

114. As I indicated earlier, I accept the plaintiff's evidence in relation to his injuries, his ongoing symptoms and the effect they have had on his daily life. I found the plaintiff to be a truthful and honest witness who did not exaggerate the impact of the injuries upon him. I had the opportunity of observing the plaintiff during the course of the hearing. This confirmed my assessment of the veracity of the plaintiff's evidence.

115. Having assessed the plaintiff's evidence and the evidence of the medical witnesses referred to above, I make the following findings.

116. The plaintiff suffered a very serious and nasty fracture of his left ankle. The fracture is one known as a Maisonneuve fracture. It involved a fracture of a number of the bones in the plaintiff's ankle (the posterior malleolus and the proximal fibula) as well as a rupture of the syndesmosis with talar shift. The plaintiff required a significant surgical operation to fix the bones and to repair the ligament damage with screws and a plate. Because of the intersection of the various bones and ligaments, I accept Mr. D'Souza's description of the operation as being like putting a jigsaw together. The plaintiff experienced very significant pain at the time of the accident and subsequent to it. The plaintiff was in a cast for several months which was then replaced by a boot. The plaintiff was in hospital for about two weeks following the accident and was on constant pain relief. The plaintiff required further surgery to remove the screw and plate from his ankle on 29th October, 2014.

117. The plaintiff underwent ten to twelve sessions of physiotherapy on his ankle. He was on heavy pain medication and remains on pain medication to date. The plaintiff also continues to require medication to assist him sleeping due to the pain in his left ankle at night.

118. The plaintiff was on crutches for approximately four months following his operation. He then required the assistance of two walking sticks to walk for a further month or so and thereafter required the assistance of one stick to walk. The plaintiff still uses the walking stick from time to time.

119. The plaintiff's home life was severely disrupted as a result of the accident. He required considerable assistance from his wife to assist him about his daily duties. The plaintiff had and continues to have difficulty ascending and descending stairs. The plaintiff's sleeping arrangements were altered as a result of his inability to ascend and descend the stairs. It is the plaintiff's intention to make permanent changes to his home to enable him to sleep at ground level. The plaintiff was very anxious to return to work and did return to work in November, 2014. His employer, the HSE, was able to facilitate the plaintiff's return to work by allowing him to work on a sedentary basis. The plaintiff retired in May 2015. The plaintiff had very extensive and ambitious retirement plans which included foreign travel and mountain walking and cycling. He has been unable to pursue those plans. While the plaintiff had a complicated medical history prior to the accident, I am satisfied that the plaintiff was coping with his medical conditions and would have been able to pursue his plans for retirement were it not for the accident.

120. The plaintiff has ongoing problems with his left ankle. He continues to be in pain. He continues to have swelling on his left ankle. His ankle feels hot from time to time (including while he was in court). The plaintiff continues to have difficulty sleeping. Notwithstanding conservative measures in the form of intra-articular injections performed on two occasions by Mr. D'Souza in 2016 and 2018, the plaintiff's symptoms have persisted. The injections would not have been a pleasant experience for the plaintiffs.

121. I accept the evidence of Mr. D'Souza that the osteophytic lipping over the anterior distal tibia seen on the x-rays at the time of the accident indicate that the plaintiff had asymptomatic early arthritis in the ankle. However, it was just that, asymptomatic. I accept Mr. D'Souza's evidence that the traumatic injury sustained by the plaintiff brought on symptoms of early arthritis and subsequent scans and x-rays have revealed significant degenerative change in his left ankle and evidence of mild to moderate osteoarthritis predominantly in the tibiotalar joint. I am satisfied on the evidence that it is likely that these degenerative changes were caused as a result of the traumatic injury sustained by the plaintiff when he fractured his ankle in the fall off his bicycle in August 2014. I entirely accept Mr. D'Souza's evidence in that regard.

122. I am satisfied that the conservative treatment given to the plaintiff in the form of the intraarticular injections into his left ankle have not resolved the plaintiff's symptoms. I accept that the plaintiff has ongoing, significant and debilitating pain. I also accept that the plaintiff continues to experience swelling of his left ankle. These ongoing symptoms have continued to disrupt and effect the plaintiff's daily life and activities. In this regard I accept the plaintiff's evidence and that of Dr. Henry and Mr. D'Souza. While I have been provided with medical reports from Prof. Masterson on behalf of the Council, I have not had the benefit of hearing Prof. Masterson giving evidence or being cross examined. I do note however that Prof. Masterson describes the plaintiff's injury as a "*nasty fracture to his left ankle with a rupture of the medial collateral ligament*" and a "*nasty injury".* I also note that Prof. Masterson observed in his first report that the plaintiff would remain at moderate risk of post-traumatic arthritis. I accept that that is what occurred. I do not accept Prof. Masterson's evidence that the ongoing pain being suffered by the plaintiff is properly described as "*intermittent niggling discomfort*" or at a "*nuisance level*". I accept the evidence of the plaintiff and of Dr. Henry and Mr. D'Souza that it is of a much more significant nature and is disabling. While Prof. Masterson notes at the conclusion of his second report in October 2017 that it was merely a possibility rather than a probability that the plaintiff would develop arthritic change in the ankle in the future, I accept Mr. D'Souza's evidence that arthritic change has occurred and that this was caused by the traumatic injury sustained by the plaintiff when he fell from his bicycle in August 2014.

123. I accept on the evidence that the plaintiff will require either a fusion of his left ankle or an ankle joint replacement. A fusion would result in a stiffening of the joint and would mean that the plaintiff would cease to experience pain. However, his joint will not move. That may create stress on other joints. I also accept the evidence of Dr. Henry that if the plaintiff undergoes a fusion, he will be left with a limp, will be unable to run or take quick steps and his gait will be permanently affected. I note Mr. D'Souza's marginal preference for the plaintiff to undergo an ankle joint replacement. While this will remove the arthritic components from his ankle joint, it will require a significant further surgical intervention which itself will involve pain and discomfort for the plaintiff. I also note that there is a 20% chance of the joint replacement failing within ten years. Presumably if that happened it would require a further joint replacement. The plaintiff would also require pain medication in that event. There was no evidence to contradict the evidence of Mr. D'Souza that the plaintiff will require either a fusion of his left ankle or an ankle joint replacement. I also accept Mr. D'Souza's evidence that if the plaintiff does not take one of these options, he will be left with ongoing pain and difficulty in sleeping at night.

Relevant legal principles on quantum

124. In light of my finding on liability, I must assess general damages in respect of the plaintiff's pain and suffering to date and into the future. The plaintiff's symptoms are ongoing and he will require further intervention whether by means of a fusion of his ankle or an ankle joint replacement. I must also take account of the fact that I have concluded that the degenerative disease now present in the plaintiff's ankle joint was caused by the traumatic injury sustained by the plaintiff in the accident, the subject of these proceedings.

125. In *McWhinney v. Cork City Council* [2018] IEHC 472, I set out what I believed to be the correct approach to be taken in relation to the assessment of general damages to date and into the future. I refer in this context to para. 57 – 61 of that judgment.

126. First, I must bear in mind that the primary objective of an award of damages is, as best the court can do, to put the plaintiff back in the position he was in before he sustained the injuries in the accident for which I have found the Council liable. Recognising the imprecise and imperfect nature of that exercise, Irvine J. in the Court of Appeal in *Nolan v. Wirenski* [2016] IECA 56, [2016] 1 I.R. 461, stated that the true purpose of an award of damages is "*to provide reasonable compensation for the pain and suffering that the person has endured and will likely endure in the future".*

127. Second, recognising the vast range of injuries which a person may suffer as a result of an accident, Irvine J. stated in Nolan, in a passage with which I am in full agreement, as follows:-

> "*Principle and authority require that awards of damages should be (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and (iii) proportionate within the scheme of awards for personal injuries generally. This usually means locating the seriousness of the case at an appropriate point somewhere on a scale which includes everything from the most minor to the most serious injuries*." (per Irvine J. at para. 33)

128. I acknowledge and agree with the further observations of Irvine J. in the Court of Appeal in Nolan, where she observed that Denham J. in the Supreme Court advised in *M.N. v. S.M.* [2005] IESC 17, [2005] 4 I.R. 461, that:-

> *"… damages can only be fair and just if they are proportionate not only to the injuries sustained by* [the] *plaintiff but also proportionate when assessed against the level of the damages commonly awarded to other plaintiffs who have sustained injuries which are of a significantly greater or lesser magnitude. As* [Denham J.] *stated at para. 44, of her judgment, 'there should be a rational relationship between awards of damages in personal injuries cases'. Thus it is important that minor injuries attract appropriately modest damages, middling injuries moderate damages, and more severe injuries damages of a level which are clearly distinguishable in terms of quantum from those that fall into the other lesser categories. … However, when it comes to assessing damages, what is important is how significant the injury concerned is when viewed within the whole spectrum of potential injuries to which I have earlier referred."*

129. Third, I have also taken into account and applied the guidance given by Irvine J. in the Court of Appeal in *Shannon v. O'Sullivan* [2016] IECA 93:-

> *"'Most judges, when it comes to assessing the severity of any given injury and the appropriate sum to be awarded in respect of pain and suffering to date, will be guided by the answers to questions such as the following:*
>
> *(i) Was the incident which caused the injury traumatic, and if so, how much distress did it cause?*
>
> *(ii) Did the plaintiff require hospitalisation, and if so, for how long?*
>
> *(iii) What did the plaintiff suffer in terms of pain and discomfort or lack of dignity during that period?*
>
> *(iv) What type and number of surgical interventions or other treatments did they require during the period of hospitalisation?*
>
> *(v) Did the plaintiff need to attend a rehabilitation facility at any stage, and if so, for how long?*
>
> *(vi) While recovering in their home, was the plaintiff capable of independent living? Were they, for example, able to dress, toilet themselves and otherwise cater to all of their personal needs or were they dependent in all or some respects, and if so, for how long?*
>
> *(vii) If the plaintiff was dependent, why was this so? Were they, for example, wheelchair-bound, on crutches or did they have their arm in a sling? In respect of what activities were they so dependent?*
>
> *(viii) What limitations had been imposed on their activities such as leisure or sporting pursuits?*
>
> *(ix) For how long was the plaintiff out of work?*
>
> *(x) To what extent was their relationship with their family interfered with?*
>
> *(xi) Finally, what was the nature and extent of any treatment, therapy or medication required?"*

130. I have also seen the recent judgment of Barton J. in *Douglas v. Michael Guiney Limited* [2019] IEHC 301, which was delivered after the case was heard. At paragraphs 78 and 79 of his judgment in that case, Barton J. set out the applicable legal principles to the assessment of damages. I completely agree with what Barton J. stated in those paragraphs. The principles outlined by the court in that case are consistent with the principles set out by the Supreme Court and the Court of Appeal in a series of decisions which Barton J. himself had recently reviewed in *B.D. v. Minister for Health* [2019] IEHC 173.

131. I have outlined earlier, the plaintiff's evidence and the evidence of Dr. Henry and Mr. D'Souza concerning the nature of the injury sustained by the plaintiff, the hospitalisation and surgical intervention required, the ongoing pain and discomfort suffered by the plaintiff, the treatment administered to the plaintiff including physiotherapy, pain medication and intraarticular injections into his left ankle joint, the fact that the plaintiff required crutches and then two walking sticks, and now requires one walking stick from time to time, the changes with the plaintiff had to make to his living and sleeping arrangements at home and the severe disruption to the plaintiff's retirement plans. I have also outlined the full extent in the very serious fracture sustained by the plaintiff and the ongoing symptoms which the plaintiff is experiencing. It is also extremely significant in this context that the plaintiff will require either a fusion of his left ankle (with the consequences which that procedure will give such as a permanent limp and altered gait) or an ankle joint replacement (with all that would go with such a procedure and the risk that it may fail). Finally, in this context, I have taken account of the development of arthritis in the plaintiff's left ankle joint. While I have accepted that Mr. D'Souza's evidence is more than likely that the plaintiff had a symptomatic early arthritis in his left ankle, the traumatic injury sustained by him has caused arthritis to develop in his left ankle. As of December 2017, x-rays disclosed mild to moderate osteoarthritis in his ankle joint.

132. Fourth, I am required by s. 22 of the Civil Liability and Courts Act, 2004 (as amended), to have regard to the (revised) Book of Quantum (2016). In particular, I have had regard to the information provided at Section 5F in respect of ankle soft tissue injuries and fractures. It will be recalled that the plaintiff suffered a very serious fracture of the post malleolus with a rupture of the syndesmosis with talar shift and a fracture of the proximal fibula. There were, therefore, soft tissue and fracture injuries. I am satisfied that the injuries of soft tissue (being the rupture of the syndesmosis) and the fracture fell within the "*severe and permanent*" categories set out in s. 5F of the Book of Quantum. However, in my view, the full extent of the plaintiff's injuries and the ongoing nature of those injuries together with the certain requirement for further intervention in the form of a fusion or ankle joint replacement is not fully reflected in the injuries described in s. 5F

Conclusion on Quantum
133. In conclusion, having regard to the findings of fact which I have made on the issues relevant to quantum and the legal principles which I have set out, I consider that a fair, reasonable and proportionate sum by way of general damages to compensate the plaintiff for his injuries to date is €95,000. Having regard to the fact that the plaintiff has ongoing problems and will require further intervention in the form of a fusion or ankle joint replacement, I consider that a fair, reasonable and proportionate sum by way of general damages to compensate the plaintiff for the pain and suffering he will experience into the future is €45,000. The total sum for general damages will be €140,000, before deducting 25% in respect of the contributory negligence I have found against the plaintiff.

Overall Conclusions
134. In summary, therefore, I have found the Council liable to the plaintiff for the injuries the plaintiff sustained on 3rd August, 2014, when he fell from his bicycle while cycling over a concrete surround or dome or ramp at a cattle grid on a public road in Clonmoney South, Shannon, Co. Clare. I have found that the state of the concrete surround at the cattle grid amounted to a danger or hazard for persons such as the plaintiff using the road. I have concluded that the Council is liable in negligence in its capacity as the road authority. I have concluded that the state of the concrete surround at the cattle grid was caused by misfeasance rather than nonfeasance in the initial construction or installation of the concrete surround at the cattle grid by the Council's predecessor in title, Shannon Development, who transferred the road including the cattle grid and concrete surround to the Council in 2004. There were defects in the construction and installation of the cattle grid. Those defects were present at the time the Council designated the road as a public road in 2011. I have also found that the condition of the concrete surround at the cattle grid amounted to a public nuisance which was created by the Council's predecessors in title and continued or adopted by the Council. I have not found it necessary to express any concluded view on the possible liability of the Council under the Occupiers' Liability Act 1995, or under the Roads Act 1993 (as amended). Difficult legal issues arise in relation to those heads of claim which it is not necessary to resolve in this case.

135. I have concluded that the plaintiff is guilty of contributory negligence which I have assessed at 25%.

136. I have assessed general damages for pain and suffering to date at €95,000 and general damages for pain and suffering into the future of €45,000. The total, therefore, damages for pain and suffering will be €140,000 before the appropriate deduction for the contributory negligence of the plaintiff. Special damages have been agreed at €11,206.50. This does not include any loss of earnings as there was no such claim. A deduction of 25% must be taken from this sum also.

Award
137. In conclusion, therefore, taking account of the 25% for the plaintiff's contributory negligence, I award general damages (to include damages to date and into the future) of €105,000. I award special damages in the sum of €8,404.87.

138. Accordingly, there will be a decree in favour of the plaintiff in the sum of €113,404.87.

139. Finally, I thank counsel and solicitors for both sides for their considerable assistance in this case, which included the provision of numerous cases and authorities at short notice, for which I am very grateful.