

## THE HIGH COURT

[2015 No. 194 P.]

BETWEEN

PAUL O'TOOLE

PLAINTIFF

AND

TIPPERARY COUNTY COUNCIL

DEFENDANT

**JUDGMENT of Ms. Justice O'Hanlon delivered on the 25th day of July, 2018****Background**

1. On or about 13th January, 2015, a personal injury summons issued in relation to an accident which occurred on Sunday, 27th April, 2014, when the plaintiff was cycling his pedal cycle along the public highway between Portroe and Ballina, Tipperary. He was caused to fall off his cycle due to the presence of a pothole on the roadway. As a result of this, he suffered severe personal injuries, loss, damage, inconvenience and expense.

2. The defendant is Tipperary County Council and is the successor in title to North Tipperary County Council. It is pleaded that all material times, the defendant was under a statutory duty to maintain the public roadways, including the proper construction and design of the said roadways, erection of warning signs and like matters.

3. The Court agreed to amend the date of the accident from 28th April, 2014, which was pleaded, to Sunday, 27th April, 2014.

4. This case was opened on the basis that the accident occurred on the R494 and that the plaintiff was wearing a helmet, cold weather gear including overshoes on his cycling shoes. He was rendered unconscious by this accident despite the fact that he was wearing a helmet at the time. The plaintiff suffered very serious rib fractures, displaced fracture of the clavicle, hearing loss in the right ear and a shoulder injury to the right shoulder. The plaintiff suffered from a puncturing of the lungs, bleeding from the ear and tinnitus as well as a rotator cuff injury. He is employed in the insurance industry. He was out of work for thirteen weeks following this accident. The plaintiff's contention is that he suffered very serious ongoing sequelae as a result of this accident and may require a hearing aid or implant.

5. The accident concerned a pothole which is one-foot square and three inches deep and is described by counsel for the plaintiff as a nuisance. It is asserted that this is not a nonfeasance case but rather a case of defective repair and a failure to respond to complaints. Reliance is placed on the decision of Murphy J. in *Lewis v. Cork County Council and Youghal UDC*, which decided that repairs must be effective.

**The Evidence of the Plaintiff**

6. The plaintiff gave evidence that his date of birth is 21st January, 1966 and he is now aged 52 years. The plaintiff confirmed that the accident actually happened on Sunday, 27th April, 2014. The pleadings were amended accordingly and there was no objection from the defence to that amendment.

7. The plaintiff described himself as a financial advisor with Finance First and that he had worked with them for ten years and had taken one year leave of absence during that time. He described himself as an insurance broker where he reviews packages in terms of insurance and tries to get better benefits for clients. The plaintiff has worked from home post-accident and has used Skype in his work. One or two days per month, the plaintiff is obliged to travel to Dublin for work purposes. The plaintiff then went on to describe how for the last fifteen years, cycling was his hobby and that he had a previous history of competitive cycling before he had his own young family. The plaintiff explained that he had taken part in the Wicklow 200 which would involve lengthy cycles. On the date of the accident, he left home between 9 and 9:30am and was on the Nenagh/Ballina road. He said that at that stage four or five, the party of cyclists intended going to Limerick and back to Portroe which would be 160km and that they had done that once or twice before but that it was a busy road. However, on a Sunday morning, traffic would not be that heavy.

8. The plaintiff described the group as casual cyclists who did charity cycles and gave the example of the Ring of Kerry being traversed for that purpose. The plaintiff further described training for a charity cycle between Mizzen and Malin Head last year which was 600km. That was done over three days. He described the weather as wet and misty when he left Borrisoleigh. He was wearing full winter gear with overshoes on shoes and a base layer of jackets over that as well as a helmet at the time.

9. The plaintiff described Portroe as involving a sharp climb for 4km with a fifteen-degree gradient. They were split up at different levels and the party had agreed to meet at the viewing point.

10. The plaintiff was coming down the hill. He described his line of vision and how he was using the drop bars on the bike to reduce the centre of gravity. He was feathering the brakes because the road was wet and he did not want to skid. He did not see the pothole. He said he was completely disorientated and did not know what was going on after he fell. The plaintiff described having been taken to hospital and having an injury to the right side of the pneumothorax. A right sided drain was inserted into the lung which remained in for four days. He was in hospital until Friday of that week. Regarding the right clavicle injury, he was obliged to wear a sling for four to six weeks. That was standard treatment for a clavicle fracture. The plaintiff lost consciousness on impact. He was bleeding from the right ear and had an awful headache with buzzing in the right ear. He was seen by an ENT surgeon in relation to the ear issue and the severe headaches continued for the first couple of days. The plaintiff described how he now goes deaf if he is in a room with other people or in a bar with a TV. He can now hear a person alright but the buzzing is still there. He describes this as not affecting his work but rather his social life. The plaintiff has indicated in his evidence that his wife will say that he cannot hear her and will give evidence of that. His balance was not affected.

11. In relation to the injury to the clavicle, he wore a sling and he said that if he now looks in the mirror, the right shoulder has dropped one and a half inches by comparison with the left shoulder. He describes having pain if he uses a manual lawnmower. He feels pain in his shoulder area and may have a rotator cuff injury.

12. The plaintiff lives in Templemore and agreed to work in the Templemore area post-accident. He said that a number of hours driving

would cause pain in the shoulder.

13. The plaintiff described being able to lift his right arm to 80 degrees but cannot undertake jobs such as household painting any more.

14. The plaintiff described being treated with injections two to three times a day. He was also treated with acupuncture and physiotherapy and was advised to have a paravertebral block.

15. As a result of this, the plaintiff has now had to limit his cycling and can feel pressure or pain in the lungs pressing against his ribs on exercise. The plaintiff indicated that it took him one full year to get to 80% in terms of his mobility. He described having a scar on the right side below the ribcage where the drain was inserted.

16. The plaintiff indicated that there was water generally in the area where he was cycling at the time of the accident. He moved to the centre to improve his line of vision. His carbon-fibre bike snapped in two. He gave its value as €2,800.

17. Under cross examination, the plaintiff confirmed that he had been cycling for fifteen years and that he had had other falls from his bicycle. He described one previous accident where a car hit him and he suffered injuries to two ribs on the left side.

18. It was put to this witness on cross examination that the hospital records of 27th April, 2014 from Limerick Hospital describe one other person who was trying to avoid falling on him or to his side. He said he was not aware of the record and that when he hit the pothole, he hit the ground and he did not remember anything after that. He said he was on the side of the road and he was put into an ambulance.

19. It was put to this witness that the ambulance driver recorded him having fourteen out of fifteen in terms of his level of consciousness. He said he did not recall, that that it was a damp and misty morning and that it was wet. It was put to this witness that a meteorological witness would say that there was a ridge of high pressure and that he would describe that by saying that there might have been localised trace.

20. The plaintiff disagreed with that and said that the gear he would have worn had it been dry would have been a vest and a light jacket and not the waterproof vest and waterproof jacket, waterproof pants and cycling shoes with overshoes and gloves which he was wearing on the occasion of the accident. The plaintiff continued to assert that it was a wet day on the day of the accident. He disputed that there were dry conditions and said that there was water on the road on the day, water on the surface on the left hand side in the pothole. He said it was not a torrent but there was certainly water on that road.

21. It was put to this witness that it was a steep hill and that he was wisely placing himself at the centre of the road for the descent. He said he was feathering the brakes all the time to avoid a skid. He said there was considerable debris and a rough surface on the road. He could see the debris on the left and then moved slightly out to the centre of the road to get a better line of vision. He could also see water on the left. He said that for those reasons, he moved towards the centre line.

22. This witness described himself as going at 30km per hour down towards the dip in the road. He said the road went down two or three levels and that there was a slight flattening for quite a long distance down the hill. He described himself as being fourteen stone weight and that because of his weight, he was feathering the brakes to avoid skids. He said that had it been a dry day, he would have been travelling at 55km per hour. The plaintiff was adamant that he was going at 30km an hour and not faster and that he fell down when he hit the pothole. Had he been travelling faster, he would have slid along and suffered a road rash. He also said that his helmet snapped and that he was not going too fast on the basis that if he was going too fast he would have broken the wheel and slid along the road. He described a group of twelve to fourteen people cycling with him and he said that they had agreed to meet past the locus of the accident. He would have been about tenth position in the group, which was fragmented. He agreed that he had cycled this route a couple of times before.

23. The plaintiff was referred to the report of Mr. Masterson of 18th August, 2014, which confirmed a right rib injury. He said that his right shoulder was still a bit sore and that he had the full range of movement and signs of healing. It was put to this witness that he was seen by Mr. Chhabra in 2016. He said that he had had shoulder problems since the accident and that he had physiotherapy and acupuncture and exercises in Thurles for a number of weeks and is not limited in a normal day's work. He described himself as limited regarding cycling or if he cycles for a number of hours, he can feel physically weak and can feel pain in his shoulder.

24. The plaintiff tumbled over a bicycle at age 21 or 22. At that stage he played sport, football and hurling until at age 21 he got a cartilage in the knee problem which stopped all of his contact sport. He described being hit by a car in 2010 while on a bicycle and that he had one or two falls but nothing major.

#### **Evidence of Michelle O'Toole, Wife of the Plaintiff**

25. This witness said that she came upon the scene at about 12:30pm and 1pm on the day of the accident and that it was drizzling rain on and off. She came to collect the bicycle and went to the accident and emergency with a bag including all the plaintiff's gear which was wet and heavy. The helmet was cracked. She spent the rest of the day and evening with her husband. She described him as wearing an all-in-one pants and vest, a top heavy jacket, a neck cover to cover his mouth and sports prescription spectacles on the date of the accident.

26. Concerning his hearing problems, this witness said that unless the plaintiff looks at her, he will not hear her properly and that on and off she has to nudge him or speak louder if they are at a dinner party or such like. This witness confirmed that she took the early photographs already referred to and that she got the plaintiff to take off his shoe to show the length of the pothole because his shoe size is a 10.

27. Regarding photograph 3 in the house named "Leonora", she said that the house was somewhat derelict and had a tennis court at the old bridge where the road ends. There was a car accident at that point, they were told.

28. The plaintiff was cross-examined as to where she collected his bike exactly and she said it was just above the scene of the accident in the area of the accident before she went to the hospital. She was going to Limerick and took a wrong turn. She was very flustered but she did see the area where it happened. She said the bike was there against the wall at the entrance to the house before the red bollards. There was a gate on the right hand side.

29. This witness described drizzle occurring on and off and saturated clothing belonging to the plaintiff. She said that blood had come from his right ear to the right side of the clothes.

30. Mr. John Hogan gave evidence that he lives in Castletown, Portroe and that he is familiar with the locus of the accident, that it is approximately 400m from his house, which is southwest of the accident. He said he goes over a slight bridge and goes right into Castle Rock and that he lives on the right side. He has been 24 years in that house. He described himself as being a mechanical engineer in terms of design and construction engineering and both product and industrial engineer. He has a diploma in this work. He described himself as semi-retired. He works for himself. He originally came to set up a plant for Warner in the area.

31. This witness said that four times a day, he goes over and back at that particular stretch of the road where the accident occurred, that he turns left at Castletown Cross and goes up to Charlie's Cross and over the pothole towards Nenagh on that route. This witness said that the pothole was on the road for at least seven to eight years. He said it comes at the bottom of a very steep hill and it does not have to rain very heavily for it to pond and that it runs into a stream 60m further on. He described it as having been repaired many times after, for example, after the heavy snow in March this year. This witness cannot recall when it was first repaired but he said he was witness to the hole being filled with two hoppers, one of tar and one of chips. He said he was behind the vehicle when that occurred but that the pothole has definitely been there for the last seven years. He repeated that it was repaired on many occasions over that period of time. He said that the repair would last for two to three months and that it depends on the level of care it gets. There was a three-inch depression in the pothole this morning.

32. This witness was shown photograph 11 and was asked about patching on the right of the road itself. He said he did remember it being done more than two years ago and that that is where the volume of water gathers. He said there was no adhesion to the tar which had been used.

33. Under cross-examination, Mr. Paul O'Toole said that he called to the plaintiff over a year ago and asked him whether he was familiar with the area. He told him about the accident and asked him about works in the area. He said that he remembered the pothole being repaired on many occasions. He said that he wanted his expenses for coming to court covered and that Mr. O'Toole agreed to do that. This witness agreed that there were patch repairs on the extreme left side, that there was an area of recurring repairs, that the water comes down onto the left and ponds at the bottom where the pothole is, that people pull to the left to avoid the pothole and that the road crumbles as a result and that it does not have to rain very heavily for the whole area to pond. He said that there were many cuttings to allow the rain run off but they are not effective. He said that on his trips to the village, he has to keep slightly to the left of the centre line to avoid the pothole. This witness was shown the defendant's photographs and a wall which was demolished in a car accident prior to this accident which was visible in one of the photographs. This witness said that the pothole may have been filled. There is no pothole in the defence photographs, he cannot see it, but he disagreed with the contention put to him that the defence engineers will say there were repairs of other potholes but the offending pothole did not exist until 2014. It was further put to him that this conflicts with the evidence of Mrs. O'Toole and of her photographs five days post the accident. This witness marked where he thought the pothole was on the defendant's photograph and he said it could be the angle which the photograph was taken or his own eyesight.

34. The affidavit of discovery was referred to. Category B reads 2nd October, 2014, and 1st August, 2014, but in fact the year should be 2013.

35. Mr. Terence Murphy, Orthopaedic Surgeon, Ardkeen Hospital, Waterford gave evidence that he saw the plaintiff on 8th May, 2018, and that he could raise his upper arm above his head and that the movements cause pain from the point of view of height. He said they did travel most days to Dublin but he was working from home post-accident. He described the plaintiff as suffering from a deformity of the right clavicle with limited rotation in the shoulder and limited movement in the upper arm. He felt that there was a partial rotator cuff issue and difficulty on high elevation. His clinical assessment showed that there was some weakness, some pain on resistance and he had a concern about the rotator cuff or tendon tear. He confirmed significant injuries to the right thorax, clavicle and shoulder.

36. Under cross-examination, this witness said that there was a shortened clavicle which was a standard feature of clavicle injury. He said it can inhibit function down the road. He said that there was an injury to the shoulder and a proximal humerus injury but that it has low risk of interference with his activities.

#### **Vincent O'Hara, Consultant Engineer,**

37. Mr. O'Hara indicated that Tony O'Keefe engineer of O'Keefe Engineering where he works himself, attended and took photographs of the locus on 10th November, 2014. This witness attended last week with the plaintiff to review the locus. He looked at the plaintiff's wife's photographs and the issue of whether there was a previous repair. These photographs were dated the 2nd May, 2014. He commented that the shoe placed beside the pothole was very helpful and that it was twelve millimetres in diameter. Regarding the general road surface, there was a different surface to the left of the pothole and above it. He looked at photographs 5, 6, 7 and 8 taken in June, 2014 and said that photograph 7 and 8 show three different surfaces. Firstly, the main area of the roadway and secondly the main area of repair. He compared that with photograph 3 which showed the third area circled by the witness and copied by himself. He said that photograph 9 showed further repair and described it as a rectangular area in the photographs taken on 22nd June, 2018. He concluded that there were previous repairs to the pothole, because if there were no previous repairs it would be a uniform surface in appearance.

38. Photographs 1 and 9 showed that it is need of repair again. Mr. Hogan was asked to look at the defendant's photographs. He said that it was difficult to say if there was a pothole there or if it had been repaired and had water lodging in it.

39. Mr. Hogan was asked about August, 2013. He said that the hole was repaired in March, 2018 and on Friday he visited it and could confirm it was in need of repair again. Page 6 of the discovery s. 1(b) was referred to. He confirmed again that repair is needed and that it is part of a series of photographs that there had been. We are now told that it was with reference to 2013. He said that there was a large area around it and the centre within it which was repaired again. A series of complaints were referred to regarding the state of the road in 2008 on 18th November, and on 8th April, 2010 regarding R494.

40. He was referred to the photograph showing the house named "Leonora" at a house entrance directly opposite the pothole. He said it was quite a significant pothole, quite deep and it was a hazard for a person on a bicycle. He said that it would be necessary to clean it out entirely and cut the sides as close to vertical and fill and compact the pothole. He referred to a velocity filling method, often unused, where a large lorry blows out and pours in sealant or blows it in and it is filled and rolled. It is five to ten minutes quicker to do it that way.

41. Under cross-examination, the last photograph showed evidence of a repair at the farm gate side in October, 2014. The rest of the photographs were put to him and were actually taken in August, 2013. Mr. Counihan said there had been a failure of the plaintiff to understand their discovery. The plaintiff didn't accept that but said that there was an error where discovery should read the 2nd October, 2013 and not 2014.

### **Cross-examination of Mr. O'Hara**

42. The defence photograph marked by Mr. Hogan was shown to this witness. It was put to him that there is no pothole from the rear of the car in the picture to the centre of the road. He said that the area is best related to the vehicle and that the water was ponding on the left of the centre line and on the right side adjacent to the rear of the car. He could say that the level on the right was lower than the rest of the surrounding road surface.

43. This witness described a different gradient all the way down the hill. He said one is still on the down slope at the locus of the accident. The area where the pothole is is adjacent to the rear of the car. There was evidence of water.

44. It was put to this witness that looking at the first of the plaintiff's photograph that there was no evidence of any repair, just staining on the road. He said with reference to photograph 9 he did not agree with that. Photograph 9 was put to him showing hatching. His response was that it was very similar in appearance to the pothole in the centre and that there were several repairs and no lumpiness there in photograph 1. He said that it didn't seem to be on three or four repairs, rather one, given the difference in appearance and no darkening to the right hand side. He said that the bridge was seven metres further on towards the end of the wall for the bridge as it currently exists and that it is visible on the road depending on weather conditions. He said he assumed in terms of the defence photographs that one would cycle in there and it would be full of water.

### **Under re-examination**

45. He said the patch in photograph 1 was to the left of the rectangular patch. He referred to complaint on 3rd January, 2014 from Richard Atkinson in the opposite house with the tennis court, who complained of a bad pothole on Road 494 between Portroe and Ballina and that the house "Leonora", was directly opposite the entrance and that he would expect them to have repaired the pothole.

46. It was agreed that the medical report of Mr. Reilly would be handed in and items of special damage in the sum of €6,129.80 were agreed.

47. The defence called Mr. Vincent O'Shea who is a meteorologist in excess of 25 years' experience and is an officer with the Meteorological Service in Glasnevin. He had prepared his report for 28th April, but now realised that the accident actually occurred on 27th April. He said it was a similar situation to 28th April but that the atmosphere was slightly more unstable on 27th and that there were isolated showers with light local precipitation. He made comparisons. He said that in Gurteen in North Tipperary, which is the nearest point of contact, there was 0.1mm of rain which he described as a barely a wet surface trace or little more than a wet surface trace.

48. He referred to Oak Park in Carlow as having 0.2mm of rain and Shannon Airport 0.1mm reading. This witness described Moore Park near Fermoy, Co. Cork as having 4.2mm between 6pm and 7pm.

49. Under cross-examination he said that the atmosphere was more unstable on 27th April, that there were showers of an isolated and well scattered variety whereas on the 28th there had been none at all. He said that it was likely in remote isolated spots that there were some showers and that there was an appreciable amount which fell in Moore Park between 7 to 8pm on 27th. He concluded therefore that theoretically it would have been possible that there would have been some rain in the area. He said that they do not have a weather station at Portroe, that Portumna was 45km away from the site and that Gurteen was 60 to 70 kilometres north of the incident. He said in higher areas above 1,000ft, there would be a greater propensity to showers.

50. Mr. Fahy, Executive Engineer with the road section in Tipperary County Council, gave evidence that he had worked as a civil engineer for the council for almost twenty years. He described the collapse of Castletown Bridge the previous year.

51. This witness described a number of inlets allowing water to run off the road and he said debris was there and it was necessary to patch it but he cannot personally recall repairs to the road.

52. This witness was shown, in the defence discovery at s. 2(b), a photograph including the farm gate and he said there was a certain amount of water caused by water coming out and darkening the spot but it had been patched up at that stage.

53. This witness was shown the first three photographs of the plaintiff's photographs and he was shown the original report of 9th October, 2011. He said that the locus requires another repair at this stage, that the age of the road showed quite a bit of visible wear and tear and loose stone was very visible. He said that McAdam material and stone chips are compacted with a layer of tar.

54. Under cross-examination this witness said he could contradict that there was repair from time to time with reference to the evidence of Mr. Hogan. He said there were a number of complaints over the years regarding reporting of holes on the road and in relation to the poor state of the roads R494 and R496. He said the status of Mr. Shinner's complaint was "status resolved". He was referred to 3C at the back of the discovery. He said he was not in a position to dispute that the problem was solved. He said whatever pothole was there in January, 2014, it was resolved. The only pothole he found was the offending pothole concerning the complaint.

55. He was referred to documentary evidence and what was there from the council in January, 2014. He admitted that he never put it together that Leonora's house and the tennis court house were one and the same and that that changed his view of the case somewhat. It was put to this witness that regarding his first report, there isn't a history of a potholing at this location. He said they didn't keep reports as such, that R494 is a long road and that he didn't see the area until it was patched. When he was looking at the bridge he was focussing on the damage to the bridge.

56. Regarding para. 1(b) of his affidavit of discovery, he was asked whether he saw it before it was fixed in October, 2014 and he answered in the affirmative.

57. Regarding photograph no. 4, he was asked whether it was patched at that stage or whether it was before it was fixed. He said it showed a patched area and that with regard to the area of damage to the road surface, he wasn't sure if it was the pothole.

58. It was put to this witness regarding the plaintiff's photographs that there was a dark grey area where there was water. In photograph no. 7, for example, there was no water. That was a photograph from June 2014 but it was still a darkened area in the same location as in photograph 3. He said it doesn't look like fresh repair to him.

59. He was not suggesting a particular time. He could take it that it was taken in June, 2014. There was a rectangular area in the corner darkened area. He agreed but said they were looking at what was different to the main surface and at a very small area.

60. It was put to him that the council's discovery showed that there had been repairs to that road at the right. He noted that it was in that area. Regarding photograph 7, it was pointed out to him under cross-examination that this showed a different colour and evidence of a previous repair. He said possibly, maybe, probably, it was consistent with repair and that there was a difference in wear.

61. It was put to this witness that the area needs repair again and that was consistent with the 2014 photograph of the area where it showed a different colour and an area of previous repair. His response to this was possibly that the area of the road was just worn.

62. Regarding photograph 11 it was put to this witness that there was a difference in texture and nature and evidence of a previous repair. He said that nozzles blow tar and chips and it is not going to be nice and neat and there could possibly be evidence of a previous repair.

63. It was put to this witness there was a dark patch there prior to the previous repair as there is in photograph 3. He said it was more obvious in photograph 10 that there was difference in darker patch.

64. Under re-examination this witness was shown photograph 9 from the top of the hill on the white line and he said there was evidence of previous patching, that there was an inlet which had been blocked two years previously and there had been ponding and patching repairs. It was pointed out that his repairs are referred to as 2013 in his report of the same year.

65. He agreed under re-examination that the patching in photograph 9 in 2012 was at the road edge.

66. He was asked about the house opposite the particular house and he said it was at the edge of the road near the house.

#### **Re-examination by the defence of Mr. O'Hara**

67. Mr. O'Hara confirmed that the first examination of the site was by Mr. O'Keeffe himself and it was soon after the accident. He gave the date of 20th November, 2014. It was put to him that he did not find evidence that the pothole was the subject matter of the accident. He referred to the second page, para. 3, of that report which said that there were repairs in the vicinity of the pothole. It put to him that Mr. O'Keeffe in the original report did not find evidence in the vicinity of the pothole and that the report does not say that it was the offending pothole.

#### **Mr. John Fulham, Civil Engineer**

68. Mr. Fulham of Paul Twomey Engineers in Cork visited the locus. He said that the road would have a 25-year span in terms of its life and that it was at the end of its design life. The surface was breaking down and potholes were due to water penetration of the road.

69. He was shown photograph 1. He said there were two different surfaces, that the road was rougher on the left and smoother on the right. He was asked whether there were any other sign of recurring repairs. He said he didn't see it. He said it comes at the bottom of a long steep hill and that there is a drainage cross over and that looser debris and water pour down. He said there was ingrained dirt on the road and it slopes right from the left downwards. The photograph could not show whether it was repaired or not. The defence photographs show a rougher side on the right.

70. He said with regard to Mr. Hogan's photograph that it doesn't identify the locus which was in line with the black car. He was asked about two different textures on the road and he said it was not just water coming out of the pothole.

71. With regard to photograph no. 3, it was put to him that there was no other darkened area in the vicinity of the pothole, that there was a continuous white line down the centre and that it was darker to the left rather than the right. He said yes, from a distance. It was put to him there was a dark patch adjacent to the pothole and it didn't explain the makeup of the road. His response was that it was more textured and it wasn't in wheel tracks. He said there was a water process and summer dry period but that the water crosses over.

72. In photograph 3 there was an obvious dark patch and a repair patch. This was put to this witness. He said there was an overspill around the pothole from the machine and that there was no sign of any overspill. There was a layer of tar and a layer of stone and there was no sign of that having happened here. He said in the last ten years a velocity machine was the preferred option for fixing potholes.

73. With regard to photographs 7 and 8, he said that there was possibly overspill and a possible depression. He said with regard to the issue about the main area where the repair appears darker to the area adjacent to it, that it does appear darker but dirt has interfered with it and it cannot be conclusive.

74. It was put to him that if a repair job had been done it was probable that one would accept a uniformity of appearance. He agreed but said he wasn't conclusively saying that.

75. Photograph 9 from the top edge of the road and the area showed problems on the tarmacadam and different types the tar went up through the repair path. The repair alone was done at the same time and that glossy bitchem has come up, same repair and different colourings but there is no sign of that in the photos.

#### **Legal submissions on behalf of the defendant**

76. In general terms it is submitted that in order to succeed, the plaintiff has to prove more than that there was a simple pothole on the public highway in question.

77. It is further submitted that in the absence of positive interference with the said locus that it is a question of nonfeasance. Hogan J. in the High Court case of *Zara McCabe v. South Dublin County Council* [2015] IEHC 529 in his decision delivered on 18th November, 2014, described it as an anomaly where local authorities are immune for failing to maintain the road surface. It is submitted that Mr. Fulham who gave evidence says it simply a pothole and that the road is at end stage in terms of its condition.

78. Mr. O'Hara gave evidence of previous repair. It is submitted that even if the court prefers the evidence of Mr. O'Hara, his evidence is lacking in that the original repair which allowed the repair of the pothole is insufficient to get beyond the nonfeasance state. If he says the repair is defective, then it comes within misfeasance. The example is used by Counsel that if one were to refer, say, to a mound of material on the road, it would concede misfeasance in those circumstances.

79. With regard to the decision of Hogan J. already referred to herein, the evidence of heavy rain is rejected and it is noted that the

replies to particulars furnished by the plaintiff describe heavy rain. The court is invited to accept by contrast the evidence of a meteorologist. It is further submitted that even if the court goes against the defendant, it must find against the plaintiff for not keeping a proper lookout. It is pointed out that there is no corroboration to explain the cause of the accident and even though there was one witness as to fact on the list that person was not called.

### **Submissions on behalf of the plaintiff**

80. It is accepted by both parties what nonfeasance is, but it is distinguished from the situation in this case where it is said that it is not a mere failure to repair which is in issue. Reference is made by Counsel to *Kelly v. Mayo County Council* [1964] I.R. 315, which states that it is well established that where as a highway authority maybe liable for misfeasance, that is acts of positively negligent character regarding the maintenance or repair of the highway, it will not be liable for nonfeasance, that is, the failure to maintain the highway, however negligent that failure may have been.

81. By contrast reference is made to the decision of *Lewis v. Cork County* at p. 78 where Murphy J. addressed the question of how to characterise a pothole that re-emerges after temporary repair has been carried out. He considered that:

“where a local authority engages in repairs, ... those repairs must be effective; effective either as temporary repairs and then reviewed as temporary repairs or else effective as permanent repairs; but to conduct or carry out a repair which is temporary and then not to follow up that repair to ensure that the danger did not re-engage, must be taken as negligence by the local authority”.

82. Counsel on behalf of the plaintiff points out that this is a re-emerging pothole following repairs and that repairs must be effective:

1. As temporary repairs and reviewed or
2. As permanent repairs.

83. This submission is made that on the basis of the history of repairs on the road of this pothole, and based on the complaint of Mr. Atkins shown in discovery in January, 2014 who complained of a bad pothole opposite the house with the tennis court. Counsel indicated that that three months later an enormous and deep pothole was there following ineffective repair. The facts of the case are that the pothole deteriorated within three months. The last repair is conceded by Mr. Fahy, engineer for the Council. It occurred after the snow in 2018 and it was further conceded by him that this pothole needs repair. There is ample evidence that a repair was carried out and that the repair is not effective.

84. Counsel distinguishes between the instant case and that of *Zara McCabe v. South Dublin County Council* [2014] IEHC 529 where there may have been unauthorised interference by third parties with regard to a missing stopcock. He points out that this is a different cause in that case.

85. Counsel also refers to the reference by counsel for the defence to “heavy rain” and clarifies that in the replies to particulars they merely state that it was raining at the time of the accident.

86. Counsel on behalf of the plaintiff also points out that the meteorologist accepted under cross-examination that the plaintiff could have been right in relation to wetness at the time of the accident and further clarifies that Gurteen to which he referred is 50km away and could not be relied upon as ruling out wetness or wet weather at the locus of the accident on the morning in question.

87. It is further pointed out on behalf of the plaintiff that the state of the clothing taken from the plaintiff after this accident is referred to as being saturated in his wife’s testimony to the court. This is compelling evidence of wet weather at the locus on the occasion of the accident.

88. It is further pointed out that it was never put to the plaintiff or his wife that the accident did not happen. Counsel clarified the position by saying that there was no corroboration regarding the plaintiff’s description of weather conditions at the time of the accident and he argues further that on the basis of *Lewis v. Cork County Council* that if a repair fails you are back at square one in terms of nonfeasance.

89. The plaintiff’s counsel submits that repairs must be effective and that if they are not then it is a case of misfeasance. He refers back to the *Lewis* decision for the repairs to be effective either or temporary repairs which have to be reviewed or they are treated as permanent repairs.

90. Counsel dealt with the fact that nuisance had been raised in the plaintiff’s opening of the case and they agree that it is pleaded but that it implies something positive. It is pointed out that nuisance was denied at para. 3c of the defence.

91. The plaintiff’s counsel pointed out that Mr. Fahy, engineer on behalf of the defence noted that they had fixed the pothole in January. Counsel for the plaintiff argues that it was wrongly done and that this amounts to misfeasance.

92. This submission is made that on the basis of the history of repairs on the road of this pothole and based on the complaint of Mr. Atkins shown in discovery, in January, 2014 who complained of a bad pothole opposite the house with the tennis court. Counsel indicated that that three months later an enormous and deep pothole was there following ineffective repair. The facts of the case are that the pothole deteriorated within three months. The last repair, it is conceded by Mr. Fahy, engineer for the Council, occurred after the snow in 2018 and it was further conceded by him that this pothole needs repair. There is ample evidence that a repair was carried out and that the repair is not effective.

93. Counsel distinguishes between the instant case and that of *Zara McCabe v. South Dublin County Council* where there may have been unauthorised interference by third parties with regard to a missing stopcock. He points out that this is a different cause to that case.

94. Counsel also refers to the reference by counsel for the defence to “heavy rain” and clarifies that in the replies to particulars they merely state that it was raining at the time of the accident.

95. The plaintiff’s counsel pointed out that Mr. Fahy engineer on behalf of the defence noted that they had fixed the pothole in January and Counsel argues it was wrongly done and that this amounts to misfeasance.

### **Causation**

96. In the view of this Court this accident occurred as described by the plaintiff and the plaintiff's witnesses. The court takes particular note of the evidence of the wife of the plaintiff who confirmed how wet and soggy his clothing was. That evidence, coupled with that of the meteorologist who was called on behalf of the defendant, assisted greatly in the court arriving at the conclusion that there was some wetness or rain on the day of this accident. Indeed, the meteorologist was very careful to give his evidence in a really truthful manner and conceded that there was a difference between the temperatures on the 28th which he believed and had been told had been the date of the accident in error and the 27th day of that month and that there might have been a localised trace of rain/dampness on that day.

97. This Court was very impressed not only by the plaintiff who came across as extremely straightforward and credible without exaggerating in any way his injuries, but also by the evidence of his neighbour, Mr. John Hogan who lives 400m from the locus of the accident with a background himself in engineering, although of course he was present in court as a neighbour who had travelled that road many times on a daily basis for the past seven to eight years. His evidence was to the effect that the pothole had been there for seven years and it had been repaired on many occasions over that time, that the repair might last for two or three months and that it would depend on the level of care that it would get. He said there was a three-inch depression in the pothole that very morning.

98. This Court notes with reference to *Kelly v. Mayo County Council* [1964] I.R. 319 and that it is well established that whereas a highway authority may be liable for misfeasance, that is, acts of positively negligent character regarding the maintenance or repair of the highway, it will not be liable for nonfeasance however negligent that failure might be. By contrast then, reference is made to *Lewis v. Cork County Council* where Murphy J. addressed the question of how to characterise a pothole that re-emerges after temporary repair. He considered that:

"where local authority engages in repairs ... these repairs must be effective; effective either as temporary repairs and then reviewed as temporary repairs or else effective as permanent repairs; but to conduct or carry out a repair which is temporary and then not to follow up that repair to ensure that the danger did not re-engage, must be taken as negligence by the local authority."

99. It is significant to note that the complaint of Mr. Atkins shown in discovery documentation, which was made in January, 2014 and who complained of a bad pothole opposite the house with the tennis court. Three months later an enormous and deep pothole was there following ineffective repair. The last repair was conceded by Mr. Fahy, engineer for the council, as having occurred after the snow in 2018 and it was further conceded by him that this pothole needs repair. It is submitted that it was ample evidence that a repair was carried out and that the repair is not effective.

100. It is quite clear from the evidence that, on the balance of probabilities, this is a case of negligence and misfeasance by the local authority. This Court accepts in full the submissions made on behalf of the plaintiff in relation to this accident. On the balance of probabilities this accident occurred as described by the plaintiff and his expert witnesses and witnesses as to fact to the accident and was foreseeable. This Court notes that Mr. Hogan was asked to identify the pothole on the defence's photographs but notes that these are photographs which were used in relation to an entirely different issue and from an entirely different angle. He prefers the plaintiff's photographs as truly representing what occurred in terms of the area concerned.

101. This Court accepts the medical evidence offered in relation to the plaintiff's injuries and considers the significant injury loss and damage suffered by the plaintiff and the fact that this has had ongoing sequelae for him which has meant certain adjustments have had to be made by him in his working and daily living. The Court considers that the appropriate figure in general damages is €85,000 plus special damages as agreed in the sum of €6,129.80 giving a total sum of €91,129.80.