JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L.2002/S094

BETWEEN	**MAVIS SMITH**	**CLAIMANT**
AND	**THE CHIEF TECHNICAL DIRECTOR**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

Mr. Lawrence Haynes for the Claimant.

Miss Nicola Brown instructed by the Director of State Proceedings for the Defendants.

Heard : 21st April 2008 and 6th March 2009

Mangatal J:

1. Mrs. Smith had an unfortunate accident while walking along Church Street Main Road, Morant Bay, Saint Thomas. She states that she sustained injuries when she fell in a pothole on the road and she contends that the Defendants are liable for her injuries. Although the Statement of Claim and other documents filed refer to this incident as having occurred on the 25th of September 2000, by agreement between the parties, all such references are to be treated as references to the 28th September 2000.

2. The claim is made on the basis that prior to September 28 2000, workmen attached to the Government Public Works Department carried out repairs and/or excavation works on the main road and created a deep hole which remained unfilled up to the time of Mrs. Smith's accident. By permitting the pothole to remain unfilled and/or unfenced, it is alleged that the Defendants acted negligently or in breach of the statutory duties under the Main Roads Act. Mrs. Smith also contends that there were no warning

signs posted to indicate that there was a hole in the road. When it rained on the day in question the pothole was filled with water and this resulted in Mrs. Smith not seeing the pothole and stepping into it.

3. The Defendants for their part contend that at the time of the alleged accident there was no hole at the location and they were not carrying out any work on any section of the Church Street main road. Further, the Defendants state that at no time prior to the date of the alleged incident was any work carried out by the Defendants on the particular stretch of road.

THE ISSUES

4. The main issues which arise are:

   (i) Was there any pothole? Did Mrs. Smith fall into a pothole along the Church Street main road?

   (ii) What, if any, is the duty owed by a highway authority to a person who suffers injury in the course of using the highway?

   (iii) Does the principle of res ipsa loquitur apply in the circumstances of this case? In other words, do the facts speak for themselves and raise an inference of negligence against the Defendants?

   (iv) Was the highway authority in breach of its statutory duty? Did the highway authority owe a duty of care to Mrs. Smith? Was the authority guilty of negligence?

   (v) If the Defendants are found liable, is Mrs. Smith entitled to compensatory damages and if so, in what sums?

(i) –POTHOLE OR NO POTHOLE AND DID MRS. SMITH FALL IN IT

5. One of the first factual matters which Mrs. Smith has to make out is whether there was a pothole in the road. The Defendants say there was not.

6. I turn to examine the evidence. Mrs. Smith states in her witness statement that it was while she was walking along the main road, in the vicinity of a place known as "Chi-Chi" that she fell into a pothole which was at the side of the road. In oral amplification of her statement in court, she said that she knows that there is a pothole there because she had seen it there before that day. She indicated that whenever it rains the pothole would flood with water. When cross-examined Mrs. Smith indicated that she did not have an opportunity to point out the exact location of the pothole to any member of the Public Works Department. She indicated that there was a sidewalk on the Morant Bay main road; it is what she would refer to as the piazza for the shops that are along the road. She was wearing flat shoes on the day in question.

7. Mrs. Smith called one witness on her behalf, Miss Michelle Duncan. Miss Duncan in her witness statement indicated that on the date in question, at about 11:30 a.m. to 12 noon, she was at her stall in the Morant Bay market. She is a higgler, i.e. she buys and sells goods. Miss Duncan states that she looked up the road to the east, which is in the Morant Bay direction, and she saw Mrs. Smith walking towards her. In her statement Miss Duncan claims that she saw Mrs. Smith fall into a pothole. Miss Duncan's mother helped Mrs. Smith to get up. In cross-examination Miss Duncan clarified that when she first saw Mrs. Smith that day Mrs. Smith had already fallen. Miss Duncan testifies that she could not see the pothole from where she was because of the water on the road surface that particular day. She disagreed with Counsel for the Defendants that Mrs. Smith could have fallen next to the pothole because she says that she knows the spot where the pothole is because she sells in the market every day.

8. There was one witness called on behalf of the Defendants and that was Mr. Fred Sinclair. Mr. Sinclair in his witness statement indicated that he was now a pensioner but between 1998 and 2002, he was Senior

Superintendent / Parish Manager of the National Works Agency for the Parish of Saint Thomas. Prior to that he had worked with the Public Works Department for more than three decades. His duties as Senior Superintendent /Parish Manager entailed overall responsibility for main arterial, secondary and tertiary roads, including all structures found on these roads such as bridges, walls, drains and culverts.

9. Mr. Sinclair states that one day in September 2000, he was unable to recall the exact date, Mr. William Smith came to Mr. Sinclair's office in Morant Bay. He introduced himself as the husband of Mrs. Mavis Smith and he indicated that his wife was in the hospital as a result of her stepping into a pothole and falling down on the road. Mr. Smith was unable to assist in terms of indicating the exact spot where his wife was said to have fallen. He indicated that he had not in fact been present when his wife fell so he only had a rough idea as to where she had fallen. Mr. Sinclair states that based on information received from his works overseers and field staff who he had asked to accompany Mr. Smith to the scene, he Mr. Sinclair went to same area which had been pointed out by Mr. Smith but he did not observe any pothole. Mr. Sinclair states that his department decided to wait for Mrs. Smith to come in and tell them exactly what the location where the accident took place was, but Mrs. Smith never did attend at his office.

10. As regards the question of works done, Mr. Sinclair stated that he does not recall any road or excavation works along the Morant Bay main road immediately before the 28th September 2000 or on that day itself. He said that the National Works Agency subsequently did some investigations but the results revealed that there was no record of any such works done.

11. The general area identified by Mr. Smith was not subject to inundation, flooding or scouring of any kind due to rainfall. Upon investigation, there was no indication of depressions in the road surface or potholes in the

general area. As a matter of fact, according to Mr. Sinclair, approximately one year prior to September 2000, the entire road surface was overlaid with barber green which gave it a very smooth driving surface.

12. Mr. Sinclair described in some detail the normal procedure carried out by the National Works Agency when a claim of this nature is made, including inspecting the location and taking precise measurements, and making a sketch of various cross-sections of the pothole. Statements from the complainant and any eye witnesses would then be obtained. A report would be prepared by his Department to indicate whether the complainant was negligent, whether the Department was negligent, or whether it was an act of God.

13. No aspect of these procedures was ever carried out because Mrs. Smith never attended to report the matter and no site of the alleged incident was ever precisely identified to the National Works Agency. It is to be noted also that Mr. Smith, the only person who could be said to have attempted to identify the general, if not the exact location of the pothole, did not give evidence and I do not recall any explanation being advanced for his not testifying.

14. In cross-examination, Mr. Sinclair estimated that the distance between his office and a place called Hope and Company, is about twenty chains .It was never made clear to me exactly where that was, but I draw the inference that the area known as Chi-Chi where the incident is alleged to have happened, falls within that stretch of the main road. Mr. Sinclair's evidence was that no pothole whatsoever was along that stretch on the relevant date in September 2000. He stated that his Department would have authority to allow the telephone companies, and electric lighting personnel to do works on the road. These persons sometimes seek permission but sometimes they do not. Sometimes they perform work which involves the road and they do not restore the road back to the

condition it was in before. Mr. Sinclair stated that under the law it was the National Works Agency's responsibility to see that they restore the road to the condition that it was in.

FINDINGS OF FACT

15. I do not in any way doubt the truthfulness or integrity of Mr. Sinclair's evidence as to whether there was or was not a pothole as alleged by Mrs. Smith and Miss Duncan. He struck me generally as a public servant of considerable ability, diligence and integrity. However, although I am confident that Mr. Sinclair truthfully and to the best of his ability and recollection, recounted the procedures normally adopted by the National Works Agency when there is a report of a pothole incident, at the same time I was left with the distinct impression that much of what he had to say about whether there was a pothole was based not on his own observations and actions, but was rather based on reports made to him, and hence second-hand information , relayed by his staff and employees. Indeed, at the trial Mr. Haynes, Counsel for Mrs. Smith, successfully applied for a portion of paragraph 5 of Mr. Sinclair's witness statement to be struck out on the basis that it was comprised of inadmissible hearsay. Essentially, prior to the modification of paragraph 5, Mr. Sinclair had spoken of what his staff had observed and of those of their interactions with Mr. Smith which took place in the absence of Mr. Sinclair. Against that backdrop of hearsay sources and information, I found Mr. Sinclair's evidence about the absence at the relevant time of any pothole at all on the whole stretch of road that he was cross-examined about (some 20 chains), somewhat hard to accept as being accurate.

16. On the other hand, I found Mrs. Smith to be a simple but honest witness, and I believe she spoke the truth when she states that on the day in question in September 2000 there was a pothole along the stretch of road

that she described. She withstood cross-examination quite convincingly and she gave reasonable concessions where necessary. For example, when cross-examined she conceded that there was a sidewalk along the Morant Bay main road at the relevant time.

17. Miss Duncan supported Mrs. Smith's evidence, but to some extent it did appear to me that her main purpose may have been to come and support Mrs. Smith, who she calls Miss Lita, and who, in her witness statement, she says she has known for twenty years. I come to this view because in her witness statement Ms. Duncan clearly states that she saw Mrs. Smith actually fall into the pothole, yet in her cross-examination she admitted that when she first saw Mrs. Smith that day she had already fallen.

18. I find on a balance of probabilities that there was a pothole on the road, on the date alleged by Mrs. Smith and that there were small pools of water along the road that day. I accept that she fell in the pothole, that it was flooded with rain water and that Mrs. Smith did not see it.

19. I now turn to examine the law as it relates to the significance of a pothole being present along the main road and Mrs. Smith falling into it. I will also examine the liability of a highway authority.

The Law

(ii) WHAT, IF ANY, IS THE DUTY OWED BY A HIGHWAY AUTHORITY TO A PERSON WHO SUFFERS INJURY WHILE USING HIGHWAY

20. As Counsel for the Defendants Miss Brown posits in her written closing submissions, it is well established that in claims such as this one, it is the Claimant upon whom the burden rests to prove that on a balance of probabilities the Defendants have breached some duty owed to the Claimant, have acted negligently or in breach of statutory duty. The Claimant must therefore prove that there is some duty which the law recognizes as being owed by the Defendants to the Claimant. There must

be proof that there has been a breach of that duty and that any injuries which the Claimant has suffered arose as a result of this breach.

21. The law in relation to this subject has developed in the area of the common law over some centuries. A useful starting point is the 1892 decision in **Cowley v. The Newmarket Local Board** [1892] A.C. 345. In **Cowley** a highway was by virtue of the 1875 Public Health Act vested in and under the control of a local board as the urban authority for the district. The relevant sections of the Act provide that the urban authority should have and be subject to all the powers duties and liabilities of surveyors of highways. It was also provided that they should from time to time level alter and repair these highways as the occasion may require. An owner of land adjoining the highway in making an approach to his land without the sanction or authority of the local board made a drop of about eighteen inches in the level of the footway, (which is included in the highway) , and left it in a dangerous condition. Mr. Cowley whilst walking along the footway fell down the drop and sustained considerable injuries. He sued the local board for allowing the highway to be out of repair and in a dangerous condition. It was held by the House of Lords, affirming the decision of the Court of Appeal, that the local board was at most only guilty of non-feasance and not misfeasance and was therefore not liable.

22. Lord Hershell at page 353 of the judgment points out that long ago it was held that an action could not be maintained at common law by one of the public in respect of an injury sustained through a highway being out of repair. The decision along those lines was largely, but not exclusively founded on the fact that the inhabitants of a county were not a corporation, and could not be sued collectively. In a later action brought against the surveyor of highways, it was urged by counsel for the claimant that a Statute which enacted that the county could be sued in the name of

their surveyor had removed the only difficulty in the Claimant's way. However, it was held that the effect of the Statute was not to create a new liability, but only to establish a more convenient way of enforcing existing rights-**McKinnon v. Penson** 8 Ex. 319.

23. It was also held that this principle was equally applicable where the duties and liabilities of the surveyor have been transferred to other bodies, unless a distinct intention on the part of the legislature can be inferred from the particular statute under consideration to create a new liability-Per Lord Hannon at page 355. To the same effect is the decision of the Privy Council in **Municipality of Picton v. Geldert** [1893] A.C.524 and also **Maguire v. Corporation of Liverpool** [1905] 1 K.B.767.

24. An authority has committed misfeasance where it performs a statutory duty or obligation in a negligent manner. However, non-feasance is the failure of statutory authorities or bodies to carry out its functions such as repairing roads, highways, gullies and the like. Thus, highway authorities are not liable to an action for an injury arising out of their failure to repair the highway. They are liable for injuries to users of the highway if they themselves repair it negligently or have employed contractors who repair it negligently-**Penny v. Wimbledon Urban District Council** [1899] 2 Q.B. 72.

25. In the Jamaican case of **Sunbeam Transport Service Limited v. The Attorney-General, et al** (1989) 26 J.L.R. 1, Wolfe J. as he then was, had before him a case involving questions as to the nature and extent of liability of a highway authority. Wolfe J. held that the liability of a highway authority in Jamaica is governed by the common law and that at common law, such an authority cannot be held liable for damage suffered unless there is clear evidence of an act of misfeasance. In discussing the matter, his Lordship referred to and discussed a number of authorities

and referred to the well-known work of **Salmon on Torts** , 12th edition at page 238 as stating the applicable law as follows:

> *The law governing the liability of highway authorities toward individual members of the public exercising the common right of passage over the highway has no similarity or even analogy to the duties of occupiers of property to those permitted or invited to enter the premises. No action will lie against any authority entrusted with the care of highways for damages suffered in consequence of the omission of the defendants to perform their statutory duty of keeping the highway in repair. This exemption extends only to cases of pure non-feasance and the public authority is responsible in damages for any active mis-feasance by which the highway is rendered dangerous.*

26. See also **Mayor & Corporation of Shoreditch v. Bull** 1904 Vol. 90 L.T.R.210, **McClelland v. Manchester Corporation** [1912] 1 K.B. 118, and **Robinson v. The Director of Public Works** –Adrian Clark Reports 1917-1932, 276, referred to by Wolfe J. in **Sunbeam Transport**.

27. To summarize, the common law in Jamaica therefore is that a public authority is not liable for damage occurring on the highway unless the damage is caused by an act of misfeasance on the authority's part or by negligent repair and not if it is guilty only of non-feasance. Where the failure of the authority is failure to carry out its statutory functions and responsibility to repair roads, highways, bridges gullies and the like, it is guilty of non-feasance and not misfeasance and is not liable. The public authority is responsible for any active misfeasance by which the highway is rendered dangerous. This is the legal position unless the law is clearly changed or abrogated by statute.

28. I have looked through our **Main Roads Act**, and indeed, any other tangentially relevant legislation, and nowhere can I find, whether expressly, or by inference, any change in the law to make a public

authority liable for non-repair. Section 6 of the **Main Roads Act** provides as follows:

> *Subject to the directions of the Minister, the laying out, making, repairing, widening, altering, deviating, maintaining, superintending and managing of main roads, and the control of the expenditure of all monies allotted thereto, shall be vested in the Director, with such permanent staff of engineers, superintendents and other subordinate officers as the Governor-General may from time to time appoint, and such temporary staff of superintendents and other subordinate officers as may from time to time be appointed, all of whom shall be deemed to be officers of the Public Works Department within the meaning of any enactment relating to the same.*

29. Director under the Act means the Chief Technical Director and section 21 fleshes out the powers which the Director and persons authorized by him may exercise in giving effect to section 6 of the Act.

30. To be contrasted is the position taken in England. By virtue originally of sub-**section 1 (1) of the Highways (Miscellaneous Provisions) Act 1961**, the rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways was abrogated. The section became operative in August 1964. That Act has since been repealed and replaced by later pieces of English legislation dealing with highways but the relevant change in the law has been maintained. There is, however, a statutory defence available to highway authorities in certain circumstances. It is useful to look at the actual language used in the English Statute. The relevant sub-sections provide as follows:

> *1(1) The rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways is hereby abrogated.*

(2) In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense, it shall be a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.

(3)For the purposes of a defence under the last foregoing, the court shall in particular have regard to the following matters, that is to say-

(a) the character of the highway, and the traffic which was reasonably expected to use it; (b) the standard of maintenance appropriate for a highway of that character and used by such traffic; (c) the state of repair in which a reasonable person would have expected to find the highway; (d) whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the roadway to which the action relates was likely to cause danger to users of the highway; (e) where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed....

31. These changes in the legal position in relation to the English law are well-discussed in **Halsbury's Laws of England, Volume 21 (2004 Reissue) HIGHWAYS, STREETS & BRIDGES** at paragraph **(9) Liability for Non-Repair and Injury by Repair**, at sub-paragraphs **302-306**. Indeed, in footnote one (1), to paragraph 302, the learned authors state "as to the old rule of law see" and then proceed to refer to a number of the cases discussed in the paragraphs above and which still represent the legal position in Jamaica.

32. I found it useful to refer to the English Court of Appeal's decision in **Griffiths v. Liverpool Corporation** [1966] 2 All E.R. 1015, which seems possibly to have been the first case to be decided since the new law abrogating the rule of law exempting the inhabitants at large and their successors. At pages 1021-1022 Lord Diplock performs an admirable recounting of the development of the common law and the relationship, and distinctions at common law between the highway authority's duty to the public, and its duty to a private individual who suffered damage as a result of a highway being out of repair.

33. In his dissenting judgment in **Griffiths** , Sellers L.J. at page 1016, refers to the abrogating sub-section , and then states

> *It has long been thought that a highway authority's immunity from liability for non-feasance should be abolished...*

34. This immunity of a highway authority from liability for non-feasance has not to date been abolished in Jamaica and I have to apply the law as it stands to the circumstances of this case. Mrs. Smith cannot recover against the Defendants unless she proves on a balance of probabilities that she fell into the pothole because of the Defendants negligence in carrying out repairs or some other act of misfeasance or negligence. The Defendants will not be liable if they are guilty of mere non-feasance, i.e. where they have failed in their statutory duty to carry out repairs.

(iii) RES IPSA LOQUITUR-DOES IT APPLY?

35. Mrs. Smith having proven that there was a pothole present and that she fell in it, what does this prove? In the Statement of Claim, Mrs. Smith prays in aid the doctrine of res ipsa loquitur. Simply put, that latin phrase means that the facts speak for themselves. Do the facts and circumstances of this case furnish prima facie evidence of negligence?

36. In **Scott v. London and St. Catherine Dock Co**, (1865) 3 H. & C. 596, discussed in the Court of Appeal of Jamaica's decision in **Jamaica Omnibus Services Limited v. Hamilton** (1970) 12 J.L.R. 277, at 279, Erle C.J., in oft-quoted dictum, discussed the conditions for the application of the doctrine of res ipsa loquitur as follows :

> *There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.*

37. As Fox J.A. puts it neatly at page 279 of **Jamaica Omnibus**, to obtain the assistance of the doctrine, the claimant must therefore prove two facts:

(1) that the "thing" causing the damage was under the management of the defendant or his servants, and

(2) that in the ordinary course of things the accident would not have happened without negligence.

38. It is for the Claimant to establish the facts from which the proper inference is that the injury complained of was the result of the Defendants' negligence. Mrs. Smith cannot recover if the cause of the damage is left in doubt or is attributable with equal reason to some cause other than the Defendants' negligence. At paragraph **664 of Halsbury's Laws of England**, Reissue, **Volume 33, Negligence**, the learned authors point out that the plaintiff cannot rely upon an inference of negligence unless he has alleged in the pleadings and proved at the trial the facts from which the inference is to be drawn, and in that regard reference is made to the well-known House of Lords decision in **Esso Petroleum Co Ltd. v. Southport Corp.** [1955] 3 All E.R.864.

39. The case of **Lloyde v. West Midlands Gas Board**[1971} 2 All E.R. 1240, at 246 demonstrates that the principle of res ipsa loquitur is applicable in circumstances where it is not possible for the claimant to prove precisely what was the relevant act or omission which set in train the events leading to the accident. See also **Courage Construction Limited v. Royal Bank Trust Co.** (1992) 29 J.L.R. 115 at 118 where Rowe P., states : " If there is evidence as to the cause of the accident the doctrine of res ipsa loquitur has no application."

40. I also found paragraph 667 of the same volume on Negligence to be quite useful. It states:

> 667. *The harm must be of such a kind that it does not ordinarily happen if proper care is taken. The doctrine of res ipsa loquitur has been applied to things falling from buildings, and to accidents resulting from defective machines, apparatus or vehicles. It has also been applied where motor cars mount the pavement, or where aircraft crash on taking off. On the other hand, it was held inapplicable where a fire, having been left by a lodger in his grate, spread from his room and damaged neighbouring rooms.*
>
> .....
>
> *Footnote 5- See also Pritchard v. Clwd County Council [1993] PIQRP 21, CA (collection of flood water on highway did not give rise to res ipsa loquitur).*

In **Jamaica Omnibus Services Ltd. v. Hamilton** (1970) 12 J.L.R. 277, it was held that the doctrine of res ipsa loquitur applied in circumstances where a door of the defendant's bus flew open while the bus was in motion.

41. Also, in **Kingston and St. Andrew Corp. v. Pottinger** (1972) 12 J.L.R. 889, the Court of Appeal of Jamaica held that the doctrine of res ipsa loquitur applied. The Claimant was injured as a result of falling into an uncovered manhole on the sidewalk to the entrance of her home. It is important to

note that in this case the Court of Appeal accepted that (page 890 G-I) the general rule that a plaintiff would fail in an action against a highway authority for mere non-feasance of the authority in the discharge of its duties, and would succeed if he could show some act amounting to positive mis-feasance, was not applicable. This was because the rule only applied to repair to the road *qua* road and so the nonfeasance rule did not apply to the manhole cover because it was "a thing put on the road".

42. In the recent English Court of Appeal decision in **Drake v. Harbour and another** [2008] E.W.C.A. 25, Toulson L.J., citing with approval dictum of Sopuka J. in **Snell v. Farrell** (1990) 72 D.L.R. 4th, 289, at 301, indicated that the burden of proof in cases where res ipsa loquitur applies, that is, the legal or ultimate burden, remains on the Claimant. However, in the absence of evidence to the contrary, adduced by the Defendant, an inference of causation may be drawn. See also paragraph 668 of Volume 33, of the Halsbury's Laws where the learned authors express the view that the maxim does not reverse the burden of proof.

43. The present case is a strange one. Although I do accept that Mrs. Smith fell in a pothole on the day in question, during the course of her case, there was no attempt to describe the dimensions of this pothole, for example, its width, circumference or depth. So I am unable to say how wide or deep the pothole was, or whether Mrs. Smith or any part of her was submerged in the pothole. Further, although in the Statement of Claim it is expressly pleaded that workmen attached to the 1st Defendant's office carried out repair and excavation works and in the course of such works caused a deep hole to be dug which remained unfilled, there was not one scintilla of evidence presented as to what caused or led to the presence of the pothole on the road.

44. I have come to the view that this is not a case to which the doctrine of res ipsa loquitur applies. Although the claim pleads that workmen for whom

the Defendants would be responsible carried out repairs in a faulty or negligent manner, leaving the hole unfilled, there was no evidence to this effect forthcoming during Mrs. Smith's case. It therefore seems to me that Mrs. Smith was unable to say or prove precisely what was the relevant act or omission that set in train the events leading to the accident. The evidence as it stands is therefore that Mrs. Smith fell into a pothole on a main road which was under the management and control of the Defendants. On that state of affairs, I am of the view that it can not be said that it was more likely than not that the effective cause of the accident was some act or omission of the Defendants or of someone for whom the Defendant is responsible, which act or omission would constitute a failure to take proper care of the Claimant's safety. I am of the view that the presence of a pothole on a road under the management of the Defendants does not raise an inference of negligence. A pothole may come about as a result of fair wear and tear. This is particularly so if the pothole is a small one. In this case, the Claimant has made no effort to establish the dimensions of the pothole. It is not enough to say she fell in it. In **Pritchard v. Clwd.County Council** referred to in paragraph 40 above, paragraph 667 of the commentary by Halsbury's it was held that the presence of floodwater on a highway did not give rise to res ipsa loquitur. In **Ford v. Liverpool Corp.** (1972) 117 Sol. Jo. 167, it was held that defects in a roadway did not amount to a dangerous condition for pedestrians (my emphasis). Further, in **Rider v. Rider** [1973 1 ALL ER294, at 300, the English Court of Appeal accepted that mere unevenness, undulations and minor potholes do not normally constitute a danger. There has also been no evidence led to support the bald assertion that the Defendants had dug up a deep hole and allowed it to remain unfilled.

(iv) WAS THERE ANY NEGLIGENCE OR BREACH OF STATUTORY DUTY ON THE PART OF THE DEFENDANTS ?

45. The above question is the one which arises at this juncture. Although the Claimant alleges that the pothole came about as a result of the Defendants carrying out repairs negligently, the Defendants deny not just the presence of the pothole, but also that they had carried out any repairs, in a faulty manner or otherwise. The Statement of Claim makes reference to the carrying out of the repairs, but neither in the witness statements nor in cross-examination was there any evidence of the allegation that the Defendants carried out any work and caused the pothole to be dug up and remain unfilled. Whilst both Mrs. Smith and Ms. Duncan say that the pothole was there for some time before the accident, there is no evidence as to how long it was in existence. The burden of proof on a balance of probabilities remains on the Claimant and Mrs. Smith cannot recover if the cause of the damage is left in doubt or is attributable with equal reason to some cause other than the Defendant's negligence. The state of the evidence is such that at the end of the day I am not satisfied on a balance of probabilities whether this pothole came about as a result of faulty repairs or as a result of a failure of the Defendants to carry out repairs. If it came about as a result of failure to repair, then the Defendants would be guilty only of non-feasance. That would then activate the old common law rule exempting liability on the part of public authorities in those circumstances. In addition, in this case Mrs. Smith admits that she had known of the presence of the pothole before the date of the accident and also that there was a sidewalk upon which she could have walked. On the day in question, Mrs. Smith was a pedestrian and not a motorist. She could have used the sidewalk, and not been walking on the road. Mrs. Smith, the ambulatory pedestrian, unlike the stationary pothole, was the one in motion. Although I have found that there was a pothole, there is no

evidence as to how big it was, or as to how long it was in existence so I cannot say that a duty arose for the Defendants to warn of its presence whether by signs or otherwise. Although in the Claim it is alleged that the Defendants were negligent in failing to fence the pothole, I have grave doubts that a highway authority would have a duty to fence a pothole as opposed to filling it or repairing it. In any event, there has as I have said, been no evidence as to the dimensions of this pothole.

46. In the result, I find that there is not sufficient evidence to satisfy me that the cause of the accident was the negligence of the Defendants or breach of a statutory duty. The statutory duty is owed to the public and is based on the law in nuisance and not in negligence. Further, if the cause of the accident was the Defendants' failure to carry out repairs in breach of their statutory duties, this would amount to non-feasance as opposed to misfeasance and the Defendants would therefore as a result of old common law rules be exempt from liability.

47. I think that the best explanation of the law as it stands is that provided in **Griffiths v. Liverpool Corporation**. At pages 1021-1022, Lord Diplock discusses the matter as follows:

> *The duty which at common law rested on the inhabitants at large to maintain the highways in their parish, was long ago transferred to local authorities acting as highway authorities and has become a statutory duty currently imposed by s 44(1) of the Highways Act, 1959. The duty at common law to maintain, which includes a duty to repair a highway, was not based in negligence but in nuisance. It was an absolute duty to maintain, not merely a duty to take reasonable care to maintain, and the statutory duty which replaced it was absolute. At common law the duty, being a duty to the public, was enforceable by indictment, but its rigour was reduced by another rule of common law that a private individual who suffered damage as a result of a highway's being out of repair could not*

recover damages in a civil action against the inhabitants at large if the lack of repair was due to mere failure to repair(that is non-feasance), and not to acts of repair or other acts in relation to the highway improperly performed (that is misfeasance) (my emphasis).

48. In light of my conclusions in relation to the question of liability, the Claimant is not entitled to damages as claimed or at all.

49. In this case there has been a general paucity of evidence. At paragraph 27 above I have summarized the law in relation to highway authorities and their lack of liability to a private individual for non-repair. Our law remains unchanged after centuries, despite wide-scale changes in the level of development and role of Government and public authorities in our society. Highways are maintainable at public expense. The legislators will have to consider whether it is desirable for the law to remain in this state exempting liability of public authorities for non-feasance. This state of affairs continues to exist in a time and climate where the citizens are demanding greater accountability from public authorities and requiring some level of accounting as to the allocation and spending of their tax dollars.

50. There will therefore be Judgment for the Defendants on the Claim, with costs to be taxed if not agreed or otherwise ascertained.