

BETWEEN**RICHARD DIGNAM****PLAINTIFF****AND****EIRCOM LIMITED AND DUBLIN CITY COUNCIL****DEFENDANTS****JUDGMENT of Mr. Justice Barr delivered on the 18th day of December, 2018****Introduction**

1. This action arises out of an accident which occurred on 29th July, 2014, at approximately 10:00hrs on Lower Baggot Street, Dublin. The plaintiff, who was at that time engaged in the refurbishment of the Shelbourne Hotel, had gone to a hardware shop in the vicinity of Pembroke Street for the purpose of obtaining an article for use in the course of his work as a French polisher. While walking on the left hand footpath, going in the direction of St. Stephen's Green, the plaintiff was caused to stumble when his right foot went into a hole adjacent to a cover over a chamber, which was the property of the first defendant.

2. The plaintiff did not fall to the ground, but stumbled forward causing a wrenching injury to his right knee. The plaintiff composed himself by leaning against the window of an adjacent shop. He then went into the shop to purchase some coffee. The shop owner advised him to take a photograph of the locus. The plaintiff returned to the locus and took a photograph of it on his mobile phone.

3. The plaintiff is 40 years of age, having been born on 27th January, 1978. He has had a varied and very successful sporting career. He won nine senior county championships with his club, Rathnew GFC. He also won one Leinster title with the club. He has represented Ireland in Australian Rules Football. He also played senior rugby with Clontarf RFC and also played with Wicklow RFC and Arklow RFC.

4. Possibly as a result of his extensive sporting career, he had developed pain and discomfort in his knee for approximately twelve months prior to the accident. He had attended with his GP who had referred him for an MRI scan on 24th October, 2013. As will be seen, the plaintiff's surgeon, Prof. O'Donnell, is of the view that the surgery and other treatment which the plaintiff has undergone since the accident, would have been required in any event, given the findings on the pre-accident MRI scan and the level of his pre-accident symptomatology, however, he is of the view that the accident brought forward the necessity for such treatment by a factor of approximately fifteen years. There were also some psychiatric aspects to his injuries. These will be dealt with later in the judgment.

5. The plaintiff has sued the first defendant, being the utility company responsible for the chamber and cover, adjacent to which the hole existed. The plaintiff has also sued the second defendant, being the Roads' Authority for the relevant area.

Liability

6. The court was greatly assisted by a number of photographs of the locus. In particular, the photograph taken by the plaintiff in the immediate aftermath of the accident, which was appended as photograph No. 6 in the report furnished by the plaintiff's engineer, Mr. Alan Conlon. There were also a number of photographs of the locus taken some months later in September 2014, by Ms. Moore, a representative of the second defendant, which showed the condition of the locus at that time. The court also had the benefit of photographs taken by Mr. Conlon at the time of his inspection of the locus on 15th April, 2016. Finally, the court had the benefit of photographs taken by a representative of the first defendant, Mr. Malone on 15th November, 2018.

7. It was common case that the cover that was shown in the plaintiff's photograph and in Ms. Moore's photographs had originally been placed in situ by the Department of Post and Telegraphs. That entity was a predecessor in title to Telecom Éireann, which subsequently became Eircom and more recently it became Eir.

8. It appears that there were, at the time of the accident, two covers laid end to end, which covered a single chamber. The hole in question was on the shop side of the chamber that was nearest to St. Stephen's Green. It is clear from the photograph taken by the plaintiff, that portion of the surround immediately adjacent to the frame of the P&T cover had broken away exposing a hole in the public footpath. The plaintiff instructed his engineer that he estimated that the hole was up to 50mm deep. The engineer estimated from the photograph taken by the plaintiff that the hole was approximately 125mm wide x 200mm long.

9. It is clear from the photographs taken by Ms. Moore in September 2014, that the locus had further deteriorated in the months following the plaintiff's accident. In particular, it would appear that further chunks of the concrete surround had broken away, thereby enlarging the hole.

10. It was common case that the two covers, which covered a single chamber, had been designed in such a way that they could be lifted to enable works to be carried out by servants or agents of the first defendant to the chamber below. The chamber itself was constructed by a hole being dug and then blocks being inserted to form the walls of the chamber. The blocks would be brought up to just below the level of the footpath. A layer of wet cement would be placed on top of the blocks. Into the wet cement, a frame would be placed, into which the cover itself would sit. The main feature securing the frame was the wet cement into which it was placed. However, additional support was provided by the surround of concrete mix, which was placed into the gap between the frame and the surrounding concrete paving slabs.

11. It was clear from the photographs taken by the plaintiff and by Ms. Moore that the hole in question had been caused when the concrete mix which surrounded the P&T cover had cracked and ultimately broken away. From the plaintiff's photograph No. 6, it is clear that the hole in which he stumbled, was caused by portion of the surround on the shop side of the P&T cover becoming dislodged and removed. That hole had become bigger by the dislodgment and removal of further portions of the surround by the time that Ms. Moore took her photographs in September 2014.

12. The only expert evidence called in the case was that given by Mr. Alan Conlon, Consulting Engineer, who was called on behalf of the plaintiff. He stated that the defect in the locus, as shown in the plaintiff's photograph No. 6, was caused due to the fact that an inadequate concrete mix had been used to fill in the gap between the P&T cover and the adjacent paving slabs. As a result of the

inadequate nature of that concrete mix, it had become cracked with wear and tear and portion of it had ultimately become broken away prior to the time of the plaintiff's accident. Further portions had become broken away by the time that the subsequent photographs were taken.

13. The essential dispute in the case revolved around the question of which of the defendants was responsible for the concrete surround around the chamber cover. Mr. David Flanagan gave evidence on behalf of the first defendant. He had been employed by them since 1972, until his retirement in 2011. Initially, he had been a technician in the engineering department. He subsequently rose to the position of supervisor and in that capacity, had management of contracts concerning works carried out to the footpaths in the areas of Dublin City, Bray and Wicklow. In that capacity, he oversaw the completion of contracts, inspected the works that had been carried out and liaised with Dublin City Council. He held that position until in or about 2001, when he switched to the accident investigation section of the first defendant.

14. Mr. Flanagan stated that the utility known as the Post and Telegraphs ceased to operate in 1984. On that basis, he was of the opinion that the cover which was shown in the plaintiff's photograph No. 6, had been placed in situ before 1984/1985. After that time, all the covers placed on chambers would have had the Telecom Éireann logo, followed by the Eircom logo and more recently, the Eir logo. The significance of this was that in the 1980s, the procedure was that the P&T would carry out the works, such as the insertion of a chamber as in this case. The P&T workers would put in the chamber and the frame and the cover for the chamber. The surround around the frame holding the chamber cover, would be temporarily back filled with tarmac. Mr. Flanagan would then issue a reinstatement order, at which time, the second defendant would attend on site and carry out an inspection. They would then proceed to do the permanent reinstatement of the area around the cover. They would subsequently bill the P&T for those works.

15. However, in the late 1980s/early 1990s, there were a lot of road works going on in Dublin City. The system was changed at that time, whereby it was agreed that the Eircom contractors could do the reinstatement of the area surrounding the chamber cover. Following which, the second defendant would inspect the locus and if they were satisfied with the quality of the work done, they would take the locus in charge. Subsequently, in 2002/2003, there were discussions leading to the 2005 Regulations, which imposed an obligation on the utility company to take responsibility for an area measuring 300mm around the chamber. That obligation was repeated in the Directions for the Control and Management of Roadworks in Dublin City at para. 5.16, which was issued in June 2010.

16. In cross examination, Mr. Flanagan conceded that he did not have any documentation to establish when exactly the chamber had been constructed, or when the cover had been placed on it. Nor could he say if the first defendant had done any works at the locus since the 1980s. He accepted that as a consequence of the P&T having authority to carry out works to the public footpath in the form of the wayleave which was originally provided under the Telegraphs Act, that there was an ongoing obligation on them to inspect, maintain and repair the works which they had done. He stated that if the company was made aware that a particular locus had become dangerous, or if one of their work crews saw that a particular area had become dangerous due to wear and tear, they would carry out repairs thereto. However, they did not have any system for carrying out periodic inspections of the various chambers owned by them throughout Dublin City.

17. Mr. Flanagan further accepted that the construction of the collar around the chamber cover was an integral part of the chamber itself. While the primary method of securing the frame for the cover, was the fact that it was embedded in wet cement on the top of the blocks, he accepted that the surround also had a function in keeping the frame secure. If the surround or collar was not put in place, the frame itself would tend to move with ordinary wear and tear and use of the footpath.

Conclusions on Liability

18. I am satisfied that the concrete surround between the frame holding the chamber cover and the surrounding paving slabs, was an integral part of the construction of the chamber itself. I am satisfied that this surround serves a function to provide additional security for the frame. If it was not there, not only would there be a hole in the footpath surrounding the frame holding the cover of the chamber, but the frame itself would then move and become dislodged with ordinary wear and tear. Accordingly, it can be seen as being an integral part of the construction of the chamber itself.

19. I accept the evidence given by Mr. Conlon that in this case, the concrete mix which was used to fill in the gap between the frame for the chamber cover and the surrounding paving slabs was clearly inadequate. As a result, it became cracked. This can be clearly seen from the photograph taken by the plaintiff on the day of the accident. The portion of the concrete surround nearest to the shops had become extensively cracked and portion had actually become broken away. The concrete surround on the other side of the frame which was on the road side thereof, was also cracked and was in the process of breaking away. This was further exemplified by the photographs taken by Ms. Moore in September 2014, which revealed a further deterioration at the locus. I accept the evidence of Mr. Conlon that that was due to ordinary wear and tear on the footpath, occurring on top of an inadequate concrete mix which had been used as the surround for the chamber cover.

20. Mr. Flanagan's evidence was based solely on the fact that the cover as shown in the plaintiff's photograph had a P&T logo. Based on that, he put forward the proposition that it must have been put in situ prior to 1984, which was at a time when the agreement between the first defendant and Dublin City Council was that the former would only do temporary reinstatement works around the chamber cover and that the second defendant as the Roads' Authority would carry out the main reinstatement of the area. However, he did not have any documentary evidence to support that proposition. Nor was he able to give evidence as to whether any works had subsequently been carried out by the first defendant at the locus since the 1980s. He also candidly accepted that there was a continuing obligation on the first defendant to inspect, maintain and, if necessary, repair, their structures, such as chambers holding wires and other apparatus, on an ongoing basis.

21. Based on the photographs in this case, together with the evidence of Mr. Conlon, I am not satisfied that the inadequate surround had been placed in situ by the second defendant, rather than by the first defendant, or its contractors at some time subsequent to the 1980s. It seems to me that it is an integral part of the chamber, as it serves a function to secure the frame into which the cover was placed. It was clearly inadequate to deal with ordinary wear and tear on the footpath. As a result, portion of the surround became broken away, thereby creating a substantial danger on the footpath. In the circumstances, liability for the accident must rest with the first defendant.

22. Given that this was a relatively small hole, I do not think that there was any negligence on the part of the plaintiff in failing to observe same when he was returning to his place of work on the morning in question.

Quantum

23. The plaintiff experienced severe pain in his right knee, which became progressively worse in the days and weeks following the accident. He attended with his GP and was prescribed analgesia and attended for physiotherapy treatment. When he failed to make improvement, he was referred to Prof. Turlough O'Donnell, Consultant Orthopaedic Surgeon, at the Beacon Hospital. He was seen on

23rd October, 2014, at which time Prof. O'Donnell felt that the plaintiff's symptoms were consistent with a tear of the medial meniscus. This was confirmed by an arthroscopy which was carried out shortly thereafter. It also demonstrated significant grade 3 – 4 focal articular wear of the medial femoral condyle.

24. When reviewed on 15th January, 2015, the plaintiff had a full range of motion of the knee, but was struggling with anteromedial pain. On 30th January, 2015, the plaintiff underwent a Focal Articular Surface Replacement (FASR). Thereafter, he had 20 – 25 sessions of physiotherapy, 15 – 20 specialist visits and had approximately three injections to the knee for tendinopathy. One of those was carried out under sedation. The plaintiff also had further surgery on the knee by way of excision of a loose fragment of scar tissue/cartilage, and small ganglion. A further arthroscopy on 22nd November, 2016, demonstrated that the previous FASR implant was well fixed, was undamaged and was in good position. The plaintiff was noted to have progressive wear of the medial compartment of the knee, specifically the medial tibial plateau, as well as having a small tear of the medial meniscus, which was debrided.

25. When reviewed on 3rd February, 2017, the plaintiff continued to complain of anteromedial right knee pain which was present on a daily basis. This adversely affected him in carrying out his work as a French polisher. He experienced pain at night. He had a sensation of instability in the knee. His exercise tolerance was limited. Examination revealed a full range of motion of the knee, which was stable. He was tender to palpate the medial compartment of the knee. Radiological evaluation of the knee revealed Ahlback Grade 1 arthritis of both medial compartments.

26. More recently, prior to September 2017, the plaintiff underwent revision of a resurfacing implant of the medial femoral condyle of the knee to a Unicompartmental Knee Replacement (UKR). He also underwent a manipulation under anaesthesia as a day case for mild arthrofibrosis following the surgery.

27. Prof. O'Donnell is of the view that based on the radiological findings, it is not possible to attribute the plaintiff's condition to the accident, particularly given the existence of discomfort in the knee prior to the accident. However, the doctor is of the view that the accident changed the temporal relationship of the symptoms and the condition. The plaintiff would ultimately have developed symptoms typical of medial compartment osteoarthritis of the knee, although the likelihood is that he would have been in his early to mid 50s before that would have happened. The findings on the MRI from 24th October, 2013, were consistent with the symptoms Mr. Dignam was complaining of that ultimately resulted in him undergoing surgery.

28. Prof. O'Donnell is of the view that had the plaintiff avoided the accident, he would not have undergone the surgery which he has done to date, although he would have done so at some stage in the longer term. In essence, he is of the view that the surgery has been brought forward by something in the order of fifteen years.

29. In terms of a prognosis, he noted in September 2017, that the plaintiff was doing well and was on course with his rehabilitation, which was expected to take a further six months from that time. The doctor expects the plaintiff to return to full activities socially and professionally. He also expects the plaintiff to return to golfing, cycling, swimming and gym work. However, he has been advised to avoid running in all circumstances. Given his age, and physical activity profile, there is a chance that he will require a total knee replacement in the future. The risk thereof as reported in the literature is 1% per annum. However, the risk may be higher in the plaintiff's case.

30. The plaintiff also suffered psychiatric sequelae as a result of the injury he suffered in the accident and the treatment that he had to undergo and the resultant disability. This manifested itself in two ways: firstly, he developed depression and secondly, there was a recurrence of pre-existing Obsessive Compulsive Disorder, from which the plaintiff had suffered since his teens, but which had been quiescent for the five years prior to the accident. The court had the benefit of a report from Dr. Denis Murphy, Consultant Psychiatrist. He advised the plaintiff of various treatment options and agreed that the plaintiff would discuss those further with his general practitioner. Dr. Murphy stated that it was difficult to give a definitive prognosis. Much would depend on the outcome of his injury, but it was usual to anticipate a positive response to treatment.

31. The plaintiff was very frank in relation to his injuries and resultant disablement. He stated that he was now able to play golf, playing off a handicap of eleven at present. However, he requires the use of a buggy to get around the course. He stated that he felt that he was now 90% back to his pre-accident condition. He stated that he had found the injuries difficult, due to the fact that he was 36 years of age at the time of the accident, and was still playing sport at a competitive level.

32. This is a very difficult case in which to assess general damages. The plaintiff has undergone significant operative treatment to his knee. However, it is Prof. O'Donnell's opinion that the plaintiff would have required such surgery in any event, due to the wear and tear on his knee caused by his long sporting career. What the accident has done is that it has effectively brought forward the necessity for that treatment by a factor of approximately fifteen years. There is no indication that the plaintiff's ongoing knee condition, or his prognosis post surgery, has been in any way adversely affected by the surgery being brought forward. Nevertheless, the court is entitled to take into account that but for the accident, the plaintiff would have been operating at a reasonable level for at least another fifteen years or so. I accept the plaintiff's evidence that in 2013, he was working and playing sport as normal, although he did have knee pain, but it was of a different type than that post-accident.

33. In addition, the court has had regard to the psychiatric sequelae suffered by the plaintiff as detailed in his evidence and in the medical report furnished by Dr. Murphy. Taking all of these factors into account, I award the plaintiff the sum of €50,000 for general damages. To this must be added, the agreed figure for loss of earnings of €1,936.02.

34. The only other item of special damages is the sum of approximately €36,000 in respect of medical expenses, being the costs of the various operations to date. These have been discharged by the plaintiff's private health insurer. It seems to me that in light of the report furnished by Prof. O'Donnell, wherein he is of opinion that the plaintiff would have had to have undergone this surgery in any event, the cost thereof would have had to be borne by the plaintiff, either from his own resources, or through private medical insurance, or by availing of such treatment as a public patient. In other words, the accident did not cause the plaintiff to incur any additional expenses by having this surgery, he was going to need it at some time in the future. All the accident did was to bring forward the necessity for such treatment by a factor of fifteen years. Accordingly, I do not think that the cost of the surgical treatment is recoverable from the first named defendant.

35. In light of the findings made on liability, I award the plaintiff judgment against the first defendant in the sum of €51,936.02. I dismiss the plaintiff's case against the second defendant.