

**THE HIGH COURT****1999 No 2182P****MARTIN McCLUSKEY****PLAINTIFF****AND****THE RIGHT HONOURABLE LORD MAYOR ALDERMAN AND BURGESSES OF DUBLIN, BORD GÁIS ÉIREANN, ELECTRICITY SUPPLY BOARD, EIRCOM PLC AND NTL COMMUNICATIONS (IRELAND) LIMITED****DEFENDANTS****Judgment of Mr. Justice de Valera delivered on the 26th day of January, 2007.**

1. I am satisfied that on the 18th July, 1987, at about 9.30 p.m. or a little later the plaintiff fell on a defective pavement at Botanic Road between Phibsborough and Glasnevin just outside 30/32 Botanic Road.

2. I accept the plaintiff's evidence and that of Mr. Carroll as to the circumstances of the plaintiff's fall. I will deal with the damages arising from the injuries sustained by the plaintiff later in this judgment.

3. The location at which the plaintiff fell and which at the time of his fall constituted an irregular subsidence below the level of the adjoining pavement had been the subject of excavations previously.

4. The plaintiff knew the area quite well; at the time of his fall it was still bright (being July) and he cannot have been keeping a sufficiently careful lookout. It is inevitable from the condition of the path at the time of his fall that the surface had been defective for some considerable time.

5. It is clear that the excavation when last opened had not been properly reinstated after the work was carried out, subsidence occurred as a result of ordinary usage of the footpath (the reinstatement being unable to properly cope with ordinary pedestrian traffic) ultimately causing the hazard over which the plaintiff fell.

6. The question that rises from this is which defendant, last, worked on this area and therefore was responsible for filling in the hole without taking proper care to ensure that this work was correctly completed.

7. At this point the oft quoted dictum of Sir Arthur Conan Doyle attributed to Sherlock Holmes comes to mind:

"When you have eliminated the impossible, whatever remains, however improbable, must be the truth."

8. bearing in mind that I must decide, in this matter, on the balance of probabilities.

9. It is, I confess freely, most difficult to reach a decision in this matter even on that standard of proof and the scales have tipped barely in the direction of my decision.

10. I am siding the matter as between An Bord Gáis and NTL Communications (Ireland) Limited – I do not consider on the basis of the submissions made to me that Dublin City Council has any liability in this matter (at the most their involvement could only constitute nonfeasance) and the Electricity Supply Board and Eircom Plc. have not been the subject of any evidence.

11. It is clear that the defective area over which the plaintiff fell had been the subject of works by both An Bord Gáis and NTL (and its predecessors) on the basis of the evidence, particularly that of Mr. Meade. When the exploratory investigation was made in August, 2000, the first evidence of work was a cable, which it is accepted, belonged to Cablelink/NTL. Below this, at a deeper level was the gas piping involved in the supply to no. 32 Botanic Avenue installed by An Bord Gáis.

12. This indicates to me that on the balance of probabilities the last entity to work in this excavation, and therefore the one who filled in the hole, was NTL. This work was clearly inadequate and, ultimately, the cause of Mr. McCluskey's fall. However as I have already stated Mr. McCluskey must accept that his failure to keep a proper lookout has contributed to the damage he has suffered and I assess his contributory negligence at 30%.

13. Mr. McCluskey suffered injuries to:

(a) His right wrist.

(b) His left hand.

14. The wrist injury was the more serious and the plaintiff was not finally discharged from Mr. Walsh's (his orthopaedic surgeon) care until September, 1999. Though this was a serious injury I am satisfied that there is no immediate evidence of the onset of arthritis and on the balance of probability no such deficit will occur.

15. On the basis of all the medical reports submitted to me, including the report from Roger Leonard the occupational therapist who gave evidence on Mr. McCluskey's behalf, I think it is reasonable for Mr. McCluskey to assert that for a period of a further nine months after discharged by Mr. Walsh he was unable to work to his pre-accident standard.

16. However I am satisfied that from that time he was able to undertake all work to his pre-accident standard, and, on the basis of his vocational report even if he did not want to return to his pre-accident work as a window fitter (and I don't accept this would have been physically beyond his powers) he is capable of many other forms of endeavour which would remunerate him to the same or to a greater extent than before and in today's economic conditions I find it impossible to accept that such jobs are not obtainable by Mr. McCluskey.

17. Therefore the damages to which Mr. McCluskey are entitled are as follows:

(a) General damages to date €35,000.

(b) General damages into the future €15,000.

18. I do not accept Mr. McCluskey's claim that he was earning €500 or more per week prior to the accident. Based on the revenue documentation it appears Mr. McCluskey was earning approximately €250 per week gross in the year prior to his fall.

19. On this basis I am prepared to allow Mr. McCluskey loss of earnings for 43 weeks at £185 per week which amounts to €10,180.

20. Therefore the total amount of damages to which Mr. McCluskey is entitled is €60,108 reduced by 30% because of his contributory negligence. The final figure amounting to €42,075.