THE HIGH COURT

[2015 No. 7847 P.]

BETWEEN

IAN MCWHINNEY

PLAINTIFF

AND

CORK CITY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice David Barniville delivered on the 31st day of July, 2018

1. This is my judgment in this personal injuries action which was heard before me in Cork on 9th and 10th July, 2018. On 11th July, 2018, I indicated that:-

(1) I would be finding for the plaintiff on liability;

(2) I would be making a finding of contributory negligence against the plaintiff, which I would be assessing at 25%;

(3) I would be assessing the plaintiff's general damages to date at €60,000.00 with general damages into the future of €10,000.00, making a total of €70,000.00 for general damages (subject to the appropriate deduction to reflect my finding of contributory negligence);

(4) Special damages were agreed at €13,310.00;

(5) Overall, therefore, taking into account both general and special damages and the appropriate deduction to reflect my finding of contributory negligence, I would be making an award in favour of the plaintiff of €62,482.50; and

(6) I would give my detailed reasons in a written judgment.

This is that judgment.

Facts: Circumstances of the Accident

2. The facts as agreed or otherwise found by me are as follows. The plaintiff was born on 15th April, 1965 and is now 53 years of age. He is a maintenance fitter. For the past several years he has been employed as a fitter by Petrofac, a multi-national concern, on off-shore oil rigs in the North Sea. Typically, he is required to work for three weeks and is then off work for the following three weeks. The work involved is strenuous and requires him to work both inside and outside oil rigs in particularly tough and inclement weather conditions. He generally works a twelve hour shift.

3. During the plaintiff's periods off work, he normally returns home to his family in Cork. While at home, the plaintiff carries out work on his own account repairing doors and shutters and the like, primarily for businesses who were previously customers of his prior to the commencement of his employment with Petrofac.

4. It was on one of the plaintiff's break periods back in Cork in July 2013 that he was contacted by the Cork City Fire Station (which is under the control and responsibility of Cork City Council, the defendant). The plaintiff was requested to attend at Cork City Fire Station on Anglesea Street to carry out repairs to the shutter of one of the fire trucks operating from the station. He attended at the station on 22nd July, 2013. He drove there in his own van (a Volkswagen Transporter) which had the plaintiff's tools and other accoutrements for his trade in the rear compartment. Having telephoned to announce his arrival, he was admitted to the rear yard of the fire station which is an area not generally accessible to the public save by prior arrangement. There are some designated parking spaces for visitors and others in the rear yard of the fire station. However, they were all occupied when the plaintiff arrived in his van that day. He asked a staff member present whether he could park his van in one of the bays normally used by the fire trucks. It was confirmed to him that he could. He reversed his van into one of the bays. There are at least five such bays in the rear yard of the fire station. There is some uncertainty as to which of the bays the plaintiff parked in. It is probable, however, on the basis of the evidence of Mr. John Fullam, the defendant's engineer, that the plaintiff parked in Bay 3. In any event, it was either Bay 3 or Bay 4. However, nothing much turns on this.

5. Having reversed his van into the particular parking bay, the plaintiff then went in search of the Duty Officer at the fire station from whom he was to take his instructions for the repair job he was being engaged to carry out. The Duty Officer was based in the front of the fire station. To get there, the plaintiff had first to step down from the driver's side of his van and then walk along the side of the van and through the fire station to the Duty Officer's office in the front of the station. Having reported to the Duty Officer and having been told what work was required of him, the plaintiff was then escorted back through the fire station by another fire officer and was shown where the particular fire truck was located which had the faulty or damaged shutter which required repair.

6. The plaintiff states that he asked that officer whether it was alright for him to leave his van parked in the particular parking bay in which he had previously been directed to park and that he also stated that he had left his keys in the ignition in case it had to be moved to make way for another vehicle. He was told that it would be in order for him to leave his van parked where it was. The plaintiff's evidence in that regard was not contested by the defendant and I accept it.

7. The plaintiff then returned to the passenger side of his van, opened the sliding door of the van and got up into the rear compartment of the van to obtain the tools he required for the job. He took some tools out with him, which he held in his right hand. He then backed down out of the rear compartment of the van (apparently not holding on to anything with his left hand as he did so). As he backed out of the rear compartment he put his left foot down onto the ground. Unfortunately, he placed that foot on the sloping side of an uncovered drain which ran across the length of the yard and under the open rear sliding door of the plaintiff's van. The purpose of the drain was to enable excess water to be removed and drained off from the yard. Having put his foot down on the side of the drain, the plaintiff was thrown off balance, fell over and put his left hand out to protect himself from the fall. Unfortunately, the plaintiff sustained a very serious fracture to his left wrist as a result.

8. There is no dispute between the parties that this was how the accident occurred. The defendant's engineer, Mr. John Fullam, who had obviously not witnessed the accident, accepted in evidence that the plaintiff's explanation of the accident was as it had subsequently been reported to him (Mr. Fullam) by a member of the fire station staff who had witnessed it. I have no hesitation in accepting the plaintiff's account of how the accident occurred. The plaintiff struck me throughout as an honest and truthful witness in all respects.

9. The plaintiff stated in evidence that he had not noticed the drain at any point before he was caused to lose his balance and fall. He said on a number of occasions in his evidence that it did not "*register*" with him. He accepted that he had visited the fire station on about five or six occasions over the course of the previous year. He also accepted that he would have had to reverse over the drain when parking his van in the parking bay. However, he said that he did not notice it as he was more concerned about protecting the mirrors on his van while reversing into the bay. The plaintiff also stated that he did not notice the drain on the day of the accident while walking from his van into the station in order to speak with the Duty Officer or when he returned to his van to get the tools required for the job from the rear compartment of the van. The plaintiff stated that the presence of the drain did not "*register*" with him on any of these occasions. He accepted, however, in cross-examination that in hindsight he probably ought to have noticed it and that it was a "*fair comment*" that he ought to have had "*more of an eye out*" for it. However, he says that he did not notice it. I completely accept the plaintiff's evidence in that regard. The plaintiff's fair and appropriate concession in cross-examination that he probably ought to have noticed the drain before the accident would undoubtedly provide a basis for a finding of contributory negligence against the plaintiff in the event that the plaintiff established that the defendant was liable for the accident.

10. As noted earlier, the plaintiff sustained a serious injury to his left wrist. I will address the nature of this injury and the treatment received by the plaintiff for it in a later part of this judgment.

Liability Expert Evidence
(a) Plaintiff's evidence

11. On the question of liability, the plaintiff called evidence from Mr. Frank Whyte, a consultant engineer. Mr. Whyte attended at the scene of the accident on 5th May, 2015 in the company of an insurance investigator/adjustor representing the defendant. The plaintiff and his solicitor, Mr. Cuthbert, were also present. Mr. Whyte took a series of photographs at the scene and prepared a report for the court (dated 11th May, 2015). Mr. Whyte measured the drain crossing the rear yard of the fire station at two points. At one point he measured the maximum depth of the drain at 52mm and another point the maximum depth was measured at 40mm. It should be noted that there is some dispute between the plaintiff and the defendant in relation to the depth of the drain at the approximate point at which the plaintiff's accident occurred. However, I do not regard that dispute to be of significance for the purpose of the issues which I have to determine. Mr. Whyte also noted that there was a slight longitudinal gradient in the drain (to enable water to be drained off). He further noted that the drain is approximately 5m out from the face of the rear of the fire station building. He also explained that there was a drop of about 320mm from the step or floor of the rear compartment of the plaintiff's van down to ground level (although Mr. Whyte did not take that measurement in respect of the plaintiff's own van and was basing his evidence on what the plaintiff had told him).

12. Mr. Whyte explained that his understanding at the time of his report was that the rear yard and drain were constructed and installed in 1975 but that information provided to him shortly before he gave evidence on the first day of the hearing suggested that the drain was in fact installed in 2002.

13. Mr. Whyte stated that, in his view, the applicable statutory provisions were the Safety, Health and Welfare at Work Act 2005 (the "2005 Act") and the Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I. No. 299/2007) (the "2007 Regulations"). Particular reliance was placed by Mr. Whyte in his report and in evidence on the provisions of ss. 8, 12, 19 and 20 of the 2005 Act and Regulations 9(1) and 14(a) of the 2007 Regulations.

14. In his evidence, Mr. Whyte stated that, in his opinion, the open drain was a hazard in that it had the potential to cause a mis-step, trip or stumble on the part of a person working or moving about the area with the potential to cause a fall, as had happened in the present case. He expressed the opinion that the drain should have been identified as a hazard in a hazard identification document or risk assessment prepared by the defendant (which he said was required by ss. 19 and 20 of the 2005 Act). Had it been so identified, the defendant would or, at least, ought to have taken steps to minimise or control the risk posed by the drain. To eliminate the risk, Mr. Whyte explained, the defendant should have covered the drain by fitting a grate across its top or by replacing it with a pre-fabricated drainage channel incorporating a grate cover. He explained that a similar drain to the front of the fire station at Anglesea Street is covered by a grate and he put in evidence photographs showing that cover drain. The drain in question appears to be covered by a metal grate. Mr. Whyte also explained that a similar approach was apparently taken by the defendant in respect of a drain at another fire station (a substation) at Ballyvolane in Cork. Photographs showing that covered drain were also put in evidence by Mr. Whyte. Mr. Whyte could see no reason why the drain in the rear yard of the fire station at Anglesea Street could not have been similarly covered. He expressed the opinion that this should have been done as it would have led to a uniformly level surface on the yard. His evidence was that if the drain had been covered it would have eliminated the potential for the plaintiff's accident. Alternatively, he explained that the defendant should have reduced the risk (as opposed to eliminating it altogether) by visually highlighting the drain using signal coloured paint. He stated that the defendant had made extensive use of both white and yellow coloured paint to delineate walkways and parking spaces and the like in the rear yard of the fire station. He expressed the opinion that adopting either of these measures would have addressed the requirement to ensure the safe circulation of pedestrians and vehicles in the yard (which he stated was a requirement of the statutory provisions referred to in his report).

15. Mr. Whyte also commented in evidence on a number of documents which had been provided by the defendant to the plaintiff by way of voluntary discovery. Three particular documents were referred to by Mr. Whyte in his evidence (and subsequently relied upon in submissions on behalf of the plaintiff). The first was a document headed "*Appendix 7 Fixed Workplace – Safety Hazard Checklist*" ("Appendix 7"). The status of Appendix 7 was never explained in evidence on behalf of the defendant. It appears to have been prepared for the purpose of identifying safety hazards in the fire station. However, the document was never filled in or completed by the defendant. In the first column of the document (under the heading "*Yard & Outside Areas*") safety hazards identified included "*drains*" and "*drain channels*". Space was provided in the next two columns for the person filling in the document to put a tick or mark under the column "OK" or "NOT OK". Note 1 at the bottom of Appendix 7 stated that the person filling in the document was to mark relevant items as "OK" or "NOT OK" on the basis of "*evaluation of risk*". However, the document was not filled in. There was no tick or mark in respect of any of the identified actual or potential safety hazards including "*drains*" and "*drain channels*". There was in fact no evidence at all that the defendant had addressed the issue of the open drain in the rear yard of the fire station at any stage.

16. The second document commented upon in evidence by Mr. Whyte was a document headed "*Risk Assessment Summary Sheet*" (the "Summary Sheet") which was stated to refer to the "*Headquaters (sic)*" at Anglesea Street. I am entitled to assume and conclude by reference to the contents of the Summary Sheet that it is intended to refer to the fire station at Anglesea Street. Again,

the provenance of this document was never explained in evidence by the defendant. The first column of the Summary Sheet under the heading "*Task/Area Training Yard*" made reference to a number of tasks or exercises, namely "*Fire Hose Training*", "*Foam Exercise*", "*Other Scenarios*" and "*Manual Handling*". The risks identified in respect of these tasks were "*Falls due to uneven ground*", "*Slips, Trips and Falls", "Physical Injury*" and "*Use of Foam as extinguishing agents*". There is then reference to the risk groups affected by these risks which are designated with the letters "A" and "B" which are not specifically defined or identified on the "Summary Sheet" itself but appear to be a reference to the fire station's staff (designed by the "A") and the defendant's other staff (Cork City Council staff) (in the case of the letter "B"). This is how those letters are defined in the third of the documents relied on by the plaintiff and referred to by Mr. Whyte (see below). There are then columns in the "Summary Sheet" indicating the likelihood and severity of the risks and the risk rating before controls were taken. The next column then lists various "*control measures*" none of which appears to be relevant in the circumstances of the drain and the plaintiff's accident. There are various other columns, none of which appears to be relevant. The principal point made by Mr. Whyte in evidence is that the "Summary Sheet" ought to have identified the particular risk posed by the open drain in the rear yard and ought to have identified as one of the risk groups affected by that risk persons coming on to the fire station premises to carry out occasional work (not being employees of the defendant or employed at the fire station itself). There was no evidence from the defendant in relation to the preparation of this "Summary Sheet" nor was there evidence that persons such as the plaintiff attending at the fire station to carry out a particular job were considered among the potentially relevant risk groups or that the open drain might potentially constitute a risk to such persons.

17. The third document relied on by the plaintiff and referred to in evidence by Mr. Whyte was a document entitled "*Fire Brigade Operations – Generic Risk Assessment*" (the "Generic Risk Assessment"). Again there was no evidence from the defendant in relation to the provenance or nature of this document. It identified as an "*identified hazard*" in connection with an "*operational activity*" the following hazard: "*Slips, Trips and Falls*" with risks or consequences being described as "*Physical Injury including broken bones, sprains & bruises*" and identified the level of risk as "*low*". The risk group identified including the staff of the fire station, the defendant's other staff and another group designated by the letter "D" which was not defined or identified in the document or otherwise explained in evidence. While the letter "C" is defined in the document as referring to the public, it is not identified or otherwise referred to in the document as part of the "*risk group*" considered. Nor are persons such as the plaintiff who attend at the fire station to carry out a particular job. Among the "*control measures*" identified in the document are that "*All areas to have adequate & properly maintained lighting & emergency lighting*" and that "*all floor surface areas should be kept free from obstructions & be suitable (sic) maintained in good order*". Mr. Whyte commented upon these documents in the context of his opinion that the defendant was in breach of the provisions of the 2005 Act and the 2007 Regulations referred to earlier.

18. Mr. Whyte accepted in cross-examination that open drains are present on footpaths and roadways and are still being used. However, he expressed the view that the open drain located in the rear yard of the fire station which is a place of work was a hazard as it could cause a person such as the plaintiff to stumble and fall. He also distinguished the drain in the rear yard of the fire station from drains used on roadways beside footpaths where, in his view, they are clearly defined (in the sense of being obvious). Mr. Whyte described the presence of the open drain in the rear yard of the fire station as an "*accident waiting to happen*" for people using the yard to carry out work on an occasional basis.

(b) Defendant's evidence

19. The only witness called by the defendant was Mr. John Fullam, consultant engineer of Paul Twomey & Associates Ltd. Mr. Fullam also provided a report for the court dated 10th May, 2016. Mr. Fullam did not attend at the inspection carried out by Mr. Whyte in May 2015 as his firm had not been engaged by the defendant at that stage. Mr. Fullam's report was also prepared on the basis that the drain was installed at the time of the construction of the fire station in 1975. However, like Mr. Whyte, Mr. Fullam also found out on the morning of the first day of the hearing that the drain was in fact installed in 2002.

20. Mr. Fullam also gave evidence in relation to the dimensions of the drain. Most of that evidence was not disputed by the plaintiff. Mr. Fullam measured the width of the channel of the drain at 520mm (that was not in dispute). He identified the highest point of the channel of the drain in the centre of the middle parking bay where it is approximately 15mm below the surrounding concrete level. He measured that the lowest points of the drain channel as being in the centre of Bays 2 and 4 where the depth of the channel was measured at 50mm below the concrete surface. Mr. Fullam estimated that the depth of the drain at the point where the plaintiff's accident occurred was 22mm. Mr. Fullam made that measurement by reference to photographs taken immediately after the accident (which were not put in evidence) and he confirmed that he had not in fact taken any physical measurement at the point at which the plaintiff's accident occurred. Mr. Fullam did however state that the accident occurred close to the highest part of the drain where he estimated that the side slopes of the drain are approximately 1:12.

21. In his report, which Mr. Fullam confirmed in evidence, he explained that the drain channel was formed using the same concrete as was used in the concrete yard itself and that this was normal for yards of the same age and typical of similar drains used on public roads and footpaths throughout Ireland. As noted earlier, Mr. Fullam corrected his report insofar as it stated that the drain was installed in 1975 whereas Mr. Fullam had been told on the first morning of the case that the drain was in fact installed in 2002. He expressed the opinion that the depth of the channel was necessary to provide an adequate gradient for the effective removal of water from the yard. He further explained in evidence that open drains without a cover are commonly seen on footpaths and roadways although he did acknowledge that the presence of such open drains on footpaths had given rise to personal injury claims in the past. He further indicated that such open drains continue to be used in plaza type developments, particularly where limestone paving is used. Mr. Fullam did not see any problem with the use of the open drain in the rear yard of the fire station and was not aware of any previous accidents associated with the drain. He did not accept that the open drain in that location was a hazard for persons such as the plaintiff or the occasional visitors to the fire station who altered to carry out particular jobs.

22. Mr. Fullam did not agree that the defendant ought to have highlighted the presence of the drain by way of signalling paint or otherwise. He explained that he had never seen an open drain highlighted in that way and that there was already quite a lot of painting in the yard to highlight features there. He felt that if the drain was to be highlighted by way of signal paint it would be confusing to people who were not familiar with the yard. Nor did he accept that the drain ought to have been covered although he did concede that there was no reason why it could not have been covered. While pointing to the potential damage to a cover which could be caused by vehicles crossing over the drain (if covered), Mr. Fullam's principal difficulty with the cover appeared to be that it would require maintenance on the part of the defendant. In effect, he explained this meant that the drain would have to be cleaned out at least twice a year to remove leaves or other debris which may have been carried in on the wheels of vehicles. Mr. Fullam was not in a position to explain why the defendant had installed a covered drain at the front of the fire station where the drain is covered by a metal grate.

23. The entire thrust of Mr. Fullam's evidence was that the drain did not constitute a lip or amount to a sudden change in depth but rather a sloping change which did not constitute a hazard and did not require a cover or highlighting in the manner suggested by Mr. Whyte. He explained that his evidence in that respect would be the same whether the drain was installed in 1975 or in 2002. He

expressed the opinion that the accident would not have occurred if the plaintiff had been looking down at the ground while exiting from the rear of the van.

24. Finally, Mr. Fullam was questioned on behalf of the plaintiff about the documents discovered by the defendant. He was not in a position to cast any light on the documents or their provenance.

Statutory Provisions Relied On

25. Before setting out my conclusions on the disputed aspects of the evidence, I will identify the particular statutory duties and obligations which arise in the present case. As noted earlier, although the plaintiff's case is pleaded on a number of different bases, the plaintiff refined his case at trial essentially to rely on a breach of certain provisions of the 2005 Act and of a number of the provisions of the 2007 Regulations. While the plaintiff's engineer, Mr Whyte, referred to a number of different statutory provisions and expressed his opinion as regards the defendant's non-compliance with these provisions, the interpretation of, and the compliance or otherwise with, statutory provisions such as the 2005 Act and the 2007 Regulations are matters of law for the court to decide and are not for expert engineering evidence. Both the plaintiff's and the defendant's counsel made submissions in relation to a number of the relevant statutory provisions. I set out below my conclusions in relation to the interpretation and application of these provisions to the facts as I have found them.

26. The plaintiff relies on ss. 8, 12, 19 and 20 of the 2005 Act. Section 8 sets out the general duties imposed on an employer under the 2005 Act. The basic duty imposed upon an employer is set out in s. 8(1) which provides that:-

> *"Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees."*

The defendant was not the employer of the plaintiff. The plaintiff was working on his own account providing a particular service for the defendant at the time of the accident. The general duty arising under s. 8(1) does not, therefore, directly arise in this case. However, the plaintiff also relies on s. 12 which imposes general duties on employers to persons other than their employees. Section 12 provides as follows:-

> *"Every employer shall manage and conduct his or her undertaking in such a way as to ensure, so far as is reasonably practicable, that in the course of the work being carried on, individuals at the place of work (not being his or her employees) are not exposed to risks to their safety, health or welfare."*

The defendant was not the plaintiff's employer. The plaintiff was an individual attending at a "*place of work*" (as defined in s. 2(1) of the 2005 Act) and was carrying on work there at the request of the defendant. The defendant, therefore, had a duty under s. 12 to "*manage and conduct*" its "*undertaking*" (as defined in s. 2(1)) "*in such a way as to ensure, so far as is reasonably practicable, …"* that the plaintiff was not exposed to risks to his safety, health or welfare. The plaintiff alleges that the defendant was in breach of that duty. The defendant disputes that contention.

27. The plaintiff further alleges that the defendant was in breach of s. 19 of the 2005 Act. Section 19 concerns hazard identification and risk assessment. Section 19 provides as follows:-

> *"(1) Every employer shall identify the hazards in the place of work under his or her control, assess the risks presented by those hazards and be in possession of a written assessment (to be known and referred to in this Act as a "risk assessment") of the risks to the safety, health and welfare at work of his or her employees, including the safety, health and welfare of any single employee or group or groups of employees who may be exposed to any unusual or other risks under the relevant statutory provisions.*
>
> *(2) For the purposes of carrying out a risk assessment under subsection (1), the employer shall, taking account of the work being carried on at the place of work, have regard to the duties imposed by the relevant statutory provisions.*
>
> *…*
>
> *(5) Every person to whom sections 12 or 15 applies shall carry out a risk assessment in accordance with this section to the extent that his or her duties under those sections may apply to persons other than his or her employees."*

Section 19 applies as between the plaintiff and the defendant as the defendant owed duties under s. 12 to persons other than its employees. The defendant owed duties to the plaintiff under s.12. The plaintiff contends that the defendant was in breach of s. 19(1) in that it did not identify hazards in the fire station, assess the risks presented by those hazards and be in possession of a written assessment of the risks to the safety, health and welfare at work of persons such as the plaintiff. While the defendant denies any breach of s. 19, it did not put before the court any completed risk assessment or give any evidence that there was one. The defendant's answer to any alleged breach of s. 19 is that the open drain did not constitute a hazard and it relies on Mr. Fullam's evidence in that regard.

28. The plaintiff also relies on an alleged breach of s. 20 of the 2005 Act. Section 20(1) provides as follows:-

> *"(1) Every employer shall prepare, or cause to be prepared, a written statement (to be known and referred to in this Act as a "safety statement"), based on the identification of the hazards and the risk assessment carried out under section 19, specifying the manner in which the safety, health and welfare at work of his or her employees shall be secured and managed."*

Section 20(9) provides that this obligation is owed to persons covered by s. 12 and was, therefore, owed by the defendant to the plaintiff. The defendant did not put in evidence any safety statement or state whether it had or had not prepared one. As noted earlier, certain documents were provided by the defendant to the plaintiff by way of voluntary discovery. I referred to those documents earlier in the judgment. None of them amounts to a "safety statement" insofar as the open drain in the rear yard was concerned. The defendant's answer to this aspect of the plaintiff's case is again that the drain did not constitute a hazard and, therefore, did not have to be the subject of a risk assessment under s. 19 or a safety statement under s. 20.

29. I note in passing that the 2005 Act does not contain any provision similar to that previously contained in s. 60 of the Safety, Health and Welfare at Work Act 1989 (the "1989 Act"). Section 60 of the 1989 Act provided that nothing in that Act was to be construed as conferring a right of action in any civil proceedings in respect of a failure to comply with a duty imposed under ss. 6 to 11 of the Act. Since the 2005 Act contains no equivalent to s. 60 of the 1989 Act, it is clear that breaches of the duties contained in

the 2005 Act and, in particular, breaches of ss. 8, 12, 19 and 20 may give rise to a civil cause of action provided that the normal requirements for the imposition of civil liability for breach of a statutory provision are satisfied.

30. The plaintiff also contends that the defendant is in breach of two provisions of the 2007 Regulations, namely, Regulations 9(1)(a) and 14(a).

31. Regulation 9(1) provides that:-

> *"(1) An employer shall ensure that—*
>
> (a) *the floors of rooms have no dangerous bumps, holes or slopes and are fixed, stable and, so far as is reasonably practicable, not slippery,"*

The word "*room*" is not defined in the 2005 Act or in the 2007 Regulations. In my view, the area of the rear yard of the fire station in which the drain is located and in which the plaintiff's accident occurred is not a "room" and, therefore, Regulation 9(1)(a) does not apply to this case.

32. Regulation 14 of the 2007 Regulations concerns "*movement of pedestrians and vehicles in danger areas"*. Regulation 14 provides that:-

> *"An employer shall ensure that—*
>
> *(a) outdoor and indoor places of work are organised in such a way that pedestrians and vehicles can circulate in a safe manner,"*

Regulation 14 refers to an "*employer*" and while the defendant was not the employer of the plaintiff, Regulation 14, in referring to an "employer" as being subject of the duty contained therein does not confine the intended beneficiaries of the duty imposed to the employees of that employer. The description of the duties imposed on an "*employer*" under this Regulation are certainly wide enough to extend to persons other than employees of that employer. Read with s. 12 of the 2005 Act, it would be open to construe Regulation 14(a) as imposing an obligation on an employer to persons who are not his or her employees but who are present at the employer's place of work for the purpose of carrying on work. The obligation contained in Regulation 14(a) could, therefore, be owed by the defendant to a person such as the plaintiff. However, I do not believe that Regulation 14(a) is relevant in the present case. The plaintiff's accident did not occur as a result of any failure by the defendant to organise its outdoor or indoor places of work in such a way that pedestrians and vehicles could "*circulate in a safe manner".* That provision would appear to me to be directed to the management of pedestrians and vehicular traffic and not to the placement of drains or other such features in an indoor or outdoor place of work. Regulation 14(a) is, therefore, not relevant to this case either.

33. The statutory provisions of relevance to this case, in my view, are ss. 12, 19 and 20 of the 2005 Act. This is because these sections are expressly stated to impose duties on employers to persons who are not their employees but who are present at the particular place of work for the purpose of carrying on work. The plaintiff was such a person.

Relevant Authorities and Analysis

34. Two authorities were drawn to my attention by counsel for the plaintiff in this case in support of the plaintiff's contention that the defendant was in breach of the provisions of s. 12 of the 2005 Act. They were: *Boyle v. Marathon Petroleum (Ireland) Ltd*. [1999] IESC 14, [1999] 2 I.R. 460 ("*Boyle*") and *Van Dalsen v. Davy Hickey Properties Ltd.* [2016] IEHC 717 ("*Van Dalsen*").

35. In *Boyle*, the Supreme Court dismissed the plaintiff's appeal from the decision of the High Court which had dismissed the plaintiff's claim. The plaintiff was an employee of the defendant and worked on an off-shore platform owned by the defendant. While working on the first floor of the platform, the plaintiff sustained an injury when he struck his head. It was common case that the place where the accident occurred was unsafe in the sense that it would not have been permissible to have such conditions in a conventional factory. The plaintiff did not claim that the defendant was negligent but rather that it was in breach of its statutory duty under s. 10(5) of the Safety, Health and Welfare (Offshore Installations) Act, 1987. That section, which is very similar to s. 12 of the 2005 Act, provides:-

> *"It shall be the duty of an installation manager to ensure that every workplace on, in or in the neighbourhood of the offshore installation with which he is concerned is, so far as is reasonably practicable, made and kept safe."*

36. The High Court held that the place at which the accident occurred was as safe as reasonably practicable. The plaintiff argued on appeal that this finding was not supported by the evidence. The finding was upheld by the Supreme Court. In his judgment for the Supreme Court, O'Flaherty J. stated:-

> *"I conclude that the learned trial judge reached the correct decision. I have no doubt that the onus of proof does rest on the defendant to show that it did what was reasonably practicable. I am also of the opinion that this duty is more extensive than the common law duty which devolves on employers to exercise reasonable care in various respects as regards their employees. It is an obligation to take all practicable steps. That seems to me to involve more than that they should respond that they, as employers, did all that was reasonably to be expected of them in a particular situation. An employer might sometimes be able to say that what he did by way of exercising reasonable care was done in the "agony of the moment," for example, but that might not be enough to discharge his statutory duty under the section in question."* (at p. 466).

37. It should be noted that in that case the Supreme Court held that the onus of proof did rest on the defendant to show that what it did was reasonably practicable. That conclusion must be viewed in the context of the fact that it was common case that the place in which the accident occurred was unsafe in the conventional sense. That having been conceded by the defendant, it was then for the defendant to demonstrate that it was so far as was "*reasonably practicable*" safe in the particular circumstances and having regard to the balance which had to be struck by the defendant. The Supreme Court was not stating that in all cases the onus of proof was on the defendant at the very outset to show that it had taken all steps as were "*reasonably practicable*" to make and keep the place safe. In a case, such as the present case, where it is not conceded by the defendant that the presence of the open drain in the rear yard of the fire station was unsafe, the onus must first rest on the plaintiff to demonstrate at least to a *prima facie* level that the presence of the open drain was a hazard or potentially unsafe and only then would the onus or burden pass to the defendant to demonstrate that it had acted so far as was reasonably practicable to ensure that persons, such as the plaintiff, were not exposed to a risk to their safety, health or welfare.

38. The second case relied on by the plaintiff was *Van Dalsen*. In that case, the plaintiff was required to attend at the National Digital Park in Citywest to carry out some work at a premises there. He fell while attempting to access the premises. He contended that the defendants were liable (*inter alia*) for breach of statutory duty under s. 15 of the 2005 Act. That section required that a person to whom the section applied (namely, a person in control of a place of work and a means of access to or egress from that place) had to ensure so far as was reasonably practicable that the place of work and the means of access to or egress therefrom were safe and without risk to health. The evidence of the plaintiff and his engineer was disputed by evidence from the defendants and from an engineer on their behalf. In his judgment, having referred to the provisions of s. 15, the High Court (Fullam J.) cited with approval the passage of the judgment of O'Flaherty J. in *Boyle* (set out above) and then continued (at para. 79):-

> *"The duty is not an absolute one (Thompson v. Dublin Bus [2015] IESC 22). The duty is clearly more onerous than the duty on an occupier. The onus is on a defendant to prove that he has gone as far as is reasonably practicable to ensure the safety of the workplace or the means of access or egress thereto or there from. The legislature intended to impose duties on individuals who were not the immediate employers of workers at the workplace. Such persons in control would include landlords in the case of premises leased to an undertaking specifically having obligations under leases to maintain roadways or buildings or fixtures and fittings or equipment thereon. Persons in control would also include a contractor whose employees were engaged in performing services at the workplace."*

39. The High Court dismissed the plaintiff's claim, finding that there was no breach of s. 15 of 2005 Act. The court held that the defendants had provided a safe means of access to the workplace and that the accident occurred because the plaintiff had chosen not to use the designated access. The court further held that the accident was caused as a result of the plaintiff's own disregard for his own safety.

40. While the High Court held that the onus was on the defendant to prove that it had gone as far as was reasonably practicable to ensure the safety of the workplace or the means of access to or egress from that place, and so found in reliance on the decision of the Supreme Court in *Boyle*, it must be recalled that the Supreme Court found that the onus of proof lay on the defendant to show that what it did was reasonably practicable in circumstances where it was common case that the place at which the accident occurred was unsafe in the conventional sense. It should further be noted that there was evidence from the plaintiff and his engineer in *Van Dalsen* which may have been sufficient to shift the burden on to the defendants to show that what they did was reasonably practicable. Neither of these cases is authority for the proposition that the defendant bears the initial burden of proof to establish that it has acted so far as is reasonably practicable to ensure that persons are not exposed to risks to their safety. I should add that the plaintiff did not advance the case that the defendants did have that initial burden of proof.

Decision on Liability

41. I am satisfied that the evidence adduced by and on behalf of the plaintiff establishes that the open drain crossing the rear yard of the fire station did amount to a hazard to persons such as the plaintiff who were required to enter the yard for the purpose of carrying out work on an occasional basis for the defendant. The drain was uncovered and was constructed using the same materials with the same colour as the surrounding areas of the yard (albeit it that there was some slight difference in consistency between the areas immediately surrounding the drain and the drain itself). While there was a dispute between the plaintiff's engineer and the defendant's engineer as to the depth of the drain at the point at which the accident occurred, I am proceeding on the basis that the depth of the drain at that point was at least 22mm (and it could well have been deeper than that). An open drain of such a depth at a point where persons such as the plaintiff who are occasional visitors to the yard may be required to work does, in my judgment, amount to a hazard. In that respect, I accept the evidence of Mr. Whyte on behalf of the plaintiff and reject the evidence of Mr. Fullam on behalf of the defendant.

42. While Mr. Fullam is undoubtedly correct that uncovered drains are found on footpaths and between footpaths and roadways, in the latter situation there is normally a clear distinction or separation between the footpath and the roadway. In the former, there is a risk that persons will injure themselves and it was accepted by Mr. Fullam that claims have been brought by people arising out of falls over such drains. I express no view on whether such open drains across footpaths are unsafe and nothing in this judgment should be read otherwise.

43. The plaintiff's account of the accident has not been disputed. I have no hesitation in accepting that the plaintiff was caused to lose his balance and to fall over as a result of stepping onto the side of the drain and losing his balance. That happened due to the presence of the open drain. It was, therefore, in my view a hazard for a person such as the plaintiff.

44. In light of that conclusion, it seems to me that consistent with the approach taken by the Supreme Court in *Boyle*, the onus of proof passes to the defendant to show that what it did was reasonably practicable. In the context of s. 12 of the 2005 Act, the onus passes to the defendant to show that it took such steps as were necessary to ensure, so far as was reasonably practicable, that a person such as the plaintiff was not exposed to a risk to his safety, health or welfare. I am not satisfied that the defendant has discharged that onus. The plaintiff's engineer identified one measure which could have been taken by the defendant which would have eliminated the risk of the accident occurring. That involved covering the drain. It was not disputed by the defendant that the drain could have been covered by a grate, such as a metal grate. Nor was it disputed that the drain to the front of the fire station is covered by such a grate as is a drain outside the substation at Ballyvolane. It was accepted that there was no engineering or design reason why the drain crossing the rear yard of the fire station could not have been covered by such a grate. While Mr. Fullam advanced two reasons on behalf of the defendant as to why the defendant may not have felt it appropriate to cover the drain, namely, that the grate may have been broken or damaged as a result of traffic passing over it and that it would have been required to be maintained, in the sense of requiring it to be cleaned out twice a year, there was no evidence from the defendant that it even considered either of these issues. In any event, I am not satisfied that either reason is sustainable. The defendant accepts that in engineering terms the drain could have been covered. A metal grate would probably not have been susceptible to the sort of damage referred to by Mr. Fullam. Further, having to clean out the drain twice a year is not excessively burdensome and does not provide a legitimate reason for not covering the drain. I am satisfied that if the drain had been covered, the accident would not have occurred and the plaintiff would not have sustained the injuries which he did sustain.

45. Mr. Whyte on behalf of the plaintiff put forward a further measure which, while not eliminating the problem altogether, would have minimised or reduced the risk of such an accident occurring, namely, by highlighting the drain through white or yellow paint. Mr. Fullam advanced two reasons as to why he did not agree that that would be an appropriate measure to take (apart altogether from the fact that he did not accept that the drain was a hazard). The first was that it might serve to confuse persons who are occasional visitors to the yard in light of other markings on the surface of the yard. I do not accept that that is the case. Had the drain been marked with say yellow paint to highlight its edges, it would have served to differentiate the drain from the surrounding areas of the yard. I do not understand how persons could be confused by the presence of such markings.

46. The second reason advanced by Mr. Fullam is that he has never seen drains marked in such a fashion. Again, that is not a good

reason for not marking the drain in this case where it is located in an area where people, whether they be firemen or others attending at the premises on an occasional basis, such as the plaintiff, would be passing back and forth across the drain, sometimes in circumstances of some urgency. In my view, if the drain were highlighted it would have drawn the plaintiff's attention to it and would have minimised the risk of a situation where the plaintiff could say that the presence of the drain did not "*register*" with him.

47. However, the principal basis on which I conclude that the defendant has not discharged the onus of proving that it took such steps as were reasonably practicable to ensure that persons such as the plaintiff were not exposed to risks to their safety while present at the yard carrying out their work is the failure by the defendant to provide a cover or grate for the drain or otherwise to ensure that the drain was covered. The defendant's failure to take such a step, in my view, amounted to a breach of s. 12 of the 2005 Act. That breach caused the plaintiff's accident.

48. I am also satisfied that the defendant was in breach of the provisions of ss. 19 and 20 of the 2005 Act. The only documentation before the court in respect of the existence or otherwise of a "*risk assessment*" and "*safety statement*" were the three pages from the defendant's discovery referred to earlier. Those documents did not identify the open drain in the rear yard of the station as a hazard and did not assess the risks associated with that hazard. In those circumstances, there is no evidence before the court that the defendant complied with its duties under ss. 19 and 20 of the 2005 Act. Once the plaintiff raised a *prima facie* case of a failure by the defendant to comply with its duties under those provisions, the burden shifted to the defendant to demonstrate that it had in fact done so. The only evidence from the defendant was that of Mr. Fullam. His evidence did not establish that a risk assessment had been carried out or that a safety statement was in existence in respect of the particular risk posed by the open drain in the rear yard of the fire station. I conclude therefore that the defendant is in breach of its duties under ss. 19 and 20 of the 2005 Act. However, the cause of the accident (subject to my findings on contributory negligence) was the defendant's breach of s. 12 of the 2005 Act.

Contributory Negligence
49. I now turn to the question of contributory negligence. It is undoubtedly the case that it is more difficult for a defendant to establish contributory negligence on the part of a plaintiff where the defendant has been found to be in breach of a statutory duty. This is clear from many cases including *Stewart v. Killeen Paper Mills Ltd*. [1959] I.R. 436 (Supreme Court) and *Dunne v. Honeywell Control Systems* [1991] ILRM 595 (High Court, Barron J). It requires something more than a mere error of judgment or inadvertence on the part of the plaintiff to amount to contributory negligence in circumstances where the defendant is found to be in breach of a statutory duty.

50. It was fairly accepted on behalf of the plaintiff in submissions at the closing of the case that it might be open to the court on the facts of this case to find that the plaintiff was guilty of some contributory negligence, albeit at a "*very low level*". It was submitted that it might be open to the court to make a finding of contributory negligence against the plaintiff of 20% but no more than that. The defendant submitted that on the facts, if the court were to find the defendant guilty of a breach of statutory duty, contrary to its contention, it would be open to the court to make a finding of contributory negligence of up to 50%.

51. I conclude that on the basis of the plaintiff's fair and appropriate concession that fair and appropriate concession that he ought to have had "*more of an eye out*" when exiting backwards from his vehicle and that, in hindsight, the drain ought to have registered with him and having regard to the nature of the breach of s. 12 of the 2005 Act being the presence of the open drain, the plaintiff's failure to advert to the drain was more than a mere minor error of judgment or inadvertence. It does, in my view, justify a finding of contributory negligence against the plaintiff. I assess the extent of the plaintiff's responsibility and, therefore, his contributory negligence at 25%.

Quantum
52. I now turn to the plaintiff's injuries. A medical report prepared on behalf of the plaintiff by Mr. Mark Dolan, Consultant Orthopaedic Surgeon, dated 22nd May, 2017, was admitted by the defendant. It was, therefore, not necessary for Mr. Dolan to give evidence. The plaintiff sustained a displaced multi-fragmentary fracture of the left distal radius and ulnar styloid. It was a bad fracture involving a number of bones. The plaintiff was admitted to Cork University Hospital on the day of the accident and was an in-patient in the hospital for two nights. The fracture was manipulated under sedation and a temporary back slab applied on admission to hospital. The fracture was then treated by a closed reduction and stabilisation with a K-wire fixation under anaesthesia. The wrist was immobilised in a cast. The plaintiff explained in evidence that he experienced a lot of pain for which he was given pain relief and required assistance from his wife and family with dressing and showering. The plaintiff was unable to drive. He attended at the fracture clinic on a weekly basis for a change of cast and to enable the wires to be inspected. He underwent physiotherapy to help maintain his flexibility and strength while the cast was still on. Approximately, six weeks after the injury, the cast and wires were removed in the fracture clinic. The plaintiff was given a home exercise programme for his left wrist and then returned to work. The plaintiff explained that he returned to work approximately six to eight weeks after the accident. In fact, he stated that his cast was taken off on a Friday and he was back working offshore on the following Monday.

53. The plaintiff was seen again by Mr. Dolan on 22nd May, 2017, (almost four years after the accident). He reported to Mr. Dolan that he felt that his left arm was weaker than the right one. He complained of a dead hand at night time or when he was working on a computer. He also explained that he did not rely on his left wrist for manual tasks as he had done before. Indeed, in evidence, the plaintiff stated that most of the work which he is required to do offshore involves both hands, including working on valve handles and that he needed to use a mechanical aid (such as a steel bar) or to obtain assistance in carrying out his work. He informed Mr. Dolan that while he was carrying out normal duties on the oil rig, he had to modify his activities to minimise the strain in his left hand. He also reported that he had stopped playing squash and operating power kites because of concerns about injuring his left wrist again. Although the plaintiff is right handed, he would have had to use his left hand playing squash for balance and for protection against the walls of the squash court. The plaintiff is able to play golf and does so once or twice a year.

54. On examination of the plaintiff on 22nd May, 2017, Mr. Dolan noted that there were healed incisions from the pin site insertion in the left wrist. There was prominence of the ulnar styloid which is most evident in the Palmar View. This was shown to me by the plaintiff during his evidence and was quite obvious. Dorsiflexion on the left was ten degrees less than on the right. Palmar flexion was ten degrees less on the left than on the right. Supination was ten degrees less on the left than the right. There was no soft tissue swelling. There was no tenderness. There was no motor or sensory deficit. Grip strength was within normal limits and pin strength was normal.

55. Mr. Dolan concluded that the plaintiff had sustained a displaced multi-fragmentary intra articular fracture of the left distal radius with an associated fracture of the ulnar styloid. He felt that the fracture was consistent with the fall as described to him by the plaintiff. The injury required closed reduction, K-wire stabilisation and immobilisation in a cast. Four years after the accident, the plaintiff was continuing to complain of symptoms relating to stiffness and weakness in the left wrist compared to the contra-lateral side. Mr. Dolan expressed the view that the plaintiff and his symptoms had plateaued. He did not think that there would be any further improvement in flexibility or strength in the long term. He felt that the plaintiff would continue to modify his activities. He felt

that the risk of post-traumatic arthritis in the left wrist was low. While Mr. Dolan recommended that the plaintiff's left wrist be x-rayed again and noted that he would furnish an addendum to the report following those x-rays, it does not appear that this was done and no further report from Mr. Dolan was put before me.

56. I must assess general damages in respect of the plaintiff's pain and suffering to date and into the future as the plaintiff's symptoms are ongoing and, according to the uncontested evidence of Mr. Dolan, there will be no further improvement in the flexibility or strength of the plaintiff's left wrist and he is likely to continue to have symptoms related to stiffness and weakness in that wrist compared to his right wrist. I also take into account the fact that the risk of post-traumatic arthritis in the left wrist is low.

57. In assessing general damages to date and into the future, I have had regard to the following matters. First, I bear in mind that the primary objective of an award of damages which is, as best the court can do, to put the plaintiff back into the position he was in before he sustained the injuries in the accident. Recognising the imprecise and imperfect nature of that exercise, it has been said that the true purpose of an award of damages is "*to provide reasonable compensation for the pain and suffering that the person has endured and will likely endure in the future"* (per Irvine J. in the Court of Appeal in *Nolan v. Wirenski* [2016] IECA 56, [2016] 1 I.R. 461 ("*Nolan*") at para. 28). Second, recognizing the vast range of injuries which a person may suffer as a result of an accident, I apply the approach outlined by Irvine J. in *Nolan* where she stated (at para. 33):-

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

58. In this context I note and apply the further observations of Irvine J. in *Nolan* where she noted that Denham J. in the Supreme Court advised in *M.N. v. S.M. (Damages)* [2005] IESC 17, [2005] 4 I.R. 461 that:-

> *"… damages can only be fair and just if they are proportionate not only to the injuries sustained by [the] plaintiff but also proportionate when assessed against the level of the damages commonly awarded to other plaintiffs who have sustained injuries which are of a significantly greater or lesser magnitude. As [Denham J.] stated at para. 44, p. 474, 'there should be a rational relationship between awards of damages in personal injuries cases'. Thus it is important that minor injuries attract appropriately modest damages, middling injuries moderate damages, and more severe injuries damages of a level which are clearly distinguishable in terms of quantum from those that fall into the other, lesser categories. … However, when it comes to assessing damages, what is important is how significant the injury concerned is when viewed within the whole spectrum of potential injuries to which I have earlier referred."* (per Irvine J. at para. 44)

59. Third, I have taken into account the guidance given by Irvine J. in the Court of Appeal in *Shannon v. O'Sullivan* [2016] IECA 93 where she stated (at para. 43):-

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

60. I have summarised earlier the plaintiff's evidence and the evidence of Mr. Dolan, the plaintiff's consultant orthopaedic surgeon in relation to the nature of the injuries sustained, the hospitalisation and surgical intervention required, the pain and discomfort suffered by the plaintiff, the physiotherapy undertaken by the plaintiff, the assistance required by the plaintiff while his wrist was fixed and in a cast, the limitations on the plaintiff's leisure and sporting pursuits, the period of time for which the plaintiff was out of work (approximately eight weeks), the extent to which the plaintiff's work on his own account was affected (as has been agreed in the form of agreed special damages), the extent of which the plaintiff's injuries still affect him at work, the permanent altered appearance of the plaintiff's left wrist and the ongoing symptoms of which the plaintiff complains as well as the medical evidence that there is unlikely to be further improvement in the flexibility or strength of the plaintiff's left wrist in the long term and that the plaintiff will continue to modify his activities. I have also taken into account that the risk of post-traumatic arthritis in the left wrist is low.

61. Fourth, I have, as required by s. 22 of the Civil Liability and Courts Act 2004 (as amended) had regard to the (revised) Book of Quantum (2016). In particular, I have noted that in s. 4D of the Book of Quantum, the Personal Injuries Assessment Board has identified categories of fracture of bones in the wrist ranging from "*Minor*" to "*Severe and Permanent Conditions*". In my view, the plaintiff's injury falls broadly under the heading *"Moderately Severe"* which is described as comprising "*multiple fractures that have*

resolved but with ongoing pain and stiffness which impacts on movement of the wrist". The range given in the Book of Quantum for general damages for pain and suffering in respect of this category is from €54,200.00 to €70,100.00. To my mind, the plaintiff's injuries fall within that category and the general damages which I believe the plaintiff is entitled to fall somewhere in the middle of that range having regard to the various conditions identified above.

Award

62. Taking into account all of these considerations, I award general damages for pain and suffering to date at €60,000.00 with general damages for pain and suffering into the future at €10,000.00, giving a total for general damages for pain and suffering of €70,000.00.

63. Special damages have been agreed at €13,310.00. These incorporate loss of earnings due to off-shore trips and loss of earnings from on-shore work which the plaintiff would otherwise have been entitled to earn. The total agreed net loss of earnings is €13,310.00. There are no further special damages.

64. The total sum by way of general and special damages, therefore, is €83,310.00. I must deduct 25% from that total to reflect my finding of contributory negligence on the part of the plaintiff. Having done so, the total sum I award the plaintiff by way of damages is €62,482.50.

65. Accordingly, there will be a decree in favour of the plaintiff in the sum of €62,482.50.