

THE HIGH COURT

[2012 No. 6503 P.]

BETWEEN

JOSEPH COLEMAN HARVEY

PLAINTIFF

AND

DEPUY INTERNATIONAL LIMITED,

DEPUY FRANCE AND HEALTH SERVICE EXECUTIVE

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 5th day of July, 2016

Introduction

1. This judgment concerns two motions for particulars. The first, brought by the defendants seeking further and better particulars of the exact defects alleged by the plaintiff to have existed in the defendants' product. The second is a motion brought by the plaintiff seeking further and better particulars of the state of scientific and technical knowledge, which the defendants alleged existed at the time that their products were put into circulation. This is relevant to their defence under s. 6(e) of the Liability for Defective Products Act 1991.

Background

2. Before coming to the notices for particulars raised by each of the parties, it is necessary to very briefly set out the history of the proceedings to date.

3. The plaintiff commenced his action by personal injuries summons issued on 3rd July, 2012. The first two named defendants are limited liability companies. It is alleged that they were the manufacturers and distributors of an artificial hip device known as the DePuy ASR Total Acetabular Implant. The third named defendant is a statutory body and it is alleged that it was at all material times the owner, occupier and manager of a hospital known as St. Mary's Orthopaedic Hospital, Cork.

4. In essence, the plaintiff's case is that on 19th July, 2005, he underwent a left hip replacement operation. It is alleged that a product manufactured by the first or second named defendant was inserted as an artificial left hip. The plaintiff alleges that due to the defective nature of that artificial hip, he was obliged to undergo revision surgery on 13th March, 2007, when another artificial hip manufactured by the first and second named defendants was inserted in place of the first hip. The plaintiff further alleges that due to the defective nature of that artificial hip, he had to have further revision surgery on 7th September, 2011. In the personal injuries summons, the plaintiff made it clear that the summons was issued without the plaintiff having the benefit of expert medical and other reports. It was stated that the summons was issued purely having regard to the provisions of the Statutes of Limitations 1957-1991 and to prevent the action becoming a statute barred.

5. An appearance was entered on behalf of the first and second named defendants on 16th November, 2012. A defence was filed on their behalf on 25th February, 2013.

6. An appearance was entered on behalf of the third named defendant on 11th March, 2013. By notice dated 19th June, 2013, the solicitor acting for the first and second named defendants was appointed to represent the third named defendant.

7. An initial notice of trial was served on 22nd July, 2013. It does not appear that this was acted upon, probably due to the fact that a defence was only filed on behalf of the third named defendant on 8th August, 2013. A further notice of trial issued on 22nd October, 2013.

8. On 7th February, 2014, the plaintiff served particulars of the defects which he alleged were in the defendants' artificial hips, and in particular in the hips furnished to him in 2005 and 2007. The notice also contained particulars of negligence and breach of duty alleged against the defendants. This notice for particulars is of relevance to the motion brought by the defendant and will be dealt with in greater detail below.

9. On 7th January, 2016, the defendants were given liberty to amend their defence to include the following pleas:

"3(e) Without prejudice to the generality of the foregoing denial, it is denied that the first and second defendants breached the provisions of s. 2 of the Liability for Defective Products Act 1991 by manufacturing, producing, marketing, distributing and/or supplying a "defective product" within the meaning of s. 5 of the Liability for Defective Products Act 1991 or at all.

(f) Further and without prejudice to the denial that the product was defective within the meaning of the Liability for Defective Products Act 1991, the first and second defendants will rely on s. 6(e) of the Liability for Defective Products Act 1991."

10. The amended defence was issued on 12th January, 2016. On 19th January, 2016 an affidavit of verification was sworn in respect of the amended defence by Mr. Christopher Lawrence, who is the senior ASR Programme Manager employed by the first and second

named defendants.

11. On 15th January, 2016, the plaintiff served a notice for particulars arising out of the pleas contained in the amended defence. This notice is relevant to the motion brought by the plaintiff and will be dealt with later in this judgment.

12. On 1st February, 2016, McDermott J. made an order giving the defendants liberty to make a late lodgement.

13. On 17th February, 2016 the first and second named defendants raised a notice for particulars arising out of the particulars of defect which had been furnished by the plaintiff in his letter dated 7th February, 2014. This notice for particulars is at the heart of the defendants' motion and will be dealt with later in the judgment.

14. On 24th March, 2016 the plaintiff furnished replies to the defendants' notice for particulars dated 17th February, 2016. On 15th April, 2016, the defendants raised a notice seeking further and better particulars arising out of the replies which have been furnished by the plaintiff on 24th March, 2016.

15. By letter dated 9th June, 2016, the plaintiff furnished replies to the defendants' notice for particulars dated 15th April, 2016, and also furnished further particulars of negligence and particulars of defects alleged to be in the products.

16. On 10th June, 2016, the plaintiff served further particulars of personal injury on the defendants.

The Defendants' Motion for Further and Better Particulars

17. The defendants' motion concerns the question as to whether or not the plaintiff has furnished adequate replies to the matters raised in the defendants' notice for particulars dated 17th February, 2016. However, that notice had arisen out of the particulars of defect furnished by the plaintiff on 7th February, 2014. Those particulars of defect were in the following terms:

"We furnish additional particulars against the first and second defendants, DePuy International Ltd. and DePuy France, as follows:

- 1. ASR Hip Replacement Devices used in July 2005 and March 2007 were products (within the meaning of the Liability for Defective Products Act 1991) and were defective – generally and/or in design and/or manufacture (generally at common law and/or within the meaning of the Liability for Defective Products Act 1991) and/or hazardous, not fit for the purpose for which they were required and not of merchantable quality in that the first and second named defendants caused, allowed or permitted;*
 - (a) The ASR cup walls to be thickened. To do so they lateralised the bearing surface, thus reducing the effective arc of cover of the ASR cup;*
 - (b) The articulating surface of the ASR to be reduced by the design of the introducer which cuts out some of the bearing surface and leaves a sharp edge;*
 - (c) The ASR to have an excessively low clearance: low clearances are a risk factor;*
 - (d) The Acetabular component to be too shallow;*
 - (e) The arc of cover of the ASR to be too low;*
 - (f) The ASR to be prone to loosening and/or migration;*
 - (g) The rim on the inside of the Acetabular component to be so designed and/or manufactured as to lead to increased wear;*
 - (h) Excessive edge loading;*
 - (i) Excessive metal debris to come off the bearing, taper trunnion and/or head."*

18. Arising out of the particulars of defect which had been pleaded in February 2014, the defendant raised the following notice for particulars dated 17th February, 2016:

"1. Arising out of para. 1(a) please provide the following particulars:

- (a) Please state precisely at what level it is alleged that a reduced arc of cover of the ASR cup implanted in the plaintiff renders the produce defective;*
- (b) Please provide the details of the amount or measurement of the reduction in arc of cover that the plaintiff alleges has been caused by the thickening of the cup walls and constitutes a defect;*
- (c) Please state whether this is alleged to be a design or manufacturing defect and please particularise the factual basis for the answer and in that regard please provide full and detailed particulars of how it is alleged that the defect became manifest as a result of either the design or manufacture of the ASR product or its component parts, the subject matter of these proceedings;*
- (d) Please provide full and detailed particulars of what injury, loss or damage it is alleged was caused by the alleged defect and how such injury, loss or damage was so caused.*

2. Arising out of para. 1(b) please provide the following particulars:

(a) Please state whether this is alleged to be a design or manufacturing defect and please particularise the factual basis for the answer and in that regard please provide full and detailed particulars of how it is alleged that the defect became manifest as a result of either the design or manufacture of ASR product or its component parts, the subject matter of these proceedings;

(b) Please provide full and detailed particulars of what injury, loss or damage it is alleged was caused by the alleged defect and how such injury, loss or damage was so caused.

3. Arising out of para. 1(c) please provide the following particulars:

(a) Please provide precise particulars of what the plaintiff asserts to be the clearance for his ASR cup;

(b) Arising out of the foregoing, please provide the factual basis upon which it is alleged the precise clearance level in the plaintiff's ASR cup constitutes a defect in particular stating the level of clearance beneath which the plaintiff alleges creates a defect;

(c) Please provide full and detailed particulars of the risks alleged to exist as a result of low clearances;

(d) Please state whether this is alleged to be a design or manufacturing defect and please particularise the factual basis for the answer and in that regard please provide full and detailed particulars of how it is alleged that the defect became manifest as a result of either the design or manufacture of the ASR product or its component parts, the subject matter of these proceedings;

(e) Please provide full and detailed particulars of what injury, loss or damage it is alleged was caused by the alleged defect and how such injury, loss or damage was so caused.

4. Arising out of para. 1(d) please provide the following particulars:

(a) Please provide full and detailed particulars of the alleged "excessive shallowness" of the Acetabular component the subject matter of these proceedings and if same refers to the sub-hemispheric nature thereof please give full and detailed particulars of the alleged defect that is allegedly created thereby;

(b) Please state whether this is alleged to be a design or manufacturing defect and please particularise the factual basis for the answer and in that regard please provide full and detailed particulars of how it is alleged that the defect became manifest as a result of either the design or manufacture of the ASR product or its component parts, the subject matter of these proceedings;

(c) Please provide full and detailed particulars of what injury, loss or damage it is alleged was caused by the alleged defect and how such injury, loss or damage was so caused.

5. Arising out of para. 1(e) please provide the following particulars:

(a) Please state precisely what the arc of cover for the plaintiff's product was;

(b) Please give full and detailed particulars of the point at which the arc of cover allegedly constitutes a defect and please particularise the basis for such allegations;

(c) Please state whether this is alleged to be a design or manufacturing defect and please particularise the factual basis for the answer and in that regard please provide full and detailed particulars of how it is alleged that the defect became manifest as a result of either the design or manufacture of the ASR product or its component parts, the subject matter of these proceedings;

(d) Please provide full and detailed particulars of what injury, loss or damage it is alleged was caused by the alleged defect and how such injury, loss or damage was so caused.

6. Arising out of para. 1(f) please provide the following particulars:

(a) Please confirm that in this case the plaintiff is pleading that the ASR product the subject matter of these proceedings experienced alleged loosening or migration. If the answer is in the affirmative, please provide full and detailed particulars of the nature and cause of the loosening and/or migration of the ASR product the subject matter of these proceedings;

(b) Please state whether it is alleged to be a design or manufacturing defect and please particularise the factual basis for the answer and in that regard please provide full and detailed particulars of how it is alleged that the defect became manifest as a result of either the design or manufacture of the ASR product or its component parts, the subject matter of these proceedings;

(c) Please provide full and detailed particulars of what injury, loss or damage it is alleged was caused by the alleged defect and how such injury, loss or damage was so caused.

7. Arising out of para. 1(g) please provide the following particulars:

(a) Please state the precise factual basis upon which it is alleged that the rim on the inside of the Acetabular component lead to increased wear;

(b) Please provide full details of the alleged increase in wear that occurred;

(c) Please state whether this is alleged to be a design or manufacturing defect and please particularise the factual basis for the answer and in that regard please provide full and detailed particulars of how it is alleged that the defect became manifest as a result of either the design or manufacture of the ASR product or its component parts, the subject matter of these proceedings;

(d) Please provide full and detailed particulars of what injury, loss or damage it is alleged was caused by the alleged defect and how such injury, loss or damage was so caused.

8. Arising out of para. 1(h) please provide the following particulars:

(a) Please state precisely what the plaintiff states amounts to excessive edge loading on the product the subject matter of these proceedings;

(b) In that regard please provide full and detailed particulars of the alleged edge loading that occurred in relation to the ASR device the subject matter of these proceedings;

(c) Please state the factual basis upon which the plaintiff asserts that the first and second defendants caused, allowed or permitted the alleged excessive edge loading;

(d) Without prejudice to the foregoing, please state whether this is alleged to be a design or manufacturing defect and please particularise the factual basis for the answer and in that regard please provide full and detailed particulars of how it is alleged that the defect became manifest as a result of either the design or manufacture of the ASR product, or its component parts, the subject matter of these proceedings;

(e) Please provide full and detailed particulars of what injury, loss or damage it is alleged was caused by the alleged defect and how such injury, loss or damage was so caused.

9. Arising out of para. 1(i) please provide the following particulars:

(a) Please state whether it is alleged that excessive metal debris came off either the bearing, taper trunnion or head, and if so please give full and detailed particulars of the level of debris at which it is alleged that same constitutes a defect;

(b) In that regard please provide full and detailed particulars of the alleged metal debris that occurred in relation to either the bearing, the taper trunnion and/or the head of the device the subject matter of these proceedings;

(c) Please state whether it is alleged that the excessive metal debris in respect of either the bearing, the taper trunnion and/or the head of the device is alleged to be a design or manufacturing defect and please particularise the factual basis for the answer and in that regard please provide full and detailed particulars of how it is alleged that the defect became manifest as a result of either the design or manufacture of the ASR product or its component parts the subject matter of these proceedings;

(d) Please provide full and detailed particulars of what injury, loss or damage it is alleged was caused by the alleged defect and how such injury, loss or damage was so caused."

19. On 24th March, 2016, the plaintiff replied to the defendants' notice for particulars in the following terms:

"We hereby reply to the DePuy notice for particulars dated 17th February, 2016 as follows:

1. This is a matter for evidence.

2. The ASR design included a groove in the edge of the cup to facilitate the introducer. That groove reduced the articulating surface of the cup and in effect, the arc of cover and introduced a sharp edge into the articulation, see below drawing which illustrates the defect. Otherwise the question raises matters of evidence.

3. Clearance is the distance between the cup and the head. It is the difference between inner diameter of the cup and the outer diameter of the head. The defendant designed the ASR cup and head to have a much reduced clearance as compared to other prostheses with a view to improving fluid lubrication. In so doing it rendered the hip vulnerable to excessive wear – inter alia as a result of contact between the cup and the head due to cup deformation and/or failure to manufacture cup and/or head sufficiently accurately as to their respective diameters and/or shapes. Low clearance also combined with low arc of cover to cause the wear area/contact patch to cross the cup edge – thereby causing edge loading and excessive wear – see illustration below.

Reduced clearance may also cause: cup loosening, clicking and edge loading, increasing tork and friction from the bearing surface, increasing tork on the implant transmitted down to the taper trunnion junction, toggling of the head on the stem and so taper trunnion wear and/or failure releasing cobalt and chromium.

Otherwise this question raises matters of evidence.

4. The cup was too shallow by reason of the combination of its non-hemispherical shape, low arc of cover and the lateralisation thickening of the pole of the cup – exacerbated by the introducer groove. Otherwise this question raises matters of evidence (the plaintiff furnished a number of diagrams with this reply)."

In respect of items 5 to 9 in the defendants' notice for particulars, the plaintiff replied in each case that the question raised matters of evidence.

20. The defendants were not satisfied with the replies which had been furnished by the plaintiff on 24th March, 2016. On 15th April, 2016, they raised a notice for further and better particulars arising out of the replies which had been furnished by the plaintiff. However, this notice, in effect, merely restated the matters which had been raised in the defendants' original notice for particulars dated 17th February, 2014.

21. By letter dated 9th June, 2016, the plaintiff purported to reply to the defendants' notice for further and better particulars dated 15th April, 2016. In his reply, the plaintiff asserted that as Mr. Lawrence had sworn an affidavit of verification in respect of the amended defence, which contained a plea pursuant to s. 6(e) of the Liability for Defective Product Acts 1991, the defendants must have identified what they considered to be the state of scientific and technical knowledge at the time that the products were put into circulation relevant to the alleged defects. The plaintiff asserted that in order to identify the relevant state of scientific and technical knowledge, he required adequate identification of the defects to which that knowledge related.

22. The plaintiff went on to state that whether a defect was of design or manufacture was a false dichotomy. The plaintiff stated that a particular defect may derive from both or either of these aspects. However, it was asserted that more importantly, the dichotomy was false as the Liability for Defective Product Acts 1991 defined defect not in design or manufacturing terms, but in functional terms: section 5 stated that *"a product is defective if it fails to provide the safety which a person is entitled to expect"*. The plaintiff stated that while it may be convenient to analyse defects in terms of design or manufacture, such analysis was not a requirement of law or pleading. However, the plaintiff went on to state that expressly without prejudice to his foregoing remarks, it was indicated that the defects asserted were generally of design, save that in some cases explant analysis has revealed heads and/or cups manufactured out of the DePuy's stated manufacturing tolerances, thus excessively diminishing clearance between head and cup.

23. In response to the particulars sought at para. 6, the plaintiff stated as follows:

"As already pleaded it is asserted that the plaintiff's DePuy Acetabular cups came loose. Otherwise this question raises matters of evidence. Without prejudice to the foregoing and by way only of voluntary exposition of the evidence on this issue, the plaintiff was expressly told by his surgeons prior to his first revision operation and as explanatory of the need for revision, that his Acetabular cup was loose. X-ray in 2006 revealed it to be loose. It was found loose at the first revision operation. At the second revision the second DePuy cup was loose for want of bone in-growth. The cause of the loosening was the defects pleaded."

24. In response to the matters sought at para. 9, the plaintiff stated that, as previously pleaded, he had serum metal ions caused by excessive prosthesis wear. The precise source of such debris as between different parts of the prosthesis was not a matter for particulars – the first and second defendants were liable for the entire prosthesis as a unit. However, they referred to further assertions contained in the notice in relation to taper trunnion wear.

25. The plaintiff went on in the course of that letter to plead further particulars of negligence and/or particulars of defect in the product.

The Defendants' Submissions

26. The defendants were not satisfied with the replies which had been furnished by the plaintiff to its notice for particulars dated 17th February, 2016. By notice of motion dated 27th May, 2016, they sought an order directing the plaintiff to furnish replies to their notice for particulars dated 15th April, 2016, which arose out of the replies to the notice for particulars dated 17th February, 2016. As the latter notice for particulars was really only a restatement of the original notice for particulars, I have dealt with the matter on basis that the defendant was seeking an order directing the plaintiff to furnish replies to the notice for particulars dated 17th February, 2016.

27. The defendants submitted that they could not provide full particulars of the state of scientific and technical knowledge, until they were provided with precise details of the alleged defects in their product. For example, they submitted that it was not sufficient for the plaintiff merely to state that there was an insufficient arc of cover between the cup and head. The plaintiff should furnish particulars as to the arc of cover that he alleged existed between the cup and the head in the plaintiff's artificial hip and he should further state what he alleged was the lowest arc of cover which should have existed in the artificial hip. The defendants stated that it was only when detailed particulars of this nature were furnished, that they would be able to plead the textbooks, learned articles and other sources in relation to the state of scientific and technical knowledge at the time that the product was put into circulation, which are relevant to the defect pleaded.

28. The defendants submitted that the plaintiff had not pleaded specific defects, but had put up a number of possible defects, which were phrased in somewhat general terms with words such as *"generally"* and *"may have caused"*. The defendants submitted that this was not sufficient, and that the plaintiff must plead the defects with precision, so that the defendant can address them properly when giving particulars of the state of scientific and technical knowledge in relation to the alleged defects at the time when the product was put into circulation.

29. Furthermore, the defendants submitted that they were entitled to be told if it was alleged that the defects were design defects or manufacturing defects.

30. In the course of submissions, the defendants referred to a number of cases, wherein it was ruled that a defendant is entitled to sufficient particulars, so that he will know the precise case that he has to meet at trial. The defendants referred to a number of cases beginning with the decision in *Caulfield v. George Bell & Co. Limited* [1958] I.R. 326 where the court had ruled that it was not sufficient simply to allege that there was an unsafe system of work, the plaintiff would have to give particulars of the way in which he alleged that the system of work was unsafe. The plaintiff submitted that the decision was authority for the proposition that the giving of particulars must be meaningful in the context of the case itself. The defendants referred to the following statement in the judgment of Murnaghan J. at p. 332:-

*"The object of particulars, in the often quoted words of Cotton L.J. in *Spedding v. Fitzpatrick* (2), is '...to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise'."*

31. The defendant also referred to the judgment of O'Dalaigh C.J. in *Jevens v. Marine Transport Services Limited* (Unreported,

Supreme Court, 5th December, 1972), where the Chief Justice said the following in relation to the function of particulars:-

"The function of particulars is to ensure that a trial is conducted fairly, openly and without surprises. This function has been stated in various ways over the years and, among others, by saying that the purpose of particulars is to enable the other side to know what evidence they ought to be prepared with and to prepare for trial: per Cotton L.J. in Spedding v. Fitzpatrick 38 Ch.D 413 and per Jessel M.R. in Thorp v. Holdsworth 3 Ch.D 367, 369."

32. The defendants stated that for the plaintiff simply to say that the "arc of coverage was not sufficient" does not enable the defendants to know what case they have to meet at trial. It was submitted that in relation to the issue of the "arc of coverage" the plaintiff should put figures on this, so that the defendant can deal with it adequately at the trial.

33. The defendants submitted that the function of particulars was to let the defendant know the precise case that it has to meet at trial. In support of this proposition, the defendants relied on the judgment of Baron J. in *Shepperton Investment Company Limited v. Concast (1975) Limited* (Unreported, High Court, 21st December, 1992) and, in particular, to the following dictum at p. 6 of the judgment:-

"The purpose of particulars is to delimit the issues of fact. While particulars should let the other side know the precise case it has to meet, the seeking of particulars does not necessarily mean that the parties seeking them does not know such case. It may wish and probably does so to tie its opponent to a particular case so that it will not be taken by surprise at the trial. It is fact and not evidence which must be set out in reply to Letters for Particulars."

34. The defendants also relied on the dictum of Clarke J. in *Moorview Developments Limited v. First Active plc* [2005] IEHC 329, where he stated as follows at para. 7.2:-

"Both counsel accept that the test by reference to which particulars should be delivered is as was stated by Fitzgerald J. in Mahon v. Celbridge Spinning Company Limited [1967] I.R. 1 where at p. 3 he said:-

'The whole purpose of pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence at the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without any party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline, the case he will have to meet at trial.'

It should be noted that the facts that a party is required to be told, as part of the pleading process, are not the facts as they may objectively be, but the facts as his opponent alleges them to be. Therefore an assertion that the other party well knows the relevant fact will rarely be a sufficient answer to what would otherwise be a proper request for particulars. A requesting party may well have its own view about what the truth in respect of a relevant factual issue is but that does not absolve his opponent, where it is part of his case, from setting out in reasonable detail the relevant facts which he alleges."

35. The defendant referred to the recent decision in *Murphy v. DePuy Orthopaedics Inc* [2016] IECA 15, where the court had directed that where a defendant had raised a plea in its defence pursuant to s. 6(e) of the Liability for Defective Products Act 1991, the plaintiff was entitled to full and detailed particulars of the exact nature of the state of scientific and technical knowledge at the time that the product was put into circulation and upon which the defendant would rely at the trial of the action. However, the defendant submitted that they could only furnish this degree of particularity in relation to the state of scientific and technical knowledge, until they were given sufficient details of the defects which were alleged by the plaintiff to exist in the product. The defendants referred to the following extract from para. 21 of the judgment of Finlay Geoghegan J.:-

"It appears to me similarly, having regard to the defence now pleaded and the terms of s. 6(e) of the 1991 Act, that what the defendants are being asked to do in this case is to state the facts, i.e., the state of scientific and technical knowledge at the time of circulation relevant to any of the alleged defects pleaded by the plaintiff and upon which they intend to rely for the purpose of advancing any defence they might wish to pursue pursuant to s. 6(e)."

36. The defendant submitted that they could only provide these particulars when they were given adequate information as to what was alleged by the plaintiff to constitute the defects in the product.

37. The defendants' counsel stated that the defendants did not accept that the prosthesis which had been supplied by the defendants was defective. He stated that it was not defective merely because it required revision surgery. Just because a prosthetic hip may fail, does not mean that the product was defective. The defendant accepted that these hips had a larger revision rate than they would have liked, but that did not mean that they were defective. The hips may need revision due to a number of factors such as infection, aseptic loosening and/or local tissue reaction. Counsel submitted that all prosthetic hips would need revision at some time. For this reason, the defendants must know what it is that the plaintiff says was the defect in his hip. The mere fact that the hip required revision surgery did not mean that it was defective as the hip may need revision for a large number of reasons. It was submitted that s. 6(e) referred to "the defect" which implies that the defendant must be told what the alleged defect is. In these circumstances, it was submitted that the defendant was entitled to the particulars sought in its notice for particulars dated 17th February, 2016.

The Plaintiff's Submissions

38. The plaintiff submitted that all that was required of him by law was to supply sufficient particulars so that the defendant would know "in broad outline" the case that he had to meet at trial. The plaintiff submitted that this proposition was supported by a number of recent Irish decisions. In particular, the plaintiff referred to the decision of Hogan J. in *Armstrong v. Moffatt* [2013] IEHC 148, where the judge, having reviewed the obligation on parties to supply particulars pursuant to s. 11(1) of the Civil Liability and Courts Act 2004, stated as follows at para. 13 *et seq*:-

"13. The object of particulars nevertheless remains that as identified by Henchy J. in Cooney v. Browne [1984] I.R. 185, 191:-

'Where particulars are sought for the purposes of delivering a pleading, they should not be ordered unless they can be said to be necessary or desirable to enable the party seeking them to plead, or for some other special reason:

see O. 19, r. 6(3). Where the particulars are sought for the purpose of a hearing, they should not be ordered unless they are necessary or desirable for the purpose of a fair hearing.... Thus, where the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled to such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial.'

14. It follows, therefore, that particulars will be ordered in the interests of fair procedures and to ensure that a litigant will not be surprised by the nature of the case which he has to meet. The case-law shows that this is essentially the governing principle in all cases where the issue of whether the particulars should be ordered has been considered.

15. In *Mahon v. Celbridge Spinning Co. Ltd.* [1967] I.R. 1 Fitzgerald J. stated that the object of pleadings (of which particulars form part) was to ensure that a party 'should know in advance, in broad outline, the case he will have to meet at the trial'. This principle - namely, that particulars must convey the 'in broad outline' the nature of the case which the litigant must meet, as distinct from the nature of the evidence which the other party may lead in support of that case - has also been consistently endorsed in the subsequent case-law."

39. The plaintiff submitted that the particulars given in their replies dated 24th March, 2016, and 9th June, 2016, were sufficient particulars of the defects, to enable the defendants to know what was being alleged in relation to the defective nature of the products.

40. The plaintiff also referred to the decision in *Keogh v. Byrne Wallace Solicitors* [2015] IEHC 452, where O'Malley J. reviewed the relevant case law and the statements contained in the leading textbook, *Civil Procedure in the Superior Courts*, Delaney and McGrath (3rd Ed.) Roundhall where the learned authors stated as follows at para. 5-89:-

"The general principle is that particulars will be ordered if they are necessary to clarify the issues so that the party requesting them can know the case he has to meet or if there is a danger that he may be taken by surprise at the trial of the action. An order compelling a party to reply to a notice for particulars will be refused where the court is satisfied that the party seeking the particulars knows the broad outline of the case that it will have to meet. Neither will particulars be ordered of the evidence on which a party will rely on trial. The courts enjoy a broad discretion in deciding whether to order particulars, and as acknowledged by Murnaghan J in *Caulfield v George Bell & Co. Ltd* the exercise of that discretion will often depend 'on a view of fairness or convenience which is essentially a matter of degree'."

41. In the course of her judgment, O'Malley J. referred to the decision of Dunne J. in *Quinn Insurance Limited v. Tribune Newspaper plc* [2009] IEHC 229 and cited the following passage from the decision of Dunne J.:-

"Having referred at length to the authorities opened to me in the course of argument, it seems that certain principles can be derived from those authorities. It goes without saying that a party is entitled to know the case being made against them. If necessary, particulars may be ordered to clarify the issues or to prevent the party from being taken by surprise at the trial of the action. However, a party is only entitled to know the broad outline of the case that he/she will have to meet. A party is not entitled to know the evidence that will be given against them in advance of the hearing. Further, it is not usual to order the names and addresses of witness to be furnished in advance of the hearing of an action."

42. O'Malley J. also referred to the decision in *Burke v. Associated Newspapers (Ireland) Limited* [2010] IEHC 447, and in particular to para. 17 of that judgment:-

"In general, therefore, while a litigant is entitled to know from the pleadings the nature of the case he has to meet, he is not entitled to learn in advance the evidence which his opponent will lead in support of that contention. The distinction between what is a matter for pleadings on the one hand and what is a matter for evidence on the other is often a fine one and it is also one which is sometimes difficult to apply consistently in practice. Nevertheless, it seems clear that a plaintiff (or a defendant, as the case may be) is not entitled to further particulars once the essence of the case which he has to meet is clear from the proceedings."

43. The plaintiff submitted that if the true test was that the other party must know the essence of the case that he has to meet at trial, then that had been satisfied in this case, because extensive particulars of defect had already been given by the plaintiff in their various replies.

44. Finally, the plaintiff placed great reliance on the decision of the Court of Appeal in *Murphy v. DePuy Orthopaedics Inc* [2016] IECA 15, where the plaintiff submitted that the Court of Appeal had held that where a defence was amended to allow a plea under s. 6(e) of the 1991 Act and where an affidavit of verification had been sworn in respect of the content of the amended defence, a defendant must be aware of the material on which they intend to rely when framing the plea under s. 6(e) of the 1991 Act. In other words, when swearing the affidavit of verification, they must have been satisfied that there was scientific and technical knowledge at the time that the product was put into circulation, which supported their assertion.

45. It was submitted that the Court of Appeal had held that where an affidavit of verification had been sworn in respect of the amended defence, in order for such an affidavit to have been sworn in those terms, the defendant must have known what the state of scientific and technical knowledge was, on which they intended to rely. The plaintiff referred to the *dictum* of Finlay Geoghegan J. at para. 25 of her judgment:-

"That affidavit could or should not have been sworn in those terms without the defendants having identified what they consider to be the state of scientific and technical knowledge at the time of circulation relevant to the alleged defects. Unless such information was identified and considered, a view could not have been formed that there was at least an arguable defence pursuant to s. 6(e) of the 1991 Act in respect of each of the alleged defects."

46. The plaintiff submitted that this case was on all fours with the *Murphy* case and that in these circumstances, the court should refuse the defendants' motion seeking further and better particulars of the defects from the plaintiff and should direct that the defendants should provide full particulars of the alleged state of scientific and technical knowledge on which they intended to rely at the hearing of the action.

The Defendants' Submissions in Reply

47. The defendants stated that the plaintiff seemed to be making a case that by swearing an affidavit of verification in respect of the amended defence, the defendants were somehow estopped from asserting that they did not have sufficient particulars of the defects to enable them to provide full particulars of the state of scientific and technical knowledge at the relevant dates. The defendants submitted that it would be extraordinary if an issue, which was not before the court in the *Murphy* case, could give rise to an estoppel in this case. They stated that this issue was not raised in the *Murphy* case and, therefore, that decision could not give rise to any estoppel against the defendants in the present case.

Conclusions on the Defendants' Motion

48. I have already given my decision in relation to the defendants' motion. I set out hereunder my reasons for arriving at those conclusions. I felt that it was clearer to base my decision on the defendants' notice for particulars dated 17th February, 2016, as this was the primary notice for particulars in respect of which the defendants sought replies from the plaintiff.

49. The authorities are clear that the purpose of particulars is to enable the opposing party to know in broad outline the case that they will have to meet at trial. The defendant has argued that while in an ordinary RTA case, or in an action concerning an accident at work, the particulars required to be provided may not be very precise. However, the defendants argued that where one was dealing with a product liability case, the defendants are entitled to sufficient particulars of the defects, to enable them to know what exactly is being alleged by the plaintiff as constituting a defect in the product. The defendants go further and state that where a defence has been pleaded pursuant to s. 6(e) of the 1991 Act, the obligation on the defendant to provide detailed particulars of the state of scientific and technical knowledge in respect of a particular defect at a particular time, can only arise when the defendants have been given precise details as to the defect alleged by the plaintiff. For example, they state that it is not sufficient merely to plead that the product was defective because the arc of coverage was insufficient. In order for the defendants to be able to produce the relevant scientific and technical materials which were in existence at the relevant time, they need to know:-

(a) what the plaintiff alleges was the arc of coverage in relation to his hip; and

(b) what was the level of arc of coverage below which a product would be seen as defective.

50. The defendant states that until they know this precise information, they will not be in a position to furnish particulars of the learned academic articles and other materials which will touch upon this precise issue.

51. It seems to me that in a product liability case, the plaintiff must establish that there was a defect in the product and this must be done with sufficient particularity, so as to allow the defendants to know exactly what are the alleged defects in the product. For this reason, I have directed that the plaintiff must furnish further particulars in respect of a number of specific issues raised by the defendants in their notice for particulars. I will now deal with each of the matters raised in the notice for particulars dated 17th February, 2016, in turn.

52. In relation to para. 1(a), I have directed that the plaintiff must provide full replies to this item. It seems to me that if the plaintiff is alleging that the arc of cover was reduced such that the product was defective, the defendants are entitled to know at what level the plaintiff alleges the reduction in arc of cover becomes a defect. The plaintiff's experts must be in a position to say that below a certain measurement, the arc of cover is insufficient and the product is therefore defective. The defendants are entitled to be told what that level is alleged by the plaintiff to be, so that the defendant can produce the relevant academic and other literature to show that at the time when the product was put into circulation, the state of scientific and technical knowledge did not consider an arc of coverage of less than that amount, to be defective.

53. In relation to para. 1(b), the defendants are entitled to be given details of the amount or measurement of the reduction in the arc of coverage that the plaintiff alleges was caused by thickening of the cup walls, such as to constitute a defect in the product. The plaintiff's experts must know what reduction in the arc of cover was allegedly caused by the thickening of the cup walls. The defendants are entitled to be told what this is, so that it can produce the relevant scientific and technical literature on this alleged defect.

54. In relation to para. 1(c), the defendants ask the plaintiff to specify whether the alleged defect was a design or manufacturing defect. The plaintiff has stated that this is a false dichotomy, and that all they have to establish is that the product was defective. They state that it is not relevant whether this was a design or manufacturing defect. However, without prejudice to this assertion, the plaintiff has stated in his replies dated 9th June, 2016, that the defects asserted were generally of design, save that in some cases explant analysis has revealed heads and/or cups manufactured out of the DePuy stated manufacturing tolerances, thus excessively diminishing clearance between head and cup. I am of opinion that a plaintiff does not have to specify whether a defect is a design or manufacturing defect. It is only necessary for the plaintiff to give adequate particulars of the defect which is alleged to exist in the product. Accordingly, the plaintiff does not have to furnish replies to this item.

55. In respect of para. 1(d), here the defendant seeks particulars of what injury, loss or damage was allegedly caused by the alleged defect and how such injury, loss or damage was so caused. In circumstances, where it is asserted that there were a number of defects in a product, which had the consequence that the plaintiff suffered injury, loss and damage as a result of the failure of the product, it seems to me to be totally unrealistic to expect the plaintiff to say which parts of his injury, loss or damage, were caused by each alleged defect. The plaintiff's case is that it was a combination of all of these defects, which caused the product to fail. It would be unreasonable to expect the plaintiff to say which of his injuries were caused by each particular defect in the product. Accordingly, I do not direct the plaintiff to furnish replies to this item.

56. In relation to paras. 2(a) and (b), I have already given my reasons as to why the defendant does not have to indicate whether the defect alleged was a design or manufacturing defect, nor does he have to provide particulars of how it is alleged that the defect became manifest as a result of either the design or manufacture of the product, or its component parts. For the reasons outlined above, I have also declined to direct the plaintiff to furnish particulars of what injury, loss or damage was caused by each of the alleged defects in the product. Accordingly, the plaintiff does not have to furnish replies to these items.

57. In relation to para. 3(a), it seems to me that if the plaintiff asserts that the clearance for his ASR cup was inadequate or insufficient, it is reasonable for the defendants to be told what the plaintiff asserts was the actual clearance on his ASR cup. Accordingly, the plaintiff must reply to this item.

58. In relation to para. 3(b), the defendants are entitled to know the clearance level in the plaintiff's ASR cup that allegedly constituted a defect. The defendants are also entitled to know the level of clearance beneath which the plaintiff alleges it constitutes a defect. The plaintiff's experts must have given an opinion as to the level of clearance below which it constitutes a

defect. Until the defendant is told what is alleged by the plaintiff in this regard, they cannot adequately set out the state of scientific and technical knowledge in relation to clearance levels at the time that the products were put into circulation.

59. In relation to para. 3(c), here the plaintiff is asked to provide full and detailed particulars of the risks alleged to exist as a result of low clearances. The plaintiff has answered this query sufficiently in his replies dated 24th March, 2016. It is not necessary for the plaintiff to provide any further particulars in this regard. For the reasons already stated, I decline to direct the plaintiff to furnish further particulars to items 3(d) and 3(e).

60. In relation to para. 4(a), I am satisfied that the plaintiff has provided sufficient particulars of this aspect in its replies dated 24th March, 2016, in particular, having regard to the diagrams contained therein. In relation to sub-paragraphs (b) and (c), for the reasons already stated above, I do not direct that the plaintiff furnish further particulars of these items.

61. In relation to para. 5(a), the defendant is entitled to know what arc of cover the plaintiff alleges was on his product. It may be that the plaintiff will not be able to give a precise figure, but they should be in a position to state what was the approximately arc of cover.

62. In relation to para. 5(b), the defendants are entitled to be told the point at which the plaintiff alleges the arc of cover constitutes a defect. It is not until the defendant is told what the plaintiff is alleging in this regard, that it will be able to obtain and furnish the relevant scientific and technical literature which was in existence at the time the product was put into circulation.

63. For the reasons already stated in this judgment, the defendant is not entitled to the particulars sought at paras. 5(c) and 5(d).

64. In relation to para. 6(a), the plaintiff is not obliged to furnish replies in relation to this item as the matter was adequately answered in the replies furnished by the plaintiff on 6th June, 2016. For the reasons already stated, the plaintiff is not obliged to furnish the particulars sought at paras. 6(b) and 6(c).

65. In relation to para. 7(a), the defendant is entitled to particulars of the factual basis upon which it is alleged that the rim on the inside of the acetabular component led to increased wear. This is something which the plaintiff's experts must have addressed in their reports. While the defendant may have copies of the plaintiff's experts reports pursuant to S.I. 391/1998, it is clear from the decision in *Murphy v. DePuy Orthopaedics Inc* that expert reports delivered pursuant to the statutory instrument cannot fulfil an obligation to deliver particulars of fact in a pleading (cf para. 23). Accordingly, the defendants are entitled to full particulars under this heading.

66. In relation to para. 7(b), it seems to me that the defendants are entitled to be furnished with details of the alleged increase in wear that the plaintiff alleges was caused by the rim on the inside of the acetabular component. For the reasons already stated, the plaintiff is not obliged to furnish the particulars sought at para. 7(c) and 7(d).

67. In relation to para. 8(a), the defendant is entitled to particulars of what precisely the plaintiff states amounts to excessive edge loading on the product. They are also entitled to the particulars sought at sub-paragraph (b), wherein they sought details of the alleged edge loading that occurred in relation to the ASR device. The defendants are also entitled to the particulars sought at sub-paragraph (c), which sought particulars of the basis upon which the plaintiff asserted that the first and second defendants permitted the alleged excessive edge loading. The defendants are entitled to particulars of these matters, so as to enable them to furnish full particulars of the scientific and technical knowledge which the defendants allege existed in relation to these matters at the time that the product was put into circulation.

68. For the reasons already stated, the plaintiff is not obliged to furnish the particulars sought at para. 8(d) and 8(e).

69. In relation to para. 9(a), the plaintiff is not obliged to furnish the particulars sought under this heading as they have already furnished adequate particulars in their replies dated 9th June, 2016. In relation to sub-paragraph (b), the plaintiff is not obliged to furnish particulars of the alleged metal debris that occurred in relation to either the bearing, the taper trunnion and/or the head of the device. It seems to me that this is something which the plaintiff could not possibly know. All he would know is that there was debris which came away from the prosthesis. This would have been evident in his blood readings. However, he would not necessarily know the exact level of debris that had been shaved off the prosthesis. Accordingly, he is not obliged to furnish the particulars sought under this heading. For the reasons already stated, the plaintiff is not obliged to furnish the particulars sought at sub-paragraphs (c) and (d).

The Plaintiff's Motion Seeking Further and Better Particulars

70. Arising out of the delivery of the amended defence, the plaintiff raised a notice seeking further and better particulars by letter dated 3rd February, 2016. This notice contained four matters on which further and better particulars were sought. It is common case between the parties that items 1, 3 and 4 in that letter have been satisfactorily answered by the defendants.

71. The only matter which remains in issue between the parties is in relation to the response furnished to item 2 which was in the following terms:-

"2. Please state the state of scientific and technical knowledge relevant to the alleged defects at the dates the hip replacement products inserted into the plaintiff were put into circulation?"

72. The defendants responded to this notice for particulars by letter dated 15th April, 2016, wherein they gave the following reply to item 2:-

"2. The first and second named defendants deny any alleged defects in the products. This is explicitly pleaded in the Defence. However without prejudice to the foregoing, as of the date on which the plaintiff's products were put into circulation, and in this regard we refer to you reply 1 above, the state of scientific and technical knowledge was as follows:-

(a) metal-on-metal hip replacement devices were state of the art;

(b) the metals used in, and design of the ASR product were state of the art;

(c) the wear/volume loss over time suffered by the ASR product and its component parts would be, at least, as

little as that of its competitors, and less than most;

(d) the sub-hemispherical cup utilised in the ASR product would increase motion without any significant increase in wear;

(e) there was no scientific consensus that reducing the arc of cover involved in lateralisation would have any significant effect on the performance of the ASR product;

(f) there was no scientific consensus that low clearance was a risk factor for wear and the overwhelming body of evidence was that there was a connection between lower clearance and lower wear;

(g) there was no scientific consensus that sub-hemispheric cups such as the ASR product had an increased risk of edge loading; and

(h) the ASR product represented a state of the art alternative to other similar hip prosthetics available at that time."

73. The plaintiff was not satisfied with these replies and by notice of motion dated 27th April, 2016, the plaintiff brought an application seeking an order compelling the defendants to make full and proper replies to the plaintiff's notice for particulars dated 3rd February, 2016.

The Submissions of the Parties

74. The plaintiff relied on the decision in *Murphy v. DePuy Orthopaedics Inc.*, where it was held that in circumstances where the defendants had amended their defence to plead a defence pursuant to s. 6(e) of the 1991 Act, the plaintiff was entitled to have particulars of "the state of scientific and technical knowledge relevant to the alleged defects at the date the hip replacement product inserted into the plaintiff was put into circulation".

75. The plaintiff submitted that this case was on all fours with the *Murphy* case and that, accordingly, the plaintiff was entitled to full and detailed particulars of the state of scientific and technical knowledge, upon which the defendants intended to rely at the trial of the action.

76. The plaintiff referred to the decision of the Court of Justice of the European Communities in the case *European Commission v. United Kingdom* [1997] All E.R. (EC) 481, and in particular to the following paragraphs in the judgment, where the court set down the parameters of this defence in relation to the state of scientific and technical knowledge at the relevant time:-

"25. Certain general observations can be made as to the wording of Art 7(e) of the Directive.

26. First, as the Advocate General rightly observes in para. 20 of his opinion (above), since that provision refers to 'state of scientific and technical knowledge at the time when (the producer) put the product into circulation', Art 7(e) is not specifically directed at the practices and safety standards in use in the industrial sector in which the producer is operating, but, unreservedly, at the state of scientific and technical knowledge, including the most advanced level of such knowledge at the time when the product in question was put into circulation.

27. Second, the clause providing for the defence in question does not contemplate the state of knowledge of which the producer in question actually or subjectively was or could have been apprised, but the objective state of scientific and technical knowledge of which the producer is presumed to have been informed.

28. However, it is implicit in the wording of Art 7(e) that the relevant state of scientific and technical knowledge must have been accessible at the time when the product in question was put into circulation.

29. It follows that, in order to have a defence under Art 7(e) of the Directive, the producer of a defective product must prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge at the time when the product in question was put into circulation was not such as to enable the existence of the defect to be discovered. Further, in order for the relevant scientific and technical knowledge to be successfully pleaded against the producer, that knowledge must have been accessible at the time when the product in question was put into circulation. On this last point, contrary to what the Commission seems to consider, Art 7(e) of the Directive raises difficulties of interpretation which, in the event of litigation, the national courts will have to resolve having recourse, if necessary to Art 177 of the EEC Treaty."

77. The plaintiff also referred to the opinion of Advocate General Tesauro in that case and in particular to paras. 21 – 23 of his opinion, where he stated that the producer could not necessarily rely on any given consensus of scientific and technical knowledge at any relevant time but had to have regard to the sum of all the available knowledge that was accessible to him, including opinions and papers which might not reflect the opinion of the majority, but may set out a different opinion, which may, in time, become the *opinio communis*. The Advocate General had the following say at para. 23 of his opinion:-

"The aspect which I have just been discussing is closely linked with the question of the availability of scientific and technical knowledge in the sense of the accessibility of the sum of knowledge at a given time to interested persons. It is undeniable that the circulation of information is affected by objective factors, such as, for example, its place of origin, the language in which it is given and the circulation of the journals in which it is published.

To be plain, there exists quite major differences in point of the speed in which it gets into circulation and the scale of its dissemination between a study of a researcher in a university in the United States published in an international English-language international journal and, to take an example given by the Commission similar research carried out by an academic in Manchuria published in a local scientific journal in Chinese which does not go outside the boundaries of the region."

78. The Advocate General gave his opinion that it would be unrealistic and unreasonable to take the view that the producer would have to have knowledge of a study published in Chinese as having the same chance of being known to a European product manufacturer as a study published in an international English language journal. He gave the following indication of what would be included in the "state of knowledge" at para. 24 of his opinion:-

"More generally, the 'state of knowledge' must be construed so as to include all data in the information circuit of the scientific community as a whole, bearing in mind, however, on the basis of a reasonableness test, the actual opportunities for the information to circulate."

79. The plaintiff submitted that having regard to these authorities, he was entitled to receive full particulars of the academic literature, which the defendants alleged constituted the state of scientific and technical knowledge in respect of the alleged defects, at the time when the product was put into circulation. In these circumstances, it was argued that the very general replies furnished to the plaintiff in the defendants' letter dated 15th April, 2016, were hopelessly inadequate.

80. In response, the defendants did not seek to make the case that the replies furnished by them to date constituted adequate particulars of the state of scientific and technical knowledge at the relevant dates. Instead they argued that they could not provide full particulars of the state of scientific and technical knowledge, until such time as they were given precise details of the defects which were alleged by the plaintiff to exist in the product.

Conclusions on the Plaintiff's Motion for Further and Better Particulars

81. Having considered the submissions of the parties and in light of the authorities which were open to the court, I have come to the conclusion that the plaintiff is entitled to full and detailed particulars of the material which the defendants allege constituted the state of scientific and technical knowledge at the time when the products were put into circulation. The replies furnished by the defendants in this regard in the letter dated 15th April, 2016, are inadequate.

82. However, the court is of the view that the defendants are correct when they state that they can only provide detailed particulars of the state of scientific and technical knowledge in relation to a particular defect, when the plaintiff has furnished detailed particulars of what he alleges were the defects in the products. For example, in relation to the arc of cover, it is up to the plaintiff to state clearly what he alleges is the arc of cover that should have existed in the product. He will have to provide the necessary measurement in that regard. When that has been done, the defendants argue that they will then be in a position to produce the relevant scientific and technical material which related to the academic thinking at the time in relation to what was the lowest permissible arc of cover.

83. That seems to me to be a reasonable argument. Accordingly, I directed that while the defendants were obliged to furnish full particulars in reply to item 2 of the plaintiff's notice for particulars dated 3rd February, 2016, they were not obliged to do so until the plaintiff had furnished his replies as directed by the court to the defendants' notice for particulars dated 17th February, 2016.

84. The orders already made by me herein, specify the timeframe within which the relevant replies are to be furnished by each of the parties.