

**THE HIGH COURT**

[2023] IEHC 362

**Record No. 2020/6937 P**

**BETWEEN:-**

**EDWARD HICKEY**

**PLAINTIFF**

**AND**

**TIPPERARY COUNTY COUNCIL**

**DEFENDANT**

**JUDGMENT of Mr. Justice Barr delivered *extempore* on 27<sup>th</sup> day of June, 2023.**

**Introduction.**

**1.** This action arises out of an accident that occurred on 28<sup>th</sup> August, 2018 at 10.30 hours at Old Cork Road, Newport, Co Tipperary.

**2.** The plaintiff was making a delivery of a parcel to a house, as part of his work as a part-time van driver. He drove his van alongside the wall of the customer's house on Old Cork Road, as shown in photographs numbers 1 and 2 of the photographs taken by the engineer, Mr. Foy. The plaintiff parked his van with the driver's side nearest to the wall of the property. He emerged from the van and walked around to open the side door on the passenger side of the van. Having done so and having retrieved the parcel, he stepped one or two steps backwards, when his right foot went into a hole in the surface of the road. The plaintiff stated that this hole measured some 2 feet in diameter and approximately 8 inches in depth. He stumbled, but he did not fall to the ground.

**3.** The plaintiff stated that he experienced immediate severe pain in his right knee. He walked up to the front door of the house and delivered the parcel. He was given a cup of water by the house owner. He tried to continue working that day, but was unable to do so. He attended with his GP and was given analgesic and anti-inflammatory medication.

**4.** The plaintiff returned to his GP on 3<sup>rd</sup> September, 2018. At that time, he was complaining of ongoing pain in the right knee. He was not able to carry out his work as a part-time soccer goalkeeping coach. He stated that he had done almost no activity due to the pain in his knee. He had applied ice, rest and compression to the knee. He was able to walk in a straight line, but if he went left or right, he experienced severe pain in the knee. Over the Christmas period of 2018, he bought a knee

support brace. He was able to return to some part-time coaching with the league of Ireland club team in February 2019. His GP was of the opinion that he had had a significant fall in a pothole. He felt that clinically he had torn his medial meniscus cruciate ligaments. He had been unable to work for approximately five months post accident. He was obliged to wear a knee brace in order to cope with the demands of his work. At that time, the GP recommended that an MRI scan be obtained.

**5.** On 8<sup>th</sup> July, 2019, an MRI scan of the plaintiff's right knee was carried out at Barrington's Hospital. It revealed moderate to advanced patella femoral degenerative change to the lateral surface, with significant bony osteophytes impinging upon the articular surface. There was cartilage thinning in the weight-bearing compartment of the knee, more prominent in the medial compartment, with a possible vertical tear related to the medial meniscus.

**6.** The plaintiff came under the care of Mr. John Rice, consultant orthopaedic surgeon, on 8<sup>th</sup> July, 2022, when he had been requested by the plaintiff solicitor to furnish a report in the matter. He noted that at that time, almost 4 years post accident, the plaintiff complained of recurring post exertion pain on the medial and anterior aspect of his right knee. The pain was mostly related to his activities training young football players. The plaintiff stated that any twisting movements of the knee would significantly provoke his symptoms. After a training session with the soccer team, he was required to take over-the-counter analgesic medication. The plaintiff also reported pain in his knee when getting up from a low seat. He had to be careful getting in and out of his van, while working as a van driver/courier due to his right knee pain.

**7.** At that time Mr. Rice was of the opinion that the plaintiff had suffered a significant soft tissue injury to his right knee. He thought it likely that the plaintiff had had degenerative processes in the right knee, that had predated the accident; even though he had not been symptomatic pre-accident. He was of the opinion that the accident in August 2018 had triggered his ongoing problems of recurring mechanical symptoms in relation to the right knee. At that time, he did not believe that arthroscopic surgery was indicated, in the absence of any locking or catching symptoms. He stated that if the plaintiff's symptoms were to flare up he had offered the option of injection therapy.

**8.** When the plaintiff's recurring episodes of pain continued at a rate of approximately 1 – 3 times per month, when he walked on uneven ground or twisted suddenly, the plaintiff returned to Mr. Rice for further consultation in May 2023. He stated that when the pain would flareup it would last approximately 2 to 4 days. Mr. Rice noted that on examination the plaintiff had reproduction of the

right knee pain, principally while stressing his patella femoral joint with lateral pressure on the patella during flexion. He also had a positive medial McMurray sign in that stressing the medial compartment of the knee joint in compression, provoked pain in the knee joint. Mr. Rice injected the plaintiff's right knee on that occasion.

**9.** His opinion was that the plaintiff had suffered a significant soft tissue injury to his right knee in a fall almost 5 years ago. He believed that the injury was superimposed on pre-existing, but asymptomatic, degenerative disorder of the knee joint, as demonstrated on the subsequent MRI scan. He had a meniscal tear evident on the MRI scan that may have been provoked by the injuries in August 2018. However, he stated that clinically, the plaintiff symptoms appeared to relate more to patella femoral joint dysfunction, rather than his meniscal tear. He stated that he expected the plaintiff's symptoms following his knee injection to improve and he should carry out further rehabilitation exercises. He stated that if his progress was not maintained as expected, he would make arrangements for the plaintiff to be admitted for arthroscopic surgery for his knee joint.

**10.** In evidence, Mr. Rice stated that as the plaintiff had reported that the injection to the knee had not provided any lasting beneficial results and as he continued to experience the onset of flareups of pain in his knee, approximately 2/3 times per month, he was now of the opinion that it was appropriate to proceed with an arthroscopy operation. While plaintiff had initially been reluctant to undergo surgery, he had since agreed to undergo this treatment. Mr. Rice stated that the operation would probably be carried out towards the end of summer 2023.

**11.** In cross-examination, Mr. Rice accepted that he had changed his opinion in relation to the necessity for the arthroscopy operation. He stated that that change of opinion was brought about due to the fact that the plaintiff had not had a beneficial result from the injection treatment. He was of the view that if his pain had been primarily due to the patella femoral joint dysfunction, the injection treatment would probably have been successful in alleviating that pain; as that had not happened, he was inclined to the view that the episodes of flareups in pain were probably caused by the tear in the medial meniscus. He was hopeful that the arthroscopy operation would improve the plaintiff's symptoms of pain, although it would not eradicate the pain.

**12.** In the course of cross-examination suggestion was made by counsel for the defendant to Mr. Rice, that he had changed his view in relation to the arthroscopy operation and had suggested same in an effort to puff up the plaintiff's damages. There was no basis for that suggestion on the evidence

placed before the court. In response, Mr. Rice stated that he would not accept that his suggesting that the plaintiff undergo arthroscopy surgery, was done in an effort to puff up the plaintiff's damages. He stated that he had recommended such surgery, due to the fact that the other modalities of treatment, such as physiotherapy treatment and injection treatment, had not been successful. He was hopeful that the surgery would improve the plaintiff's recurring flareups of knee pain.

**The Evidence of the Plaintiff's Engineer.**

**13.** Mr. Foy gave evidence on behalf of the plaintiff. He stated that the locus had initially been examined by a colleague from his office. He had subsequently carried out a further examination of the locus and had taken the photographs that were produced in court. The locus had been repaired prior to each of these inspections.

**14.** Mr. Foy stated that it was evident that this area had been the subject of repairs in the past, which was probably due to the fact that the area was in effect a meeting point between two sloping areas of tarmacadam, where, due to the fact that there had been no proper edging between the two areas of tar macadam, the area of the join had weakened and material had migrated leading to the formation of potholes. He stated that it was evident that a series of repairs had been carried out in the general area. He stated that these repairs were clearly deficient.

**15.** In cross-examination it was put to the engineer that the hole, which appeared to measure 2 feet in diameter and 8 inches in depth, ought to have been clearly visible to the plaintiff, had he been watching where he was going. The engineer accepted that the hole would have been visible to a pedestrian approaching from a distance. However, where a person had alighted from a vehicle and was in the process of opening the vehicle and removing products from it, the hole would not necessarily have been readily apparent to the plaintiff. He stated that it was also noteworthy that the surrounding areas were in the same dark tarmacadam.

**The Defendant's Medical Evidence.**

**16.** The defendant did not call any medical evidence. By agreement of the parties, the court was furnished with a medical report from Dr. Brian Spillane taken from an examination of the plaintiff on 21<sup>st</sup> February, 2019. That examination and report was furnished prior to the plaintiff undergoing the MRI scan. Dr. Spillane was of the view that the clinical signs were suggestive of a medial meniscus tear. He stated that it was unlikely to repair spontaneously. He stated that it would continue to cause some significant discomfort and limitation of the plaintiff's activities. His view was that the plaintiff

required an MRI scan to confirm the diagnosis. He stated that it was likely that the plaintiff would require arthroscopic surgery. He stated that without surgery, further improvement would be limited.

**17.** The court was also furnished with a report from Mr. Cormac Tansey, consultant trauma and orthopaedic surgeon, who had seen the plaintiff on one occasion on 14<sup>th</sup> January, 2020. He noted that the plaintiff had seen his GP on approximately three occasions and had had approximately 10/12 sessions of physiotherapy treatment. He noted that the plaintiff complained of swelling and pain in the knee when he would twist it. He was of the opinion that no treatment was necessary at that time.

**18.** He was of the opinion that the plaintiff suffered a twisting injury to the right knee and probably aggravated pre-existing right patella femoral joint degeneration in it and had sustained a small tear of the anterior horn of the lateral meniscus. He noted that the plaintiff had some ongoing symptoms, some of which he felt may be related to the lateral meniscal tear. No further treatment was anticipated. He expected the plaintiff's remaining symptoms to improve and settle down with further appropriate treatment. He stated that it was possible that the plaintiff may have some ongoing symptoms directly related to the pre-existing right patella femoral joint degeneration.

**Conclusions.**

**19.** The plaintiff is 50 years of age, having been born on 3<sup>rd</sup> January, 1973. He is a married man with two grown-up children. To deal first with the issue of liability, I accept the evidence of Mr. Foy, that the pothole at the locus was caused due to the hazardous state of the area, which was due to the fact that defective repairs had been carried out thereto, prior to the time of the accident. In these circumstances, I am satisfied that liability for the state of the locus rests with the defendant, due to the negligence on the part of its servants or agents in carrying out repairs to the area.

**20.** I accept the evidence of Mr. Foy that while the pothole may have been visible to a pedestrian, who was approaching it from a distance, it would not necessarily have been readily apparent to a person, such as the plaintiff, who had driven up to the locus and had emerged from his vehicle and while walking along the side of the vehicle would have come into contact with the hole. I accept the evidence of the engineer that in these circumstances, the plaintiff would not necessarily have been aware of the hole that existed at the locus. Accordingly, I find that there was no contributory negligence on the part of the plaintiff in failing to see the hole as he was taking material from his van.

**21.** Turning to the quantum aspects of the case, I accept the evidence as contained in the report as furnished by the plaintiff's GP and in both the reports and evidence of Mr. Rice. The plaintiff has

suffered a significant injury to his right knee. It has to be accepted that, while the plaintiff's right knee was asymptomatic prior to the time of the accident, the injuries to the knee, were superimposed upon reasonably extensive pre-existing degenerative changes in the knee. It appears that these were rendered symptomatic as a result of the accident.

**22.** In addition, there is evidence on the MRI scan that the plaintiff has suffered a tear of the lateral meniscus. While Mr. Rice was initially of the view that surgical treatment would not be necessary, I accept his evidence that his view has changed due to the fact that injection treatment to the knee has not brought about lasting beneficial results. In these circumstances, Mr. Rice is of the view that the plaintiff's ongoing symptoms of significant flareups of pain in the knee, approximately 2/3 times per month and lasting 2/4 days, are likely due to the meniscal tear, rather than to the degenerative changes in the knee.

**23.** I accept the evidence of Mr. Rice that the arthroscopy operation is now warranted. I reject the suggestion that was put to Mr. Rice in the course of cross-examination that his evidence in this regard has been prompted by a desire on his part to "puff up" the damages that may be awarded to his patient, the plaintiff. There is no evidential basis for that suggestion. It is noteworthy that the defendant's expert, Dr. Spillane, was of the view as far back as February 2019, that if a meniscal tear was demonstrated on MRI scan, an arthroscopy procedure would be necessary. Accordingly, I find that the necessity to carry out the arthroscopy operation, which will probably be carried out towards the end of the summer of 2023, is due to the meniscal tear, which on the balance of probability, I find was caused as a result of the injury sustained on 28<sup>th</sup> August, 2018.

**24.** I accept the evidence of the plaintiff that prior to the time of the accident he did not experience significant pain in his right knee. I accept his evidence that he was able for his work as a part-time goalkeeping coach and as a van driver. I accept his evidence that due to his ongoing knee symptoms, he has had to give up both these forms of employment. He now works as an administrator in an accommodation centre. While he is able to participate in the management of soccer teams, he is not able to actively participate in coaching of the teams.

**25.** I accept the plaintiff's evidence in relation to the ongoing symptoms that he has in his right knee. These have been documented in the complaints that he has made to various doctors, as set out in the medical reports and repeated in his evidence. His complaints in this regard are consistent with the findings on clinical examination as found by Mr. Rice.

**26.** In the circumstances, I find that this man has suffered significant and at times severe pain in his right knee since the time of the accident, which was almost five years ago. It is hoped that the arthroscopy operation which will be carried out in the coming months, will alleviate his symptoms of flareups in the pain, when he walks on uneven ground and when he twists his knee. However, Mr. Rice was very clear that it will not alleviate all his symptoms. However, he also accepted that given the level of degenerative changes in the plaintiff's knee, which existed prior to the time of the accident, he was likely to have suffered some symptoms of pain in his knee, even if he had not suffered the accident in August 2018.

**27.** Having considered all of the medical evidence put before me in this case, I award the plaintiff general damages for pain and suffering to date in the sum of €45,000, together with the sum of €15,000 for future pain and suffering. To this must be added the cost of the surgical procedure of €5,000 and I will allow the plaintiff a period of four weeks post surgery when he is unable to work, thereby giving rise to a loss of earnings during that period of €4,000 net; giving a total award of €69,000. The plaintiff is entitled to judgment in that sum against the defendant.