

caps upon, or into the stove, with the result that it exploded and destroyed one of the plaintiff's eyes.

The allegation is that the defendants were making excavations in Allen street, or in that vicinity, and for that purpose used such dynamite caps as were found by the plaintiff, and that these caps so found were negligently and carelessly left upon the street by the defendants.

The work which was being done by the city was by the defendants, McNamara & Son, under a contract in writing, which contract was for a very large amount of work.

There was no evidence of any work done by the city, other than the McNamara & Son work, or of any interference by the city with the work of, or with the time or manner of doing it by, McNamara & Son. The plaintiff's right to recover depends upon his being able to establish negligence on the part of McNamara & Son. At the trial the plaintiff stated that he saw a man put down the box of caps. He was asked to look about and see if he could identify that man if in the Court room. The plaintiff made a careful search in the crowded Court room, but did not find the defendant McNamara, or any person, as the one who had the box of caps. The senior McNamara was in the Court room at the time. He was one of the firm most about the work. He stated that the caps used were kept in the cap box, then in a wooden compartment of a big tool or implement chest kept on the ground or in close proximity to the work. The work on Allen street, where caps were said to have been found, was completed a considerable time before the 16th November.

There is a considerable uncertainty as to the time when the caps first came into the possession of the plaintiff. If long before the 16th November the greater chance there was of their being McNamara caps. The notice of action is dated 18th November and states the date as 16th, but that probably was, and was intended as, the date when plaintiff received the injury.

I am not satisfied that the plaintiff gave a full and accurate account of how he came to find these caps. After the accident naturally enquiry was made and suspicion was directed towards McNamara & Son and that suspicion was strengthened because the senior of the firm was on one or more occasions intoxicated when at work. I accept the evidence of Andrew McNamara that he did not see any of the caps at Renzoni's house after the accident nor did he see any