THE HIGH COURT
PERSONAL INJURIES

[2013 No. 12479P]

BETWEEN:

EDWARD O'CONNOR

PLAINTIFF

-AND-
WEXFORD COUNTY COUNCIL

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 2nd day of May, 2018.

1. The plaintiff is a 62 year old man, who was 56 at the time of the alleged accident and was a Water Inspector employed by Wexford County Council.

2. The plaintiff alleges that on 6th February, 2011, he slipped on a steep grassy bank at the Ferns Water Reservoir and injured his back. One of the plaintiff's daily tasks was to check the water level in the reservoir by lifting the manhole cover on the top of the reservoir, which reservoir was completely covered in grass. The route that the plaintiff took to the manhole cover was up a steep bank. It was while he was descending the bank that the alleged incident occurred. The bank has an incline of between 1:3 and 1:2.3 and so is quite steep. In addition it was wet at the time of the alleged incident. There were no witnesses to this accident, but the plaintiff did fill out an accident report some days later.

3. The defendant argued that there was absolutely no need for the plaintiff to go up the steep incline to reach the manhole cover. This was because there is a route along the grassy reservoir with little or no incline and therefore was a much safer route which was only 10 or 15 metres away from the route which the plaintiff took to the manhole.

4. The plaintiff's reply to this suggestion was that his predecessor some 16 years previously, when Mr. O'Connor was being shown his tasks, had taken the route up the steep incline to the manhole and for this reason, the plaintiff said this was the manner in which did his job and therefore this was an unsafe system of work.

5. However, if as alleged by the plaintiff, it was the case that his predecessor went to the manhole adopting a route with a severe incline, common sense would dictate that this does not mean that he should take this same route, when there was a less steep route, which was only metres away. There was no evidence to suggest that Mr. O'Connor was obliged by the defendant to take this steep route to the manhole, which he chose to take each day. Since the plaintiff alleges that the defendant failed in its duty to provide a safe place and system of work under the Safety Health and Welfare at Work Act, 2005, and the Regulations made thereunder, it is relevant to note that under s. 13(1)(a) of the Safety and Health at Work Act, 2005 an employee has a duty to take reasonable care for his safety.

6. In this regard, it is significant to note that only 8 months prior to his alleged accident, the plaintiff claims that a work colleague, Mr. Kavanagh, slipped on the same steep bank and that Mr. O'Connor reported this accident to his superior, Mr. Neville Shaw, the County Council engineer.

7. Mr. Shaw denies that this accident was ever reported to him and this Court found Mr. Shaw to be a convincing witness. In any case, what is relevant about this earlier slip, is that it is curious that, when such significance was attached by the plaintiff in the proceedings before this Court to the fact that a worker had fallen on the same steep incline, he failed to mention this fact to Mr. Michael Byrne, his own expert engineer, who gave evidence on the plaintiff's behalf in this case. Mr. Byrne confirmed under cross examination that the earlier alleged accident of Mr. Kavanagh was not mentioned to him by the plaintiff.

8. It is also the case that this Court did not find the plaintiff to be a convincing witness. For example, he stated that he expects to be in a wheelchair because of his current condition. However when Mr. O'Connor was seen by his own specialist, Mr. Kiely, the Consultant Orthopaedic Surgeon, he was able to toe and heel walk and single leg stand with equivalence right and left. Similarly, Dr. Phillips, the Consultant Neurosurgeon for the defendant described him as simply having "global non organic weakness of both hips, knees and feet without evidence of muscle wasting".

9. It is also relevant that in October 2017, only six months after Mr. Kiely had noted that Mr. O'Connor was able to toe and heel walk, Mr. Philips' evidence was that when Mr. O'Connor came to see him, he was almost completely unable to rise on his toes or rock back on his heels. Mr. Philips concludes that:

> "From a neurosurgical perspective Edward O'Connor's clinical condition at this time is unexplained. His disability would appear to be significantly more severe at this point in time than it was in the immediate aftermath of the accident. Edward O'Connor informed me that the fall which he sustained on 6/2/2011 was no more severe than what he would have received in sporting activities playing hurling and training."

10. In assessing the plaintiff's credibility, it is also relevant that Mr. O'Connor has claimed that driving is difficult as a result of the incident and in his Replies to Particulars he claimed that he can only drive a maximum of 15 miles. However, despite this claim, he chose to drive from his home to this Court (sitting for part of this case in Kilkenny), a round trip of 120 km, even though his wife was with him and she has a full driving licence.

11. Similarly the plaintiff claims that he can only sit for one hour, yet in sitting in the witness box for up to two hours, it was not obvious to this Court from observing him that he was in discomfort.

Decision

12. According to the decision of the Court of Appeal in *Byrne v. Ardenheath* [2017] IECA 293, when the High Court is dealing with alleged negligence in a field of activity which is not complex or specialist, and in this Court's view falling on a steep bank to check the level of water in a reservoir is such a field of activity, the High Court is obliged to bring ordinary common sense to bear on what amounts to reasonable care by a plaintiff. While, the *Ardenheath* case was not an employer's liability case, it is nonetheless this Court's view that common sense is also relevant to employees who are injured at work as a result of the alleged negligence of their employers.

13. Applying this principle to this case, and taking the plaintiff's version of events at face value, it means that he would have known that walking up a very steep bank is a lot riskier than walking to the same location by a route that is almost flat, since this is simply common sense. The plaintiff would also know that walking up a steep *and* wet bank, as it was on the day in the question, is a lot riskier again.

14. If there was any doubt in the plaintiff's mind that the route which he took was risky, this should have been dispelled by the fall of Mr. Michael Kavanagh only eight months prior to his accident. If the plaintiff is to be believed the significance of this fall was not lost on him, since on his version of events he reported it immediately to Mr. Shaw.

15. At this stage therefore, ordinary common sense should have indicated to the plaintiff that it would be fool hardy for him to continue taking the steep bank route up to the manhole, which was clearly risky both on the basis of common sense in view of its steep incline and in view of the evidence of Mr. Kavangh's fall, particularly when there was a flat route only metres away.

16. The suggestion by the plaintiff that the reason that he did not take the flat route, namely because the flat route could be overgrown at times and that it was uneven because of cattle marks on it, was unconvincing to this Court. This was in part because Mr. Shaw confirmed that it was part of the plaintiff's job to organise the cutting of the grass and also because the entry of cattle on the site, which allegedly caused the cattle marks, was some four years previously and the defendant had put up fencing at that time to prevent its reoccurrence.

17. In conclusion therefore, just as in the *Ardenheath* case where the plaintiff took a short cut down a wet grassy slope of 31°, even though there was a safe route a modest distance away and the Court of Appeal held that she did not take reasonable care for her own safety, so too in this case, this Court concludes that the plaintiff did not take reasonable care for his own safety by using the steep incline to access the manhole when there was a flat route a modest distance away. While *Ardenheath* was an occupier's liability case and this case is an employer's liability case, it is this Court's view that the application of common sense principles to determining what amounts to reasonable care, applies to an employee such as Mr. O'Connor in a similar, although not necessarily identical, way to how it applies to a customer in a shopping centre, as was the situation in *Ardenheath*. On this basis the plaintiff's claim is dismissed.