**THE HIGH COURT**

**[2011 No. 1029 P]**

**BETWEEN**

**LIAM MURRAY**

**PLAINTIFF**

**AND**

**THE ELECTRICITY SUPPLY BOARD**

**DEFENDANT**

**JUDGMENT of Ms. Justice Irvine delivered on the 17th day of July 2012**

1. The plaintiff, who is married man with four children, was born on 27th May, 1957. At all relevant times, he was employed by the lighting department of Dublin City Council.

2. The plaintiff was injured in the course of his employment on 17th August, 2009, when he tripped over a spool of electric cable which was attached to the base of a lamp standard, the property of the defendant, on the public footpath at Beach Road, Sandymount, Dublin.

3. The defendant has conceded liability in respect of the Plaintiff's fall subject to its plea that the plaintiff was guilty of contributory negligence in failing to notice and avoid this obstruction.

**Liability**

4. On the day of the plaintiff's accident, it had been his intention to cross over Beach Road to re-number a lamp standard on the coastal side of that roadway. He parked his van in an adjacent side road. The plaintiff then proceeded to Beech Road on foot carrying an extendable ladder up against his right shoulder and holding the rest of the equipment required for the job in his left hand. When he came to the comer where the side road adjoins Beach Road, he was principally concerned with getting himself safely across the roadway. There was no oncoming traffic so he proceeded to exit the footpath. However, for some unexplained reason the plaintiff did not see the large spool of electric cable which was on the ground at the foot of the ESB pole and tripped over it.

5. Every person who uses a public roadway or footpath must take reasonable care for their own safety. Footpaths regrettably, are often hazardous places. Pedestrians must be vigilant for the presence of roadwork's, repairs, obstructions or defects which might interfere with their safe path of travel. They are not entitled to blindly proceed on the assumption that they will be safe without looking at the ground over which they are passing. Indeed, I would have thought that a person such as the plaintiff, who, because of the nature of their employment regularly is involved in reporting dangers of this type to his employers, would be more likely than almost anyone else to be aware of such potential hazards.

6. The plaintiff fell at the edge of the footpath where there was nothing obstructing his view of the area over which he was walking. He was not, for example, walking between two cars parked on the pavement or amongst a group of pedestrians who might have obscured his line of vision at the time he fell. Further, the obstruction was a large one and even a cursory glance at the ground would have identified its presence.

7. For these reasons, I am satisfied that the plaintiff should have seen the defendant's spool of electric cable regardless of the fact that he was carrying equipment at the time. Accordingly, in looking at the plaintiffs moral blameworthiness in respect of his fall, I believe that he must bear 25% of the liability for all of the consequences which flow from his fall.

**Quantum**

8. When the plaintiff tripped, he fell heavily onto his right shoulder and his knee was badly cut as a result of its impact with the ladder. He attended a nearby depot of Dublin City Council where he was able to clean and dress the wound to his knee. He later returned to the *locus in quo* to take photographs of the hazard after which, with the agreement of his supervisor, he continued with light duties for the rest of the day. Later that evening, the plaintiff's right arm became sore and he developed pins and needles. He attended his General Practitioner the following day. He prescribed pain killing medication and sent him to St. James's Hospital for X-rays which showed no bony abnormality.

9. The plaintiff was initially out of work for one week during which period he took significant pain killing and anti-inflammatory medication. The following Monday, he went back to work on a night shift. He found that his painkilling medication was making him somewhat "woozy" so he did not take it due to his need to drive. After a number of hours, he found himself in significant pain and had to go home. Thereafter, he never returned to work. He was retired by his employer's on the grounds of ill health in April 2010. In this regard I am satisfied from the evidence of Mr. Carberry that the Plaintiff asked his employers if they could facilitate him by giving him what is commonly referred to as "light work" and that they were unable to accommodate him in this regard.

10. Due to ongoing discomfort in his arm and neck, the plaintiff was referred to Mr. McGoldrick, consultant orthopaedic surgeon, whom saw him in October 2010. He then referred the plaintiff to Mr. Young, consultant neurosurgeon, because he had classic signs of nerve root irritation of the cervical spine. Conservative treatment with physiotherapy did not alleviate his ongoing pain and parasthesia. Consequently, the plaintiff remained in significant discomfort until 27th April, 2010, when Mr. Young carried out a Cervical Discetomy and fusion at the level of C6/7.

11. Following that surgery, the plaintiff obtained significant relief in respect of the pain which he had been experiencing in his arm. However, he maintains that the surgery did little to improve the pain and discomfort at the base of his neck and that this requires him to take significant amounts of over-the-counter painkilling medication. The plaintiff's injuries have also made it impossible for him to participate in sea fishing which he formerly enjoyed. Neither can he play the bagpipes, a pastime which he had enjoyed for many years in circumstances where blowing the pipes induces pain in his neck.

12. Of particular import is the plaintiff's contention that he has not been able to return to work because of his ongoing problems with his neck. He did apply to FAS to do a computer course earlier this year motivated principally by his desire to be able to communicate with two of his children who reside abroad. However, he was unable to keep up with other members of his class and dropped out prior to completion. He told the court that he has seen no other job advertised which he feels he would be capable of doing. Further, he believes that in respect of any job which he would be capable of doing that he is unlikely to be the successful candidate by reason of his age and the present economic environment.

13. Having considered the medical and vocational evidence in the present proceedings, it is clear that the plaintiff's claim for loss of earnings to date in the total sum of €67,000 is unanswerable. In terms of loss of earnings in to the future, the plaintiff claims a sum of €248,444, being the sum, which, if invested, would give him a net income of €534.00 *per week* until age 66. There is also a small claim of €5,768.00 in respect of pension loss and a further sum of €6,487.00 in respect of his reduced lump sum entitlement due to his early cessation of employment.

14. The first issue to be addressed in relation to the total figure in respect of potential loss of earnings, pension and lump sum entitlement is the extent to which that sum should, if at all, be reduced to reflect the contingencies as outlined in the decision in *Reddy v. Bates*. Having regard to the present economic circumstances and the exigencies of life in general, it is my view that notwithstanding the fact that the plaintiff was in permanent and pensionable employment at the time of his accident, I should reduce his overall claim in respect of these categories of loss by 10% prior to considering whether or not, as a matter of probability, he will be in a position to work in the future. Accordingly, the total sum in respect of these three heads of claim when discounted by 10% amounts to €234,629.00.

15. The next matter to be addressed is the legal obligation of a plaintiff such as Mr. Murray to seek to mitigate the financial loss he seeks to recover in these proceedings stemming from his loss of employment with Dublin City Council. This obligation requires him to seek out any employment which is reasonable taking into account his residual difficulties. Having considered all of the evidence in the present case, it is clear to me that the plaintiff has made little or no effort to return to any gainful employment notwithstanding the fact that he has benefited significantly from very successful surgery carried out by Mr. Young.

16. From the medical evidence, I am satisfied that the plaintiff cannot engage in any employment which would require him to lift anything heavy. Neither should he do any type of physical work that would involve him in extending his neck or working overhead. However, these residual difficulties would not preclude the plaintiff from working as a car park attendant, a security officer, a shop worker or in telesales, to mention but a few of the possibilities referred to in evidence. Nonetheless, notwithstanding this conclusion, I have to take seriously the vocational evidence of Mr. Leonard to the effect that even if the plaintiff was determined to get back into the work market, there would be many factors which would militate against him including his age, the fact that he left permanent employment through injury, the fact that he has been unemployed now for a significant period and the vast numbers of relatively better qualified people competing for the same potential jobs. Taking all of the aforementioned considerations into account, I accept Mr. Leonard's evidence that the most likely prospect of the plaintiff gaining some type of employment in the future is through the auspices of an agency such as FAS where, after retraining, he should be relatively well positioned to obtain some type of supported employment in the community. However, even if the plaintiff does retrain and get this type of work, the same is probably going to be part-time because of Social Welfare considerations and will not be permanent or continuous. He is likely to have to seek out and find a number of different willing employers between now and the age of 66.

17. For the aforementioned reasons, I am satisfied that the plaintiff should be in a position to earn something in the region of €200 net *per* week. I think it is fair to conclude that insofar as the plaintiffs future income generating capacity is concerned, he will probably only work part-time and intermittently under aged 66. I believe he should be in a position to earn something in the region of €200 net *per* week when he obtains employment and I propose to apply a multiplier of 250 to this potential earning capacity to reflect the fact that he will probably only work about 50% of the time between now and age 66. I am satisfied, therefore, that the appropriate deduction to be made from the loss of earnings claim is a sum of €50,000.00.

18. Thus, before any apportionment in respect of liability, the plaintiff's future net loss of earnings amounts to €184,629.00, being the sum of €234,629.00 less €50,000.00.

19. In respect of general damages, I will award a sum of €50,000.00 in respect of pain and suffering to date and a further sum of €30,000 into the future. The total award of damages will therefore be as follows:-

Loss of earnings to date: €67,000.00

Loss of earnings into the future, Pension

and Lump Sum adjusted for *Reddy v. Bates*

considerations and future earning capacity: €184,629.00

Pain and suffering to date: €50,000.00

Pain and suffering into the future: €30,000.00

Agreed Special Damages: €11,170.84

Sub-total: €242,799.84

Less 25%: €85,699.96

***TOTAL: €257,099.88***