

## THE HIGH COURT

[2010 No. 5762P]

BETWEEN:

ANTONI JAMROZIEWICZ

PLAINTIFF

-AND-

O'NEILL BRENNAN LIMITED

AND

STRABAG INTERNATIONAL GMBH

DEFENDANTS

**EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on 7th day of April, 2016**

1. The plaintiff's hand was injured when he was employed by the first named defendant to work on behalf of the second named defendant at a site under its control during the excavation of the Shannon Tunnel.
2. The accident occurred at approximately 4.30 p.m. on 23rd April, 2008, and it occurred when the plaintiff's left hand, which is his non-dominant hand, came into contact with the electric saw which was operated by the plaintiff in the course of his work for the second named defendant.
3. It resulted in the plaintiff losing half of his first finger, a third of his ring finger and some lesser damage and scarring to his middle finger and his little finger. His doctor, Mr. Michael O'Shaughnessy a consultant plastic and hand surgeon, described the overall effect of the accident as a loss of function of approximately 30% in the plaintiff's left hand.
4. There was no eye witness evidence given regarding the incident and the site of the accident was completely altered since the accident occurred, as it is now the Shannon tunnel.
5. The evidence of the plaintiff as regards the state of the ground at the time of the accident is that it was wavy, as it was concrete that had been laid on the bed of the River Shannon, before the river was drained. It was asserted on behalf of the plaintiff that concrete when it sets in the vicinity of water can be wavy or uneven as a result of the movement of the water, unlike concrete which is set in dry conditions.
6. There is not a lot of evidence to go on regarding the accident and in addition, the plaintiff's memory of the accident, which occurred 8 years ago is not great since he stated that he *'did not remember exactly the moment'* of the accident.
7. Based on the plaintiff's evidence, the Court concludes that that the ground was wavy or uneven as a result of the setting of the concrete on the bed of the Shannon.
8. Based on the cross-examination of the plaintiff regarding the accident, the Court concludes that he was standing beside the saw when the accident happened, as he needed to be in close proximity to the switch to turn it on, before commencing the cutting of the wood.
9. This eliminates, in the Court's view, the possibility that the plaintiff fell on the way to the saw as a result of the wavy ground.
10. On the basis of the evidence that is available to the Court, the Court concludes that, on the balance of probabilities, the plaintiff was standing beside the saw, rather than walking towards it, when he lost his balance in some way because of the uneven ground.
11. However, for this loss of balance, when he was standing so close to the saw, to have led to the damage to the plaintiff's fingers, the Court also concludes that, on the balance of probabilities, the plaintiff had his hand too close to the saw when he was doing this manoeuvre and/or he had not properly used the crown guard on the saw, which he had been operating from early that morning.
12. For this reason, while the Court finds that the defendants were negligent for failing to provide a safe place of work for the plaintiff, it finds that the plaintiff was guilty of 25% contributory negligence and so the following awards are subject to a 25% deduction.
13. As regards general damages to date, including the psychological pain and suffering of the plaintiff, this Court would award €75,000.
14. As regards future general damages, it would award €25,000 (both figures to be reduced by 25%).
15. As regards special damages, the Court is dealing with this in two tranches.
16. First, the period from the date of the accident in April 2008 until July 2010, when the Tunnel work was complete, since the plaintiff's contract would have come to an end at this date, at the latest).
17. Based on the P60 produced in court which shows a net payment of €820 per week, this Court would award the plaintiff the sum of €95,940 for a period of 117 weeks from the date of accident until July 2010 (to be reduced by 25%).
18. These special damages are being awarded on the basis that if the plaintiff had not been injured, it is likely that he would have continued to work on the Shannon Tunnel project to its conclusion in July 2010.
19. The second aspect to the special damages is the period after the Tunnel was finished in July 2010 until the plaintiff resumed work in August 2011. As regards this period of time, this Court concludes that, on the balance of probabilities, the plaintiff would not have found work due to the economic recession in Ireland and he could have left the country, as he duly did in 2011, to find work in France and Germany, for which work he is currently remunerated at the rate of €1,300 per month.

20. Accordingly, for the period from the end of the Shannon Tunnel project in July 2010 to August 2011, when he returned to work, the Court would award the plaintiff the sum of €15,600 (to be reduced by 25%) being the annualised monthly payment at a rate of €1,300 per month.

21. As regards the period from August 2011 to date and into the future, the Court is making no order in relation to special damages, even though the plaintiff has worked only approximately 50% of the time due to his injury to date.

22. This is because his inability to work for longer than a month or two at a time is attributable to tennis elbow in his left elbow, according to his own consultant's report.

23. However, his own consultant, Mr. O'Shaughnessy, felt that it was possible that this could have been resolved if the plaintiff had sought expert professional advice, which he has failed to do.

24. Furthermore, Mr. O'Shaughnessy also referred in his oral evidence to the fact that this tennis elbow may be aggravated by the modified grip which the plaintiff uses for his left hand when working. Thus, even if the tennis elbow would not have been cured by the specialist treatment, it was open to the plaintiff to seek work since August 2011 and into the future, which does not require him to use a modified grip and if he had done so, it is likely that his tennis elbow would not have prevented him from working full time.

25. While the Court accepts, based on the evidence of Mr. O'Shaughnessy, that there is a degree of uncertainty and speculation about whether the plaintiff's tennis elbow would have been, or will be, eliminated and that there is a degree of speculation of how easily he will find a job which requires him to use a modified grip for lifting material. On the other hand it is to be noted that Mr. O'Shaughnessy felt that he was well enough to return to work in October 2008, yet the foregoing special damages award compensates him not up to October 2008 but up to August 2011, when he did return to work.

26. There is a certain degree of latitude being given to the plaintiff in this regard and also because these special damages grant him the full rate of pay plus overtime which was payable at the height of the economic boom (and which was the best rate of pay the plaintiff ever received). Similarly, no account is being taken of the fact that the plaintiff might have been left go prior to end of the project in July 2010 and been unemployed, or employed at the lesser rates which had come into force from 2008 to 2010, referred to by Mr. Cronin of O'Neill Brennan Limited, who himself was made redundant by that company in 2008. Mr. Cronin also referred to the fact that 90% of the workers were made redundant by O'Neill Brennan Limited at this time, but no account is being taken of this fact in this aspect of the award.

27. On the other hand, there is a certain degree of latitude being granted to the defendant as regards there being no special damages ordered post August 2011, since it is being assumed that the plaintiff would have had his tennis elbow resolved if he had it seen by a specialist, as recommended by his consultant or in the alternative that he could have or will find full time work which will not aggravate his tennis elbow.

28. To summarise, the plaintiff will be awarded a total sum in damages of €158,655 nett, made up of general damages of €75,000 (being the €100,000 reduced by 25%) and special damages of €83,655 (being €111,540 reduced by 25%)

29. Costs awarded to the plaintiff against both defendants, including costs of discovery and any reserved costs.