Neutral Citation Number: [2008] IEHC 88

THE HIGH COURT

1997 No. 2423 P

BETWEEN

KEVIN DOYLE

PLAINTIFF

AND

ELECTRICITY SUPPLY BOARD

DEFENDANT

Judgment of Mr. Justice Quirke delivered on the 4th day of April, 2008.

The plaintiff is an electrician who was born in 1952 and is now 55 years old. He is married with one son and at all times material to these proceedings was employed by the defendant as a cable jointer, working from the defendant's premises at South Lotts Road in Dublin. The defendant is a statutory corporation which, inter alia, is responsible for the provision of electrical power throughout the State.

During the course of his employment with the defendant, the plaintiff suffered recurrent bilateral epicondylitis of his elbows while using a Pfisterer compression tool. He claims that this injury and the consequent loss and damage which resulted from the injury were caused by reason of negligence, breach of duty and breach of statutory duty on the part of the defendant.

In consequence, the plaintiff claims damages from the defendant to compensate him for his injury and its consequences.

Relevant Facts

1. The plaintiff was first employed by the defendant in 1980 as an electrician.

In 1981, or thereabouts, he was assigned to work as a cable jointer working outdoors on overhead electric power cables which provided power to residential and other dwellings. He continued to work as a cable jointer for the defendant until late 1996 or early 1997.

Between 1982 and 1997, most of the plaintiff's work as a cable jointer was undertaken in a section known as "construction section". His job within that section required him to work on the assembly of high and low tension relay panels within newly constructed substations and other small buildings known as "unit subs" and "mini pillars".

He was also required to splice and join cables in underground trenches from time to time but most of his work at this time involved the fitting of cables within the substations, unit subs and mini pillars.

2. At all material times, the plaintiff worked with the central branch of the defendant within the Dublin region. He was assisted in his normal duties by a general operative or helper. An operative called Joseph Behan usually filled that role for the plaintiff.

Twenty-six crews operated from the central branch. The plaintiff and Mr. Behan comprised one of twelve crews which worked within the construction section.

The plaintiff's work required him, *inter alia*, to connect electric conductors or cables to the terminals within the substations or mini pillars. This was achieved by bolting the conductor or cable to the terminal using a connector.

The plaintiff was required to repair the conductor cable by paring back its outer layers of insulation revealing its inner cores (usually four).

The plaintiff or his assistant then pared back the outer layers of insulation of the individual cores and prepared the cut end of the central aluminium core.

It was then necessary to fit a connector to the end of the conductor and this was achieved by sliding a connector over the conductor and then squeezing or "crimping" the connector in place so that there was a firm fixing.

The crimping was undertaken by using a special crimping tool manufactured by Pfisterer in Germany. The tool was, accordingly, called a Pfisterer tool and consisted of a set of jaws which were connected by a linkage to two handles. The handles were 600 millimetres (approximately 2 feet) in length.

Within the jaws there was a special die which the operative was required to squeeze around the connector. Different shapes and sizes of die were required for different sized connectors.

The connectors in turn were sutured to particular sizes of cable or conductor.

The Pfisterer tool, which was used at all material times by the plaintiff and his assistant, was the Pfisterer G06-300 model.

The dies and the connectors which were used by the plaintiff and his assistant were also manufactured by the Pfisterer Company in Germany.

When a connector was being fixed to a conductor it was necessary to compress each connector using the Pfisterer tool on several occasions. The number of occasions on which the connector needed to be compressed depended on the type of connection and the type of conductor. The conductors or cables most frequently used by the plaintiff and his assistant were the 185 sq. cable, (which required five separate crimps to be applied to each core), and the 380 sq. conductor, (which required eight separate compressions in respect of each connector).

The plaintiff indicated in evidence, that he would "*possibly do 100 crimps per day – maybe more*". He said that each crimp took up to five minutes to complete. He and his assistant shared the task of crimping using the Pfisterer tool.

3. It was acknowledged by all of the witnesses who testified in these proceedings that the work of crimping comprises relatively heavy manual work and that, in order to achieve a satisfactory result, the application of significant force by the operative upon the Pfisterer tool is required.

Mr. Robert Saunders, who is an Occupational Health and Ergonomics Engineer, carried out an examination of the Pfisterer tool on behalf of the plaintiff and took a series of measurements in an attempt to calculate the degree of force which was required to crimp cables in the manner undertaken by the plaintiff and his assistant.

Mr. James Watson, who is a Consulting Engineer retained on behalf of the defendant, was present when these measurements were taken. Both of these expert witnesses agreed that the measurements were crude in nature and could only be relied upon as a rough estimate of the actual mechanical force required to close the Pfisterer tool adequately upon the conductors.

Both experts were in agreement that force in the order of 20 to 25 kg. was required in the case of the 380 sq. cable cores and a force of approximately 18 to 21 kg. was required in the case of the 185 sq. cable cores.

Mr. Saunders was of the opinion that the Pfisterer tool was likely to have triggered the development of the plaintiff's epicondylitis but agreed it was not possible to be completely definitive.

Mr. Watson pointed out that the Pfisterer tool was used by all of the other crews charged by the defendant with the same work and there had been no report of a similar injury. He stated in evidence that the tool had been sold in sixteen countries and the Pfisterer Company was not aware of any injury to any operative resulting from the use of the tool. He said that he did not believe that a force of 20 kg. or thereabouts was excessive in the circumstances.

4. In August, 1991, the plaintiff consulted his General Practitioner, Dr. John Casey, complaining of pain and discomfort in his right lateral elbow, particularly when lifting. He was diagnosed with having right sided tennis elbow and prescribed anti-inflammatory medication. He continued to experience persisting symptoms and one month later he was referred by Dr. Casey for physiotherapy. This treatment produced a satisfactory outcome.

Four years later, on 2nd October, 1995, the plaintiff returned to Dr. Casey complaining of bilateral pain and tenderness in both lateral elbow joints. He was referred for physiotherapy at Beaumont Hospital where he had intensive treatment over a four to six week period. This improved his condition but when he returned to work his condition appeared to have become aggravated and worsened.

On 30th April, 1996, the plaintiff returned to Dr. Casey and was then referred to a Consultant Rheumatologist who referred him for further physiotherapy. He remained out of work until the end of September, 1996, when Dr. Casey wrote to the defendant by letter dated 26th September, 1996, advising the defendant that: -

> *"This man has attended me intermittently over the last five years with recurrent bilateral epicondylitis of elbows (in particular right) … It is my opinion, and that of the consultants, that his condition has been caused by his work as a cable jointer and is therefore likely to recur if he returns to the same type of work."*

Shortly after the plaintiff's return to work in September, 1996, he was placed on light duties which did not require the use of the Pfisterer compression tool and he has remained working for the defendant on light duties up to the present time.

It was not entirely clear on the evidence whether the plaintiff might have been required to do some cable jointing work for brief periods after his return to work in September, 1996, but I do not believe that it is necessary to make any determination in respect of that issue because nothing of relevance within these proceedings turns upon such a determination. I am, however, satisfied that all of the witnesses who testified in respect of that issue did so conscientiously and in accordance with their best recollection of events which occurred eleven years earlier.

The plaintiff in evidence stated that he still experiences pain in his elbows when he undertakes gardening work or carries heavy weights. He takes occasional anti-inflammatory medication for his condition and was somewhat depressed for a time. However, he is able to carry out the duties which are required of him in his occupation at present provided he is not required to undertake heavy work of a manual nature.

He agreed that throughout the fourteen year period between 1982 and 1996, he had never made any complaint to the defendant indicating that the use of the Pfisterer tool had caused him to suffer from pain and discomfort in his elbows. He stated that he was not aware that the use of the tool was the cause of his injury.

5. Dr. John Casey, the plaintiff's General Practitioner, in evidence stated that he believed the plaintiff suffered chronic soft tissue type injury to both of his elbows as a result of his work with the Pfisterer compression tool. He confirmed that the plaintiff had been depressed for some time after his return to work in 1996 and had required antidepressant medication which has now been discontinued for more than three years.

He stated that the plaintiff himself was of the opinion that his condition had been caused by his work with the Pfisterer compression tool and he (Dr. Casey) had agreed with him and had concluded that the condition was work related.

He felt it was significant that the plaintiff's symptoms recurred when he returned to work with the Pfisterer tool and that the symptoms subsided when he was not required to work with it.

6. Dr. Paul O'Connell, who is a Consultant Rheumatologist, stated in his evidence that he first examined the plaintiff in 1997 and had prepared a report for the benefit of the plaintiff's (then) solicitors.

He felt that his history was consistent with low grade chronic epicondylitis. He believed that, if the plaintiff was careful, his problems would remain low grade and manageable. He said that this situation will persist indefinitely.

He felt that the description of his use of the Pfisterer compression tool was consistent with the development of epicondylitis resulting from that use. He felt that the use of the tool was a "*plausible explanation*" for the condition which the plaintiff developed. He thought it was significant that whenever the plaintiff had resumed work with this tool the condition had reappeared.

7. Mr. Robert McQuillan, who is a Consultant Orthopaedic Surgeon, was retained on behalf of the defendant to examine the plaintiff. He said in evidence that he had examined the plaintiff on three occasions between 24th June, 1997, and 5th April, 2006.

He said that the plaintiff had given him a full and detailed history of his symptoms, his treatment and the nature of his work as a cable jointer with the defendant. He undertook a full and detailed examination of the plaintiff.

He said that the Pfisterer tool and its functions were demonstrated independently to him. He said that the plaintiff also personally demonstrated how he used the tool, indicating that when he was using it his arms opened beyond 180 degrees and closed to 10 degrees. He explained that he applied force whilst his arms were closing between 160 degrees and 10 degrees.

The plaintiff told him that he performed this activity approximately 150 times each day when he was working indoors.

Mr. McQuillan said that the use of the Pfisterer tool by the plaintiff involved flexion of the elbows and flexion of the wrist. He felt that this type of flexion put force on the common flexor muscles attached to the medial epicondyle. He said it was possible, but unlikely, that this could give rise to medial epicondylitis. He said the plaintiff's symptoms were, to a large extent, on the outer aspect of the elbow and would appear to be totally unrelated to the use of the Pfisterer tool.

Mr. McQuillan said that the plaintiff was currently suffering from some underlying rheumatological condition and that his epicondylitis was a manifestation of this.

He said that the plaintiff's use of the Pfisterer tool did not cause the epicondylitis in his elbows, but it could have made his condition worse, and he said it certainly would not have affected the plaintiff's medial epicondyle.

8. Mr. Colm Clifford stated in evidence that he has been the agent in Ireland for the Pfisterer Company for more than thirty years. He said that the Pfisterer Company had sold more than seven hundred Pfisterer tools of the kind which the plaintiff had been using, to the defendant, whilst he was acting as the company's agent.

He said that the Pfisterer tool is still sold internationally on a widespread basis. He said that he had never received any complaint of injury of the type sustained by the plaintiff arising out of the use of the Pfisterer tool and had never heard of any such injury of having occurred or of a complaint having been made of injury arising out of the use of the tool.

In cross-examination, he agreed that there are now hydraulically operated tools manufactured which perform the function required of the Pfisterer tool, including tools operated by foot pump. He also agreed that tools powered by electricity and by battery are now available on the market, although these are not manufactured by the Pfisterer Company. He agreed that Pfisterer now manufactures a hydraulic version of its tool which is operated manually.

Mr. David Semple who is an architect and engineer, retained on behalf of the plaintiff, stated in evidence that hand held hydraulic tools have been available on the market for use by users such as the defendant, since the early 1990s. He said he would have thought that present employers would use these hydraulic tools in preference to the Pfisterer tool which the plaintiff used during the course of his work as a cable jointer with the defendant. He thought that the defendant "*should move with the times*" and "*should use the most modern equipment*" that was available to it.

9. No evidence was adduced on behalf of the defendant that had complied with the provisions of Regulation 10 of the Safety, Health and Welfare at Work (General Application) Regulations, 1993 (S.I. No. 44 of 1993) (hereafter "the Regulations of 1993").

Relevant Legislative Provisions
The following legislative provisions are relative to the contentions of the parties in these proceedings.

Sections 6 to 11 of the Safety, Health and Welfare at Work Act, 1989, impose certain "*general duties*" which require employers to ensure, "*so far as is reasonably practicable*", the safety, health and welfare at work of their employees.

Section 60 of the Act of 1989 provides that:-

> *"(1) Nothing in this Act shall be construed:-*
>
> > *(a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by, or under, sections 6 to 11, or,*
> >
> > *(b) as affecting the extent (if any) to which breach of duty imposed by any of the existing documents is actionable".*

Section 12 of the Act of 1989 provides as follows:-

> *12. (1) Every employer shall, as soon as may be, after the coming into operation of this section, prepare, or cause to be prepared, a statement in writing to be known and hereinafter referred to as a "Safety Statement".*
>
> *(2) The Safety Statement shall specify the manner in which the safety, health and welfare of persons employed by an employer shall be secured at work.*
>
> *(3) The Safety Statement shall be based on an identification of the hazards and an assessment of the risks to safety and health at the place of work to which the Safety Statement relates.*
>
> *(4) Without prejudice to the generality of subsection (2), the Safety Statement shall specify:*
>
> > *(a) The arrangements made and resources provided for safeguarding the safety, health and welfare of persons employed at a place of work to which the Safety Statement relates;*
> >
> > *(b) The co-operation required from employees as regards safety, health and welfare; and*
> >
> > *(c) The names, including the names of authorised deputies and job titles where applicable, of the persons responsible for the performance of tasks assigned to them by the said Statement".*

Regulations 10, 11, 13 and 19 of the Safety, Health and Welfare at Work (General Application) Regulations 1993 (S.I. No. 99 pf 1993) (hereafter "the Regulations 1993), provide as follows:-

> **"10. Risk Assessment**

It shall be the duty of every employer in preparing a Safety Statement:-

(a) To be in possession of an assessment in writing of the risks to safety and health at the place of work as required under section 12 (3) of the Act, such risks to include any which put groups of employees at unusual risk, and

(b) To decide on any protective measures to be taken and, if necessary, the protective equipment to be used.

11. Information

It shall be the duty of every employer:-

(a) In providing information to his employees or safety representative (or both) on matters of safety and health, to ensure that such information includes necessary information concerning:-

(i) The safety and health risks and protective and preventive measures and activities in respect of the place of work generally or each type of workstation task (or both),

(ii) Designation of employees under Regulation 9 (1) (c),

(iii) The measures to be taken concerning safety and health pursuant to these Regulations, and

(b) To take measures to ensure that employers of employees from another undertaking engaged in work activities in his undertaking receive adequate information concerning the matters referred to in paragraph (a)…

13. Training

(1) It shall be the duty of every employer in providing training on matters of safety and health to his employees to ensure that:-

(a) His employees receive, during time off from their duties and without loss of remuneration, adequate safety and health training, including, in particular, information and instructions relating to the particular task or workstation involved,

(b) Where tasks are entrusted to an employee, his capabilities in relation to safety and health are taken into account, including in relation to the manual handling of loads by employees the individual risk factors set out in the Ninth Schedule, and

(c) Particularly sensitive risk groups of employees are protected against any dangers which specifically affect them, including in relation to the manual handling of loads by employees the individual risk factors set out in the Ninth Schedule.

(2) Training under paragraph (1) shall be adapted to take account of new or changed risks and shall be provided on recruitment of employees or in the event of transfer of employees, a change of job, the introduction of new work equipment, a change in equipment or the introduction of new technology, and shall be repeated periodically where appropriate.

(3) It shall be the duty of every employer to ensure that employees deom other undertakings engaged at work in his undertaking have received appropriate instructions relating to any risks to health and safety which may be encountered during work activities while working in his place of work.

(4) It shall be the duty of every employer who uses the services of a fixed-term employee or a temporary employee to ensure that such employee receives sufficient training appropriate to the particular characteristics of any work activity involved, account being taken of his qualifications and experience.

19. Duties of Employer

It shall be the duty of every employer, to ensure that:-

(a) The necessary measures are taken so that the work equipment is suitable for the work to be carried out or is properly adapted for that purpose and may be used by employees without risk to their safety and health;

(b) In selecting the work equipment, account is taken of the specific working conditions, characteristics and hazards in the place of work having regard to the safety and health of the employees and any additional hazards posed by the use of such work equipment;

(c) Where it is not possible fully to ensure that work equipment can be used by employees without risk to their safety or health, appropriate measures are taken to minimise any such risk;

(d) Where the use of work equipment is likely to involve a specific risk to the safety or health of employees:

(i) The use of such work equipment is restricted to those employees required to use it; and

(ii) In cases of work involving repairs, modifications, maintenance or servicing of such work equipment,

the employees concerned are competent to carry out such work;

(e) The necessary measures are taken so that employees have at their disposal adequate information and, where appropriate, written instructions on the work equipment; and

(f) Information and instruction referred to in paragraph (e) contains at least adequate safety and health information concerning:

(i) The conditions of use of work equipment

(ii) Foreseeable abnormal situations, and

(iii) The conclusions to be drawn from experience, where appropriate, in using such work equipment; and that such information and any such written instructions are comprehensible to the employees concerned.

The Plaintiff's Claim
It is contended on behalf of the plaintiff, that the defendant ought to have known that repetitive and physically stressful work activities can cause soft tissue injuries to employees.

It is argued that the plaintiff's injury comes into the category of a "*repetitive strain injury*" and that employers within this jurisdiction have been aware of the existence of such injuries since the late 1980s or the early 1990s.

Mr Counihan, S.C. on behalf of the plaintiff, argues that the plaintiff should have anticipated and foreseen that the work which the plaintiff was required to undertake with the Pfisterer machine was work which could have resulted in repetitive strain injury and ought to have taken reasonable steps to reduce the risk of the plaintiff contracting that injury.

Additionally, it is contended on behalf of the plaintiff, that an onus rests upon all employers to provide a safe system of work for their employees and that the system of work which the plaintiff was required to undertake was not safe because it exposed him to the risk of injury and accordingly, it is argued, the defendant failed in its obligation to provide the plaintiff with a safe system of work.

It is also alleged on behalf of the plaintiff that the defendant failed to comply with the obligations imposed upon the defendant pursuant to the provisions of sections 6 to12 of the Safety, Health and Welfare At Work Act 1989 (hereafter "the Act of 1989").

Those statutory provisions impose certain "*general duties*" which require employers to ensure "*so far as is reasonably practicable*" the safety, health and welfare at work of their employees.

Section 12 of the Act of 1989 imposes upon employers a duty, inter alia, to:

"Prepare, or cause to be prepared, a statement in writing to be known and hereinafter referred to as a 'Safety Statement'".

It is contended on behalf of the plaintiff that no evidence was adduced in these proceedings, demonstrating that the defendant had complied with its obligations pursuant to s. 12 of the Act of 1989, and that is certainly the case.

However, no evidence has been adduced in these proceedings which would suggest that the preparation or publication by the defendant of a Safety Statement of the kind required by s.12 of the Act of 1989 would have reduced or eliminated the risk to the plaintiff of the injury which he says he sustained.

In particular, Mr Counihan S.C., on behalf of the plaintiff, relies upon the provisions of Regulation 10 of the Regulations of 1993, which impose upon employers a duty, when preparing a Safety Statement, to:-

" . . (a) be in possession of an assessment in writing of the risks to safety and health at the place of work as required under section 12 (3) of the Act, such risks to include any which put groups of employees at unusual risk, and

(b) to decide on any protective measures to be taken and, if necessary, the protective equipment to be used."

Mr. Counihan relies also upon the provisions of Regulation 13 of the Regulations of 1993 which imposes upon employers a duty to provide their employees with training on matters of safety and health.

Pointing to the evidence adduced at the trial, he argues that the plaintiff was instructed how to use the Pfisterer tool by his contemporaries but was not trained to adopt an appropriate and correct posture and stance in order to minimise the stress created by the use of the tool. He contends that the plaintiff was, therefore, not adequately trained in a manner contemplated by Regulation 13 of the Regulations.

Finally, it is contended on behalf of the plaintiff that the defendant was in breach of the requirement imposed upon it by Regulation 19 of the Regulations of 1993, which required the defendant to provide its employees with work equipment which was suitable for the work required of its employees.

Decision

1. Duty at Common Law
The duty owed at Common Law by the defendant to the plaintiff was, and remains, the duty owed by all employers to their employees, that is the duty identified by O'Higgins C.J. in *Dalton v. Frendo* (Unreported) Supreme Court, 15th December, 1977), "*to take reasonable care for the servant's safety in all the circumstances of the case*".

It has been repeatedly confirmed by the courts that employers are not the insurers of their employees. They cannot ensure their safety in all circumstances and are not required to do so.

In *Bradley v. Coras Iompair Éireann* [1976] I.R.217, the Supreme Court (Henchy J.) confirmed at p.223 that an employer "*will have discharged his duty of care if he does what a reasonable and prudent employer would have done in the circumstances*".

In the instant case, the defendant was notified by letter dated 26th September, 1996, that the plaintiff had suffered an injury which might be connected with his work. Dr. Casey's letter of that date advising that the plaintiff had suffered intermittently over a five year period with recurrent symptoms in his elbows was the first such notice received by the plaintiff.

Dr. Casey advised that it was his opinion and that of the "*consultants*" that the plaintiff's condition had been caused by his work as a cable jointer and was therefore likely to recur if he returned to the same type of work.

Shortly after the plaintiff returned to work during the same month, he was placed on light duties which did not require the use of the Pfisterer compression tool and he has remained working on light duties up to the present time.

Evidence was adduced on behalf of the defendant indicating: (a) that between 1991 and 1996, Pfisterer tools were in constant use by all of the defendant's crews who did similar work without report of any injury and, (b), that the tool had been sold in sixteen countries around the world without any report of a similar injury resulting from its use. That evidence was not challenged by or on behalf of the plaintiff.

Additionally, the evidence adduced on behalf of the plaintiff indicated that between August, 1991, when he first consulted Dr. Casey complaining of pain and discomfort in his right elbow, and September, 1996, when Dr. Casey wrote to the defendant, neither Dr. Casey, nor the other expert medical practitioners who examined and treated the plaintiff, had made any clear connection between the plaintiff's symptoms and the nature and extent of his work with the defendant.

There was a clear conflict between the evidence of Dr. O'Connell, a Consultant Rheumatologist, and Mr. Robert McQuillan, a Consultant Orthopaedic Surgeon, as to whether the plaintiff's injury was or could be connected with his work with the Pfisterer tool.

Against that background the question arises whether the defendant could reasonably have foreseen between 1991 and 1996 that by requiring the plaintiff to use the Pfisterer tool, it was exposing him to the risk of injury of the type which he suffered. I am bound to say that I do not think that the defendant could have reasonably foreseen such a risk.

It is contended on behalf of the plaintiff that by the early 1990s, the concept of "*repetitive strain injury*" was well known to employers within this jurisdiction and to the courts. That may well have been the case but no evidence was adduced in these proceedings which suggested that between 1990 and 1996, the risk of suffering an injury such as the plaintiff suffered from the use of a tool such as the Pfisterer tool was known to employers within this or any other jurisdiction.

Mr. Semple, in evidence, said that he thought that the defendants "*moved with the times*" and "*should use the most modern equipment*" available to it. He said that in the early 1990s, hydraulically operated handheld tools and battery powered tools were available which performed the function required of the Pfisterer.

However, no evidence was adduced which suggested that the electrical, battery driven and hydraulically operated tools which were referred to in evidence, had been designed and introduced for reasons associated with the health and safety of the operators of such tools or by reason of any known risk of injury associated with the Pfisterer.

It is of significance that, when the plaintiff was notified by Dr. Casey that it was his opinion that the plaintiff's injury was connected with his work as a cable jointer, the plaintiff was immediately placed on light duties and remained on those duties permanently. That was consistent with reasonable care by the defendant for the safety and health of the plaintiff immediately the risk of injury became apparent to the defendant.

It follows from what I have found that the plaintiff has not discharged the onus of proof by way of evidence and on the balance of probabilities, that the defendant had, between 1991 and September 1996, or at any earlier time, failed to discharge its duty at Common Law to take reasonable care for the plaintiff's safety at work, to take such steps as were to be expected from a reasonable and prudent employer to provide the plaintiff with a safe system of work in the circumstances which then pertained.

2. Statutory Duty
Sections 6 to11 inclusive of the Act of 1989 are described as "*general duties*" which require employers to ensure "*so far as is reasonably practicable*" the safety, health and welfare at work of their employees.

The terms of the sections are self-explanatory and can be said to restate the obligations already imposed at Common Law upon employers.

Of particular importance, however, section 60 of the Act of 1989 provides that:-

> "*(1) Nothing in this Act shall be construed -*
>
> > *(a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by or under sections 6 to 11 [of the Act]…".*

It follows that the plaintiff may not recover damages from the defendant on the grounds alone of a failure by the defendant to comply with any duty imposed by the provisions of sections 6 to11 of the Act of 1989.

I am satisfied, however, that the provisions of s. 60 of the Act of 1989 do not disadvantage the plaintiff since duties imposed by sections 6 to 11 of the Act of 1989 are, in fact, duties imposed at Common Law upon employers and the plaintiff has been entitled to and has made those claims against the defendant at Common Law.

It is claimed on behalf of the plaintiff that the defendant failed in its duty under s. 12 of the Act of 1989 to "*. . . prepare or cause to be prepared, a statement in writing to be known and hereinafter referred as a 'Safety Statement'*".

I am satisfied on the evidence and on the balance of probabilities that the defendant has not complied with its obligations pursuant to s.12 of the Act of 1989 because that breach of duty was expressly pleaded by the plaintiff and referred to repeatedly during the course of the trial of these proceedings and no evidence was adduced on behalf of the defendant indicating or suggesting that the Safety Statement required by s.12 of the Act of 1989 had, in fact, been prepared or published.

The plaintiff has therefore established a breach by the defendant of its statutory duty under s. 12 of the Act of 1989.

However, no evidence has been adduced in these proceedings which would suggest that the preparation or publication of a Safety Statement would have reduced or eliminated the risk to the plaintiff of the injury which he sustained.

Of greater relevance, however, is the contention made by Mr. Counihan S.C. on behalf of the plaintiff, that by failing to comply with the provisions of Regulation 10 of the Regulations of 1993, the defendant caused or contributed to the injury which the plaintiff has sustained.

Article 10 of the Regulations of 1993 requires the plaintiff, when preparing a Safety Statement, to:-

> *". . . (a) be in possession of an assessment in writing of the risks to safety and health at the place of work required under section 12 (3) of the Act, such risks to include any which put groups of employees at unusual risks, and*
>
> *(b) decide on any protective measures to be taken and, if necessary, the protective equipment to be used".*

No evidence was adduced on behalf of the defendant indicating or suggesting that such an assessment was undertaken or published in respect of the plaintiff's job and the manner in which he was required to undertake his duties.

Undeniably, the defendant has a statutory obligation, with effect from 22nd February, 1993, to prepare and publish a risk assessment in respect of the plaintiff's job and to decide on any protective measures which needed to be implemented in order to protect the plaintiff from the risk of injury or illness. The defendant was in breach of that statutory duty and, upon the evidence adduced in these proceedings, it may still remain in breach of that statutory duty.

However, no evidence was adduced in these proceedings which would support the contention that if the plaintiff had carried out a risk assessment on the plaintiff's job between 1991 and 1996, the risk of his sustaining an injury of the type which he appears to have sustained, would have been apparent to the (presumably expert) assessor.

On the evidence, the Pfisterer tool had been in use by the defendant for many years prior to 1991. It was in widespread use through sixteen other countries worldwide and no report of injury had been associated with its use.

The medical experts, who examined the plaintiff in respect of his complaints between 1991 and 1996, did not appear to make a connection between his symptoms and the use of the Pfisterer tool until 1996, and there remains a difference of view between the medical witnesses who testified in these proceedings as to that connection.

Accordingly, whilst the plaintiff has established a breach by the defendant of its duty pursuant to the provisions of Regulation 10 of the Regulations of 1993, he has not established, on the evidence and on the balance of probabilities, that the defendant's breach of statutory duty caused or contributed to his illness and injury because he has not established that a risk assessment, if undertaken, as it should have been, by the defendant between 1993 and 1996, would have disclosed a connection between his injury and the use by him of the Pfisterer tool.

It is also contended on behalf of the plaintiff that the defendant was in breach of its obligations pursuant to Regulation 13 of the Regulations of 1993 to provide the plaintiff with training on matters of safety and health and in particular to provide him with information and instructions relating to his particular task.

Mr. Saunders, in evidence, stated that the plaintiff ought to have been trained to adopt a correct posture and stance so as to minimise the stress factors associated with the use of the Pfisterer tool.

However, no evidence has been adduced indicating that between 1991 and 1996, that there were any particular stress factors associated with the use of the tool or that any particular type of posture or stance would have reduced or eliminated the risk of the type of injury which the plaintiff apparently sustained. Mr Saunders, in his report, candidly acknowledged that such was the case.

Finally, it is contended on behalf of the plaintiff, that the defendant was in breach of the duty imposed upon it by Regulation 19 of the Regulations of 1993 which requires employers " *. . to ensure that . . . the necessary measures are taken so that the work equipment is suitable for the work to be carried out or is properly adapted for that purpose and may be used by employees without risk to their safety and health*".

Reliance is placed upon the decision of the High Court (Kearns J.) in *Everitt v. Thorsman Ireland Ltd.* [2000] 1 I.R. 256.

In that case, the plaintiff sustained an injury when a lever with which he was supplied by his employers, snapped and broke causing him to fall backwards onto the ground and sustained an injury. The evidence adduced in the case established that a latent defect within the metal lever caused it to snap and break. It was also established that the plaintiff's employer could not have known of this defect. It had bought the lever in good faith from a seemingly reputable manufacturer.

Kearns J. asked at p.262:-

> *"What further steps could the employer have taken . . . Short of having the lever assessed by an expert in metallurgy or breaking the lever with a view to determining its maximum stress resistance, it is difficult to see what could have been done. It was a newly purchased tool which appeared strong enough for the job and had been purchased from a reputable supplier and there is no suggestion to the contrary."*

He held that the claim in Common Law against the employer failed.

However, at p. 263 he went on to find that Regulation 19 of the Regulations of 1993:-

> *". . . imposes virtually an absolute duty on employers in respect of the safety of equipment provided for the use of their employees . . . while there is no blameworthiness in any meaningful sense of the word on the part of the employers in this case, these Regulations do exist for sound policy reasons at least, namely, to ensure that an employee who suffers an injury at work through no fault of his own by using defective equipment, should not be left without remedy". As O'Flaherty J. pointed out, "an employer in such a situation may usually, though not always, be in a position to seek indemnity from the third party who supplied the work equipment".*

He found that there was a breach of statutory duty on the part of the employer and awarded the plaintiff damages against his

employer who, in turn, was entitled to recover a full indemnity from the company from which the faulty lever had been purchased by the employer.

In the instant case, I have found that the plaintiff has not established a breach by the defendant of any duty at Common Law owed by the defendant to the plaintiff as his employer.

However, with effect from 22nd February, 1993, (when the Regulations of 1993 came into force), a statutory duty was imposed upon the defendant which has been described (by Kearns J.at p. 263 in *Everitt*) "*as virtually an absolute duty*" which requires the defendant " *. . . to ensure that . . . the necessary measures are taken so that the work equipment is suitable for the work to be carried out or is properly adapted for that purpose and may be used by employees without risk to their safety and health*".

I am satisfied that it has been established on the evidence and on the balance of probabilities that the use by the plaintiff of the Pfisterer compression tool caused or contributed to the bilateral epicondylitis of his elbows. It follows that, insofar as the plaintiff was concerned, the Pfisterer compression tool was not suitable for the work which he was required to carry out by the defendant.

The evidence has also established that hydraulically operated and battery powered tools were available between 1993 and 1996 which could have been used by the plaintiff to do his job without risk to his health or safety. Accordingly, I am satisfied that the plaintiff has established on the evidence and on the balance of probabilities that between February, 1993 and September, 1996, the defendant was in breach of the very strict duty imposed upon him by Regulation 19 of the Regulations of 1993 to ensure that the work equipment, and in particular the compression tools which the plaintiff was required to use in the course of his work on behalf of the defendant, were suitable and could be used by the plaintiff without risk to his safety and health.

It has been established on the evidence and on the balance of probabilities, that by 1993, the plaintiff had already been diagnosed with persistent symptoms in his right elbow which had been treated by way of physiotherapy in 1991. He is not entitled to recover damages in respect of those symptoms.

In evidence he stated that it was October, 1995, before his symptoms became sufficiently severe to require him to consult his General Practitioner, Dr. Casey.

By then both of his elbows were very painful and he noticed that when he returned to work his condition became aggravated and worsened. He was out of work from 30th April, 1996, until 26th September, 1996, when he was placed on light duties.

He has not had severe symptoms since his return to work although he was depressed for some time after his return to work in 1996.

On the evidence, the plaintiff had developed tendonitis in his right lateral elbow in 1991 and was also complaining of what was described as "*some slight pain*" in his left elbow. It is likely that epicondylitis had already developed in his right elbow and had commenced in his left elbow by February, 1993, in the absence of negligence or breach of duty on the part of the defendant. He is not entitled to recover damages for his pain and discomfort before February, 1993.

Between February, 1993 and October, 1995, the plaintiff's epicondylitis worsened considerably in both elbows and he required treatment in October, 1995 and September, 1996 when he returned to work and was put on light duties. Between October, 1995 and September, 1996, he required considerable treatment and had ongoing symptoms which seriously disrupted his life and indeed prevented him for working at all between April, 1996 and September, 1996.

He is entitled to recover damages to compensate him for the pain, suffering, distress, inconvenience and disruption of his life during that time and thereafter.

After September, 1996, the plaintiff suffered from depression but has now recovered largely from that condition.

Since he has been placed on light duties, he has not had a recurrence of his symptoms to any great extent but he will have an ongoing need to take appropriate care in the choice of his activities and he may be slightly restricted in vigorous manual activity. On the evidence, however, if he is careful, his life should not be altered appreciably in the future as a result of this condition.

In the circumstances, I am satisfied that this is a case where a single award for general damages is appropriate and I would assess general damages at €45,000.