

THE HIGH COURT

Record Number: 2000 No. 14685P

BETWEEN

DOROTHY KEOGH

PLAINTIFF

AND

ELECTRICITY SUPPLY BOARD AND EIRCOM LIMITED

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 23rd day of August 2005

1. The plaintiff, who was aged 30 years at the time, was speaking on the telephone on Christmas Day 1997 when she experienced an electric shock through the receiver which she was holding to her ear with her right hand. It was severe enough to render her unconscious and for her to sustain burns to her finger tips, her neck and her right hip. Her right hip had been in contact with a metal sink at the time. She has no recollection of the incident itself, and says that she recalls going to make the phone call and then waking up in an ambulance.

2. She was admitted to the Burns Unit in Loughlinstown Hospital, Co. Dublin. She was kept in hospital for forty eight hours and was then discharged to the care of her General Practitioner for dressings to her injuries.

3. In her Statement of Claim she pleads that this shock was caused as a result of electricity escaping from an ESB transformer which is on land adjoining her home at Ballybeg, Redcross, Co. Wicklow, and being transmitted to her telephone handset by an underground telephone cable.

4. A very relevant fact in this case is that on Christmas Eve 1997 weather conditions in the area of the plaintiff's home at Redcross were severe, such that there was extensive damage caused to electricity cables and supply to homes, including the plaintiff's. This undoubtedly stretched the resources of the ESB to deal with all faults and cable damage. Evidence from Met Eireann is that a vigorous storm depression of 972 hPa. tracked East-Northeastwards over the northern half of the country on the afternoon/evening the 24th December 1997, and that the strongest winds in the Redcross area occurred during that period with mean speeds reaching 60 to 85 km/h, possibly gusting over 150 km/h, and that these conditions would have led to structural damage. On Christmas Day itself, there were still very windy conditions, though not as severe as those on Christmas Eve.

5. The plaintiff's evidence is that because of the weather conditions she had no electricity at her home from about 7pm on Christmas Eve 1997, and that everywhere around her home was also cut off. When she got back home after her discharge from hospital on the 27th December 1997, she recalls that the electricity transformer near her home was being repaired at the time, and power returned that day also.

6. The plaintiff's partner, Michael Porter gave evidence of what happened when the plaintiff made the phone call on Christmas Day 1997. He said that he was talking to the plaintiff in the kitchen. He then walked away and heard a bang. He turned around and saw the plaintiff sliding downwards to the floor. He saw that she could not speak, her eyes were rolling around and there was a brown substance coming out of her mouth. He said that she could not talk to him, and looked to be what he called "a bad way". An ambulance was called, and she was taken to hospital.

7. He gave evidence also of what had happened on Christmas Eve as far as the weather and loss of electricity was concerned. He states that on Christmas Eve he telephoned the ESB because he had been outside the home and saw sparks coming out of the ESB transformer and there was no power in the premises. He remembers telling this to the person he spoke to in the ESB. He recalls that the wind was certainly very strong but that the pole was not down and there was no lightning. He remembers having seen an electrical cable knocking against the side of the transformer. It had apparently broken away from the transformer itself. He recalls also that on the Saturday after Christmas day (the 27th December 1997) the ESB restored power, put up a new transformer on the pole, and took away the old transformer. When he was cross-examined by Mel Cristle SC for the defendants, he agreed that the weather conditions were very bad, and that there were many power blackouts in the county of Wicklow over those days. But he could not comment when it was put to him that the ESB crews would have been very stretched to deal with all the necessary repairs. It was also put to him that in fact power was restored on the 26th December 1997, but he was certain that it was the day on which the plaintiff was discharged from hospital, which was Saturday the 27th December 1997.

8. It is worth mentioning at this stage that the first named defendant has taken over the defence of these proceedings, because although the ESB do not accept that it was negligent in the matter, they accept also that no fault lies with the second named defendant. I shall hereafter refer to the first named defendant as "the defendant". In its Defence delivered herein, the defendant denies negligence and pleads that this was an "inevitable accident" and/or an Act of God, given the particularly adverse weather conditions.

9. As well as the report of Met Eireann to which I have referred, the Court has had the benefit of a Report and the evidence of Mr Anthony Tennyson, Consulting Engineer on behalf of the plaintiff. He has described the method by which the transformer is fixed to the top of the pole, and cables are attached to the transformer. Its purpose is to reduce the incoming medium voltage of 10K volts fed into the transformer by means of two cables (one being live) down to the normal outgoing mains low voltage. Each cable (four in total, two incoming and two outgoing) is attached to a "bushing" which is in turn attached to the transformer. Mr Tennyson of course did not see the transformer and the detached cable, since his report was compiled long after the event. But on the basis of what is contained in the ESB's own report made at the time, he has reached certain conclusions as to what happened.

10. That ESB report notes, *inter alia*, as follows:

"When ESB went to investigate the "no supply" call out, they found that one of the high voltage bushings on the 10kV cables had broken off in the storm. This was still connected to one of the two 10kV cables supplying the transformer and had been swinging free in the wind, supported by the dropper part of the cable. The ESB electrician observed flash marks on the Low Voltage bushings where, apparently, the broken bushing or part of the dropper cable had been making contact intermittently."

11. That report also describes two possible effects caused by the intermittent contact of the live part of the high voltage phase on the transformer with the bushings on its low voltage side. Of the two effects considered the following is described as the most likely:

"If it [the live voltage cable] had contacted the neutral conductor, it would have transferred a momentary 6kV potential not only on that conductor, and whatever it was connected to, but also would have imposed a 6 kV voltage onto any earth connection and any conductive part connected to the protective conductor. It would in effect have raised all conductive parts to the same potential....."

.....Thus, if the intermittent contact between the high voltage and low voltage circuits in the transformer had happened when Ms. Keogh was leaning against the sink, the sink and her body would have been raised to a possible 6kV. She would not have felt any effect as no current would have passed. However, if she placed a phone receiver close to her head at the same time, it is quite likely that there could have been a breakdown in the air gap between her head and the phone's internal conductive parts. A current would have passed from the sink through Ms. Keogh to the telephone circuit. It would have had to be of very short duration or else Ms. Keogh would have been killed."

12. The report also comments that the breaking of the bushing was due to "the very high wind" and was one of many incidents which contributed to the extensive damage caused by the storm.

13. In general, Mr Tennyson agrees with the description of how the increased voltage reached the metal surfaces within the house, by means of the neutral bushing. There is no need to look at that evidence further.

14. Mr Tennyson has also stated that the intermittent contact of the medium voltage cable with the low voltage secondary terminal bushing would have caused the sparking observed on Christmas Eve. He agrees also that the plaintiff was injured as a result of her right hip being in contact with the metal sink. That sink was connected to the earth which in turn was connected to the ESB neutral supply which in turn was touched by the broken medium voltage supply cable, thereby causing the sink to experience 6kV of electricity. He is satisfied that when she placed the handset of the telephone to her mouth, the electricity "jumped" to her body thereby causing the shock to her head and body.

15. As far as the effect of the weather conditions on the ESB pole and transformer is concerned, Mr Tennyson is of the opinion that transformers are designed to withstand bad weather, and that they must be designed to withstand even worse weather conditions that were experienced at Redcross on this occasion. He has expressed the view that even if there is a break of a cable in adverse weather, the design ought to be such that while some slack is required there should be insufficient slack in the dropper cable for it to come into contact with the neutral terminal. He cannot say definitely what the cause was in the present case, because he did not have the opportunity of examining the installation at the time, but he has stated that whatever the cause, it ought not to happen because of the serious dangers involved. Possible causes might be, according to his evidence, that it was not properly applied or tightened, or corrosion or that it was too old. When cross-examined by Mr Cristle about this particular matter he described the falling of the dropper cable as being a mechanical failure or defect, and not simply attributable to severe weather.

16. He has expressed the opinion also that given that Mr Porter made the call to the ESB on Christmas Eve and reported sparking, that call was not given the appropriate priority commensurate with the possible implications for safety. He explained in his evidence that a medium level voltage system has what he called an isolated neutral, and that, because of this, exposed live conductors can be in contact with the ground, and still not activate the normal protective device in a house such as a fuse. It is for this reason that the ESB will give very high priority to a fallen cable of 10kV which may be in contact with the ground, because the system will not detect the fault. He stated that the person in the ESB who takes calls such as this one made by Mr Porter would be trained to understand the implications of a report of "sparking" and would give that call the appropriate high priority, because of the known dangers. He is of the view that the time lapse between the report of this call by Mr Porter and the ESB response was too long and was not a reasonable response. He described the ESB as being well resourced and equipped and he would expect that type of call to be responded to within hours. When he was cross-examined about this, he accepted that over that Christmas, the ESB emergency crews would have been very busy, but he did not accept that any such pressure could excuse the delay in dealing with this reported cable fault, and that there was a great difference between an emergency call about a dropped cable, and a loss of power call, and that calls had to be appropriately prioritised so that urgent and potentially dangerous situations were addressed with urgency. He accepted however that even when the dropper cable came loose it would not reach the ground itself and that therefore people or animals were not in direct danger from it. But he went on to say that nonetheless there was a foreseeable risk from indirect contact, such as in the present case. In the present case, as already stated, he is of the view that there was an excessive amount of slack in the dropper cable.

17. It was also put to Mr Tennyson that an official from the ESB would say that the incident which occurred in the present case was unique in his 37 years of experience with the ESB. Mr Tennyson agreed that it would be rare because it simply should not be allowed to happen, but that in the present case something went wrong, and that it was not simply the high wind conditions at the time.

18. Mr Tennyson commented, in relation to the weather conditions as reported by Met Eireann, that the weather conditions on that Christmas Eve, though severe, were not unforeseeable.

19. For the defendant, evidence was given by Mr Martin McGettigan, an electrician with over 37 years experience. He recalled the problems of Christmas 1997 because of the severe weather conditions on Christmas Eve and the following day. Extra manpower had to be brought in to deal with the volumes of calls. Most calls would have been what he described as "no supply" calls. He stated that persons taking these calls were instructed to monitor calls for emergency situations, and that the priority would always be to make things safe rather than carry out repairs. He said that "sparking" as such may not cause harm to anybody, and that it did not automatically mean that a wire was going to come into contact with any person on the ground. He stated also that this "sparking" occurs at the top of the pole and would not immediately register as a priority in his mind.

20. He stated also that priority was always given to calls regarding wires on the ground, trees fallen onto wires, broken poles and so on.

21. As far as the plaintiff's injury is concerned, he recalled hearing that somebody had been injured and that an ambulance had been called. He sent a Mr Sean O'Brien (now retired) to the scene and apparently he reported back that there had been a "faulty transformer with bushing on it". He said that in his experience if a cable detaches it normally falls clear of the transformer, and does not come into contact with it.

22. He was cross-examined by David Hegarty SC for the plaintiff and was asked why no record of this incident had been kept by the ESB since none had been produced. He replied by stating that he did not know, but that he is not surprised since there had been so many call outs and repairs over that Christmas. On the other hand he was not aware of any other incident over those days which had resulted in any person being hospitalised. He agreed that if an electrician had gone out to this area the electricity supply could have been isolated in order to avoid the dangerous situation which occurred, but he said also that it was very dangerous for an ESB worker

to be expected to climb a pole and disconnect a cable in the windy conditions prevailing at the time, and that his/her life could be endangered in the process.

23. In Mr Hegarty's submission there was evidence that this incident occurred not simply as a result of weather conditions, but that there was negligence also on the part of ESB resulting from a faulty transformer, or faulty installation by excessive slack in the dropper cable which ought to have prevented contact. He also submits that there is evidence that this call by Mr Porter was not given the appropriate priority, even allowing for the number of calls made to the ESB over that Christmas Eve. He puts that factor in the category of a system failure which gave rise to unreasonable delay.

24. Mr Cristle on the other hand submits that the ESB did everything which could be reasonably expected of it in the circumstances of these very severe weather conditions where its resources were stretched so much. He submits that these weather conditions were extremely severe and that it was not foreseeable that the downed cable would be liable to cause the chain of events which led to the plaintiff being injured, and that as Mr McGettigan stated in his evidence, it would have been dangerous for the ESB to ask one of its employees to mount a pole in these conditions for the purpose of isolating the supply.

Duty of Care and Negligence

25. On the evidence in this case I am satisfied on the balance of probabilities that the injury was caused to the plaintiff in the manner described by Mr Tennyson, and with which it appears that Mr Lawlor who prepared a report for the ESB agrees, namely that a medium voltage cable and its bushing became detached from the transformer on Christmas Eve 1997, and that it came into contact with a neutral terminal which enabled a 6kV current of electricity to go to the earth, and via the earth into the premises, thereby causing metal objects in the home of the plaintiff to become live with 6kV, and that when the plaintiff's hip came into contact with the "live" kitchen sink, the current also passed to the telephone handset in the manner described, causing her an electric shock and the injuries sustained. There is no reason to doubt this as the cause of the plaintiff's injury.

26. The question to be decided next is whether the ESB were negligent in the legal sense. In other words, firstly, was the ESB under a duty of care; if so, was the ESB in breach of that duty of care; and if so was there a causal link between that breach of duty of care and the injury sustained by the plaintiff. Issues of foreseeability of injury arise in that regard. In addition to these matters, the Court must, under the most recent authoritative statement on the law in this area by Keane CJ in his judgment in *Glencar Exploration Ltd v. Mayo County Council* [2002] 1 I.L.R.M. 481 consider whether any public policy considerations should absolve a public body such as the ESB from liability, and finally whether it is "just and reasonable" that a duty of care of the kind contended for by the plaintiff should be imposed on the ESB. In this last regard, the adverse weather conditions would be a relevant consideration. In his judgment in *Glencar*, the learned Chief Justice stated:

"...It seems to me that no injustice will be done if they [courts] are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J. at first instance in Ward v. McMaster, by Brennan J. in Sutherland Shire Council v. Heyman and by the House of Lords in Caparo Industries Plc v. Dickman. As Brennan J. pointed out, there is a significant risk that any other approach will result in what he called a "massive extension of a prima facie duty of care restrained only by undefinable considerations..."

A duty of care

27. In my view there can be no room for doubt that the ESB owes a duty of care not only to its customers but to the public generally with regard to the safety of its installations and the manner in which it delivers that service to the general public. As far as this plaintiff is concerned, there is no difficulty as far as a relationship of proximity between her and the ESB is concerned. She is firstly a customer, but as far as this case is concerned she is someone living in close proximity to an ESB supply pole and cables attached thereto, and therefore someone whom the ESB must be regarded as having in their consideration when ensuring the safety of installation in question close to her home. It would also have in mind the general public who may use the roadway on which the pole exists. This duty of care both to this plaintiff and the public at large extends to ensuring that all reasonable steps are taken by it to ensure that the pole, transformer and cables attaching thereto are properly maintained in a safe condition. A safe condition must take reasonable account of weather conditions which are reasonably foreseeable in the area. The fact that the ESB may have a great number of individual poles across the length and breadth of the country cannot in any way operate to reduce or dilute the level of vigilance to be exercised by the ESB in and about the safety of its installations, particularly since the danger of serious injury or death from coming into contact with a live cable, either directly or, as in this case, indirectly, are well known, obvious and completely foreseeable. This ever present and real danger is one which requires a very high standard of vigilance, before it could be said that reasonable care had been taken for its avoidance. The greater the danger the greater the level of care which must be expected from the person or body in whose charge the dangerous situation rests.

A breach of that duty

28. There is sufficient evidence to satisfy the Court on the balance of probabilities that what is described in the ESB's report as a high voltage cable with its bushing had broken off in the stormy conditions prevailing on Christmas Eve 1997 and that this cable made intermittent contact with the neutral conductor on the transformer, thereby causing surfaces in the plaintiff's home to become "live", and which resulted in her injury. The question is whether ESB took what in all the circumstances was reasonable care for the plaintiff's safety. In its own defence, ESB says that the weather conditions were such as to make this accident inevitable, or else it occurred as a result of an Act of God. The latter is out of the question as far as I am concerned. There is no evidence of anything unique and unforeseeable such that it could be so described. What happened, as is known to happen, is that over a day of two there was some very strong wind blowing, inter alia, in the area of this plaintiff's home in County Wicklow. The evidence is that wind strength was in the region of 60 to 85 km/hr (not miles per hour) and gusting up to 150 km/hr. These conditions were certainly very windy, and some might even describe them as stormy. The Met Eireann report for the area on that day confirms that the conditions "would have led to structural damage". But they are not rare conditions, much less unique, particularly in winter. There is no evidence that these conditions were even the worst in living memory or historically according to historical weather records. It follows in my view that the ESB have a duty, as part of the duty of care, to ensure that its installations are maintained sufficiently to ensure that they withstand the type of weather conditions experienced that day in Redcross. It would appear that a bushing became detached from the transformer in the windy conditions. If the dropper cable had operated in such a way as to prevent that loose cable and bushing from swinging in a way so as to make contact with the neutral conductor, no harm would have resulted. Whatever way the cable was designed and installed did not in the present case serve to avoid the danger which resulted from the bushing becoming detached from the transformer. Whether the transformer was old and in need of replacement, or whether through wear and tear or age, the bushing broke off from the transformer in either the wind or one gust of wind, I am satisfied that this installation was not maintained properly to ensure that it would not sustain the sort of damage which could be foreseen could result from these reasonably foreseeable weather conditions.

29. The second aspect of the duty of care and the breach of it, relates to the delay in having the problem attended to after Mr Porter reported to the ESB that he had seen sparking at the pole. Even if there was no fault in the transformer or the dropper cable, and all reasonable care had been taken in the maintenance of the pole, transformer and cables, there is an independent duty upon the defendant to make a reasonable response to such a call. This was not just a loss of service call, which no doubt was one of a very large number in the Wicklow area over that Christmas Eve and Christmas Day. This was the type of call to which priority would have to be given by those persons who are trained to know the difference between a loss of service call, and a call which indicates a potential danger to a member of the public, such as a fallen live cable. It is true that the cable in the present case was not lying on the ground and in that way causing a danger to the general public who might come across it on the roadway. But the fact that there was sparking must reasonably indicate to those suitably trained and possessed of the knowledge and expertise to understand these things as part of their work that a danger existed in the possibility of a live cable swinging freely and making contact with some part of the installation. It should be reasonably foreseeable in my view to someone working in the ESB and to whom this call was reported, that such a situation could result in that cable coming into contact with the neutral conductor and thereby cause a danger within the home of the plaintiff in the way that happened. Therefore that call needed urgent attention.

30. I have little doubt that in normal weather conditions when the manpower of the ESB was not stretched as it was on this occasion, that call would have been dealt with promptly, and by that I mean within an hour or two, or perhaps even more quickly than that. It does not follow of course that the plaintiff would not have made her phone call even within that time, but that is not the point. If the ESB acted with reasonable speed in all the circumstances, the plaintiff might have difficulty establishing that the ESB was negligent in relation to the time it took for them to respond to her call, and in the absence of any other negligence being established, would not succeed in any claim. But in the present case I am satisfied that the repair was not dealt with within a reasonable time given the danger which should have been apparent to the ESB. I accept that their resources were stretched and seriously stretched, but in a situation where it has responsibility for a very dangerous service, namely electricity, it cannot be an adequate defence to a claim to say that it could not deal with that call at about 7pm dated 24th December 1997 until the 27th December 1997. The ESB say that it was dealt with on the 26th December 1997, rather than the 27th, but either way in my view it was not reasonable to leave that danger in existence since the evening of the 24th. To do so increased the danger that someone in the plaintiff's home would receive the sort of injury that the plaintiff sustained on the 25th.

Foreseeability of injury

31. In addition to the weather conditions being foreseeable, I have no doubt that to the defendant ESB it is completely foreseeable that if that live medium voltage cable comes into contact with the neutral conductor on the transformer outside the plaintiff's home, it will have the potential to cause injury in the way which occurred to any person in the plaintiff's home who might come into contact with a "live" surface therein.

Public policy considerations

32. I can think of no policy consideration which could be such as to outweigh the obligations upon the ESB to avoid, by ensuring the proper maintenance of their installations, and responding promptly to a call indicating a potential danger, causing serious injury to members of the public even in a situation, such as the present one, where the immediate danger cause of the danger was produced by severe windy weather. No such policy consideration has been urged upon the Court.

Is it fair and reasonable that a duty of such a scope should be imposed on the ESB?

33. In my view, given the nature of the service provided and the dangers known to exist from live cables/bushings coming loose from the transformer, it is fair and reasonable, indeed absolutely necessary, for such an obligation of safety, even in adverse weather conditions, to be imposed on the ESB. It is the organisation charged with this responsibility and it has the expertise and the resources available to it, in order to both anticipate and foresee the dangers, and to remedy defects when they come to light. The public is dependent upon that expertise and those resources for its reasonable safety.

The plaintiff's injuries

34. Immediately following this electric shock, the plaintiff lost consciousness for over an hour until she came to in the ambulance. She was found to have suffered a burn to her right hip for which she received conservative treatment with dressings. Fortunately there is no residual scarring.

35. She also received a first degree burn to her neck, since she was wearing a chain around her neck at the time. Again, dressings were applied to this injury.

36. As a result of discomfort in her right ear and neck at night she suffers intermittently from sleep disturbance.

37. Right cheek tenderness/ spasm – right ear pain has not been explained in reports, but she complains of intermittent bad pain in her ear when lying in bed, and difficulty raising her head from the pillow. Mr A.R. Dennis, Medical-legal consultant has reported that he is of the opinion that she sustained a nerve injury in the region of her right ear as a result of the discharge of high voltage electricity through the telephone. He believes her recovery in this regard will be long-term if at all.

38. In her evidence she stated that she had spent two days in hospital. When she was discharged she was required to have her dressings changed at St. James's Hospital over a period of two months, and then to attend her own General Practitioner. The changing of the dressings was quite sore. She described the pain she felt in her right cheek area as being "like someone trying to pull the side of her face away", and that it was very painful. This occurs at night usually, and can happen two or three nights in a row, and then perhaps it would not happen for some weeks and then return.

39. It is the pain in the side of her face at night which continues to cause her some difficulty. The other aspects of her injury have cleared up, apart from the fact that she retains a fear of using the telephone in bad weather.

40. There is some room for doubt about the source of her right cheek/jaw pain. There is some suggestion in some of the medical reports that she may have a jaw problem, but given that she had no difficulty in that area prior to this incident, and given that she received an electric shock to the right side of her face, I am satisfied on the balance of probabilities that this is a sequela of the incident. Mr Dennis opines that it results from some nerve injury. Fortunately it is the only remaining problem she has from this dreadful incident where she could have been so much more badly injured or even killed. But she is likely to continue to suffer this problem into the future.

41. For her past pain and suffering I assess general damages in the sum of €35,000. For her future pain and suffering I assess the sum of €18,000, making the sum of €53,000, to which I add travel expenses of €400, making a total of general and special damages of €53400.

