

BETWEEN**TERENCE (OTHERWISE TERRY) MORGAN****PLAINTIFF****AND****ELECTRICITY SUPPLY BOARD****DEFENDANT****JUDGMENT of Ms. Justice O'Hanlon delivered on the 10th day of May, 2018****Evidence of Mr. Terence Morgan**

1. The plaintiff confirmed that he is 60 years of age and lives at Drumnacarra, Ravensdale, Dundalk, Co. Louth, and that he has almost 38 years of service with the ESB. He described his work there prior to the accident as involving regular electric work with an emphasis on connection or disconnection of people who were not paying bills and also protecting ESB Revenue, in investigating people stealing electricity. He described his working day prior to the accident as beginning at 8am and the first hour involved work in the post room sorting out post. He described normal duties from 9am till 1pm dealing with electricity disconnections and visiting premises. He used to take a half hour lunch break and then finish at 4:30pm. The afternoon was spent working in Dundalk, as opposed to in the rural areas.

2. The plaintiff described attending at the ESB offices in Avenue Road, Dundalk to do a run picking up the post and then at lunchtime he would collect the post, bring it down to the franking machine, frank it and have it ready for the evening collection. Between 2pm and 3:30pm he would do normal duties, calling to people's houses. He described his normal routine; parking at the back door going left up the east stairs, picking up the post in designated spots on the top landing and bringing them down the west side of the stairs to where the post room is located, towards the bottom of the stairs.

3. On the occasion of this accident, the plaintiff described parking at the back door of the building as normal and going up the stairs on the east side of the building, collecting the posts at the two designated areas and he said that included quite an amount of post with eight large envelopes and a small parcel half the size of a shoe box. He proceeded to the west side of the building and went down those stairs. The plaintiff described going down the first flight of stairs, turning on the landing and as he went to step down from the landing to the first step on the lower flight of the stairs his feet went from him, and he slipped and fell, and dropped the post.

4. The plaintiff confirmed that he extended his left arm trying to save himself but didn't and tumbled down most of the steps to the second last step. He described himself as sore and winded and sat for a few minutes to compose himself. He then went back up the stairs picking up the parcels that he had dropped and to see what he had slipped on and noticed that there was water on the landing and some water on the first step.

5. With reference to the photographic evidence, the plaintiff confirmed that, on his dissent when he slipped and fell, he had one foot on the landing and one foot down on first step marked No. 9 on the photographs. The plaintiff described how he collected the parcels, dropped them into the post room which is immediately at the bottom of the stairs or very close to it and he got some cloths from underneath the stairwell, dried the landing and the first step to ensure safety because it was quite a hazard. He then proceeded to collect whatever post he had and went out for an hour and twenty minutes, calling to houses but began to feel very sore. He dropped the post off in the post office and went home at 3:20pm, probably an hour before his normal finishing time.

6. This witness confirmed that he did not report the accident to anyone as there was no one around and that his direct supervisor would have been out to lunch. At the time he didn't think it was a major incident and he dealt with what he saw as a hazard and when he was cleaning the steps he noticed a few drops of rain coming from the ceiling which had a skylight. The plaintiff described that the following morning he went to Daisy Hill Hospital Newry at 6:45am and he telephoned David Wallace just before 8am. He described this person as a "designated in charge" person when the supervisor is not present. He described him as the supervisor at that time covering the area of Dundalk, Drogheda and Navan. This witness recalled that he explained to Mr. Wallace that he was in Daisy Hill Hospital and that he had slipped on the stairs which were wet and that he had noticed there were droplets or something falling from the skylight.

7. The plaintiff described being out of work for four or five months and he got a yellow form on which his doctor filled in the part describing his injuries. He also described also receiving a "notice of accident form" five or six weeks after the accident in the post. This plaintiff described the original document as having been returned to P.J. Rice, "Secretary and Technical Supervisor", who would have been the investigator of accidents at the time. On the portion of the form entitled "accident, cause and description" this read: "Slipped on wet steps of metal stairs. Steps have covering of plastic tiles. Fell seven or eight steps to bottom of stair case. Water had been spilled on steps. Outstretched left arm to try and save myself". Under "site conditions" he included "staircase steps wet"

8. The plaintiff then described a document given to him by Mr. Rice who asked him to have a look at it and he believes he took it home overnight. He noted a number of things which he disagreed with, which items he had struck out, which he did not accept as being true facts of what happened, and he gave it back to him expecting that he would see it amended again but he said that he had never seen the preliminary report nor indeed the final report.

9. The plaintiff confirmed that he didn't go to a solicitor until about 18 to 20 months after the accident.

10. The court was then referred to p. 3 of the "accident report notifications". The plaintiff gave evidence that he made his amendments to the document and gave it to P.J. Rice. His amendments included amending the time to morning at 7am at the bottom of para. 2 instead of the next day and also at the very bottom he wrote "Slipped on wet stairs where I believe water had been spilled. I outstretched left hand to try and save myself. I fell seven to eight steps. I felt winded and rested for a while, sore and I rested for a while. I franked post and posted same. There was nobody around to report the accident to." The plaintiff claimed that he amended what had been stated by P.J. Rice where he did not agree with the document. He disagreed with the words "loss of balance" in para. 2 and he said he was stating that he slipped on a step that had been wet. He said that at the bottom of the page he put in what happened about him being winded and resting for a while, doing the post, and also the fact that nobody was around to

report the accident to. He disagreed with the part where it was suggested that he didn't feel any pain at all and he described P.J. Rice's intimating to him that he would revert to him. He understood that Mr. Rice would amend the preliminary report to take into account what the plaintiff was saying. He claimed that he did ask Mr. Rice at one stage about it but Mr. Rice was to query it, but didn't come back to him. He said Mr. Rice retired in the following nine months. The plaintiff described that he had photocopied the document in the amended form before he gave it back to Mr. Rice.

11. When Mr. Rice was replaced by a Patrick Monaghan and again the plaintiff approached him about this document and the response was that he was not sure he would be able to access the files of P.J. Rice and that he would let him know about it, but he never came back to the plaintiff and the plaintiff did not pursue it. The plaintiff confirmed that he returned to work in September, 2013 and that the preliminary report was presented to him within a week to ten days on his return to work. The plaintiff confirmed that no training was given to him regarding the collection and carrying of post from the first floor to the post room.

12. The plaintiff described very severe pain when he was in Daisy Hill Hospital the morning after this incident. He said the pain was in his shoulder going down his neck and down into his elbow and his left shoulder. He was X-rayed, received painkillers and was recommended to have physiotherapy and to see his own doctor, Dr. Paschal Malone, whom he saw on 9th May, 2013 some eight days later. Following referral by his GP to the Beacon Clinic he had an X-ray and MRI scan and a diagnosis of inflammation of the acromioclavicular joint i.e. the left shoulder, with tenderness, was made.

13. The plaintiff confirmed referral by the GP on 28th May, 2013 to Dr. Paul Connolly in the Mater Hospital whom he saw on 5th June, 2013, and on 12th July, 2013 where he received steroid injections from Dr. Connolly.

14. The plaintiff confirmed that these injections alleviated the pain for seven days on both occasions and he described the pain returning at that point and being quite severe, and at eight out of ten on a scale of pain. The plaintiff confirmed that he was referred on to Dr. Darragh Hayes, Orthopaedic Surgeon in the Mater Private Hospital who examined him on 25th September, 2013, and performed X-ray guided injections on 7th October, 2013, and on 12th February, 2014. The plaintiff felt that these only gave him a few days relief similar to the initial injections. The plaintiff described being admitted in June, 2014 for surgery and for arthroscopic examination under local anaesthetic. The plaintiff did physiotherapy after that for six to ten weeks at that time. The result of the physiotherapy was to give him a little more movement. When further treated by Dr. Hynes on 17th September, 2014 with another MRI scan which showed tendonitis, the plaintiff confirmed that on 28th January, 2015 he had another steroid injection giving him a few days relief with the pain then returning to a constant level.

15. In April, 2015 the plaintiff confirmed that he was referred to Dr. Damien Malone, Orthopaedic Surgeon in Tallaght Hospital, who performed a joint injection in June, 2015 and two further glenohumeral joint injections in August, 2015 and October, 2015. The plaintiff confirmed that they did not help in any way other than a few initial days relief. The plaintiff confirmed in July, 2016 that a revision arthroscopy under local anaesthetic was carried out in Tallaght Hospital. The plaintiff confirmed a superior labral tear was repaired by this doctor and that he revised the previous decompression in the joint. The plaintiff said that for a week to ten days it seemed to improve the situation but then it went back to the way it was and he didn't feel there was any real change at all. The plaintiff continued to complain of irritation and limitation of movement in the left shoulder and confirmed that that had been the way from the very beginning. He said he could put his hand out straight approximately 50% and he said he confirmed that he couldn't raise his left arm outwards and upwards.

16. The plaintiff confirmed that he was referred by Dr. Malone to Dr. Hu, the pain specialist in Adelaide and Meath Hospital in Tallaght. The plaintiff confirmed that on 22nd June, 2017 a suprascapular nerve block was carried out by Dr. Hu but that again while it initially helped for a day or two it didn't continue beyond relief for two or three days. The plaintiff explained taking Oxynorm initially but then being prescribed Palexia and Lyrica by Dr. Hu. He described Oxynorm as a prescription of morphine based medication which he gets monthly from his GP. The plaintiff confirmed taking Palexia twice a day at the moment and taking Oxynorm all the time as well. The plaintiff had a further nerve block injection carried out in October, 2017 but that it only helped for two or three days. He describes presently the pain as on a scale to ten being at eight and he said that the Oxynorm helps him sleep at night but without it he would not sleep. Dr. Hu increased that drug from one a day to three a day over the last two months. Oxynorm affects one's capacity to work mechanically or drive for a long period of time. As he was beginning work at 10am he could not drive before that hour and he said he is currently beginning work at 9am and that he takes Ibuprofen.

17. The plaintiff described the pain as taking over his life altogether, and that he used to play pitch and putt and go swimming and that he had a treble bypass eight years ago and he swam two or three times a week before the accident but he could no longer swim. He was also walking three times a week for forty minutes to try and keep the weight down and no longer does that. He confirmed that he is unable to garden at the moment and that he has four acres of land and that he had to have people him keep the hedges tidy and the lawns cut but he said it is impossible. He also said socially he used to go cycling because there was a cycle path from where he lives down to Newry He would often go dancing or to the pictures or out for nights socially, for meals and holidays and weekends away and that and he said all of that is diminished completely. He described that because of the pain he is constantly in bad form and bad humour and finding it very hard to deal with things and that there is a lot of tension of home as a result. Dr. Hu made reference to the possibility of inserting wires into the plaintiff's neck and the use of electricity to treat his pain and that the implant for such a device would cost in the region of €20,000. The plaintiff was asked would he consider this and he thought that he would have to give it a lot of thought and get a second or maybe third opinion but that his thinking was that he probably would not have that trial.

18. Under cross examination this witness confirmed that he was able to do a day's work in the context of a very light working week. He confirmed that he could not physically go out for a forty minute walk nor could he physically dig up the garden using a hoe or spade or a shovel and that he can cut hedges with a motor cutting machine. The plaintiff is right handed. The plaintiff insisted that he could not cycle, that he had tried it and found it very painful because one is in a position of bending over and straining the arm out. The plaintiff accepted under cross examination that he had no hands to hold the railing, and when it was put to him that he decided to take enough posts for two hands and that that was his decision, he agreed with that. However, he said he wasn't provided with any mail bag or anything for carrying the post in. The plaintiff agreed that, in relation to the particular stairs where the accident occurred, he would have had occasion to go down them twice a day usually and he agreed that he was very familiar with the stairs and that personally he had never seen a spillage or wet on the stairs on any other occasion. He hadn't noticed the stain at the skylight prior to the accident. The witness described that he had seen droplets. The plaintiff explained this at the request of the court by saying that when he went back up to collect the parcels that he had dropped he saw that there was water on the ground on the landing and on the first step and he looked up and he saw drops falling down there. He confirmed that he saw what he believed to be rain drops hitting the ground. He confirmed that he saw wet on step marked No. 9 and on the landing. The plaintiff confirmed that while he was still in a state of shock he did see a number of drops hitting the floor. He confirmed that he told David Wallace the day after the accident where it was that he fell and that it was wet on the floor and that he saw some droplets falling from the skylight.

19. This witness confirmed that he corrected what it was in the preliminary report form where it says NT1, indicating: "that he slipped/lost his balance" and the corrected version is confirmed by him as follows: "that he slipped on the first step down from the half landing. NT1 was holding the post in both hands and was not holding the hand rail at that time."

20. Mr. Mohan S.C. queried the plaintiff's use of the word "spilled in" from the skylight and said he should have used the word leaking. The plaintiff confirmed that the issue of a leakage was rectified concerning the skylight in 1994 and he believed that that had happened there was water coming through it again in 2015 in March because further water had been seen on the steps and that there were streaks clearly visible coming down from the skylight.

21. The plaintiff said there was evidence of a leak after the accident on 12th March, 2015 and that it was witnessed by Darren McCann. The plaintiff made the distinction between a leak coming from the roof and what he says were droplets falling from the skylight, which he confirms, caused his injury. The plaintiff said he saw droplets coming down. The plaintiff did not know why he failed to refer to cleaning up the water in the report form.

22. Photograph 7 was taken by the plaintiff.

23. Counsel put to the plaintiff the note of an accident report meeting with "P.J. Rice, Frank Coyne, David O'Neill and T. Morgan". Mr. Rice was talking and Mr. O'Neill was taking the notes. Part of this note recorded rust coloured water on the step. "Not sure if slipped on step or water but fell against wall. T.M. .. ESB Shoes. He had post in both hands he was not holding hand rail nine steps and nine steps. He walked downstairs and turned at landing to go down. Slipped, fell forward, put out hand to stop himself. Post fell. Waiting a while, collected post and then went to the post room." This witness accepted that he didn't tell the above parties that he had cleaned up the water he said he didn't think it was relevant.

24. This witness told counsel that he did agree with him on the previous day that it was brown liquid on the floor. He confirmed that he was sure there was water on the floor. He recalls that in his discussion with Mr. O'Neill and P.J. Rice he said there was some sort of water on the ground and he thought it was brown water coming from the stains. The plaintiff confirmed that he did not go to a solicitor until almost twenty months after the accident. The report being referred to was made out a few days after he came back to work in September, three months after the accident.

25. Counsel put it to this witness that at stage there was no reference to a leak at that time and that it is only in the plaintiff's engineers report for the first time it refers to a leak and that there was water on the ground.

26. The plaintiff explained that he was up on the roof taking photographs of two concrete slabs from the external side, and that they could be seen clearly internally from the skylight and he went up and took a photograph of them externally to show that these were two concrete slabs that you would have in an ordinary garden and somebody placed them on top of the skylight window to keep it closed. He described this ladder as 8 or 9 ft. long somewhat like a Stira ladder.

27. The plaintiff accepted that he was coming down the stairs with both hands laden with parcels and that he was not able to see in front of him. He denies that he turned on a step and that he was not able to see the step in front of him, and that he missed the step and fell. The plaintiff says that he went back up the stairs and saw that it was wet and he said his clothes were not wet because he fell away from it.

28. The plaintiff claimed that the locus was wet in March when he saw it. The plaintiff claimed that he has a photograph of the area wet and when he dried it up and put the yellow man on it. He claimed that there was a wet stairs and that Darren McCann agreed with that all along. When asked were we going to hear from Darren McCann he said "he had thought so until last week".

Evidence of Joseph Osborne, Consultant Engineer

29. Mr. Osborne confirmed that he took all the photographs except a couple of black and white ones which were given to him. Mr. Osborne went through the photographs and described No. 10 as the landing and described it as a half landing He said photograph No. 3 is intended to show the staining on the ceiling over the half landing.

30. This witness notes that photograph No. 7 shows the nosing disintegrating and that it has come loose from the raiser of the stair. Photograph No. 8 is described as showing the out of place concrete slabs holding down the opening in the skylight. He described the stairs as being wet from an overhead leaking skylight and that this was a contributory factor in the accident but he said the step's nosing are well worn and are disintegrating, and that this was also a contributory factor. He said it was time to replace the nosing and he refers to photograph No. 7 in particular which shows the nosing coming off/disintegrating and he said that could have been a contributory factor to the plaintiff's fall, as nosing are very important in descending or ascending a stairway. They give a secure grip to the feet and to the toes. Mr. Osborne described the nosing as appearing to be loose and that this could cause a trip and fall.

31. Mr. Osborne described the slabs as being there perhaps in an attempt to exclude the rain or water and that there are certainly out of place, they would not be part of the original design. This witness confirmed that the plaintiff had told him that he slipped off the step marked No. 10, and that he fell down seven or eight steps and that his arms were occupied. He confirmed that he was not using the handrail because he was carrying armfuls of post.

32. Mr. Osborne confirmed that the handrail should be used descending the stairs, that the accident happened at a critical point on step No. 10 and the plaintiff had just come down ten steps and was turning through 180 degrees. The handrail would have been useful as he came around the corner.

33. He is again shown photograph No. 3, where he describes clear signs of leakage in the periphery of the skylight and he confirms that. Photographs No. 4 and 5 show a closer view of the leak stains and photograph No. 5 is taken at the half landing looking in the direction of the stairs that the plaintiff walked and fell. He went through the photographs and said that the nosing were well past their safe limits and should be replaced.

34. This witness indicated that while there were notices advising the use of the handrails, the plaintiff was unable to do so because of the quantity of post he was carrying with both hands and he did try to grab a rail when he slipped but hit the wall instead and tumbled down. He also pointed out that the concrete slabs holding down the levers may be in breach of fire regulations. The witness was of the view that no blame for this accident should be attached to the plaintiff.

35. Mr. Osborne gave his professional opinion that liquid on that sheet material would be very dangerous. This was in terms of the question put to him, as to whether in his professional opinion, it was consistent that the plaintiff's employer would have a proper standard of care in place for employees, which he agreed in the affirmative.

36. This witness did not accept the view put forward by the defence engineer when he said that he poured water during his examination, some months after this witness's examination, on the surface and stepped onto it, and that in his view it was not slippery. This witness said that that is a fairly subjective test and that he would not accept it. This witness felt that the state of the nosing on the stairs did not accord with the employer's duty of care. He said it would be a contributory factor in the accident, but he thought that it was primarily a slip on wetness that caused the accident.

Cross-Examination of Mr. Osborne

37. This witness felt the more significant cause of the accident was the wetness. This witness did not carry out a slip resistance test, because he said in his experience that material if wet, will not pass the slip test. Mr. Osborne said that he did not drop a plumb line down from the roof to see where the drop point landed, but that he judged it by eye, and that he immediately connected it with wetness on the stairs, therefore he did not have to go up. Mr. Osborne says he was told there were copious amounts of liquid at the scene.

38. It was put to this witness that the stain on the skylight was 10 to 15 years old. He said it was more recent than that and that the plaintiff had told him there was a drip of water down from the ceiling. In relation to the age of the stain Mr. Osborne said it could be that age i.e. ten to fifteen years old, or it could be partly that age, that some of it could be there a long time and some of it could be recent. Mr. Osborne described step in photograph No. 7 as falling apart based on this witness's experience, but he would not accept that the flooring was not slippery and he was adamant that he didn't do any testing of that because it didn't think it was necessary. This witness agreed that if the nosing was in order, and that if one holds the hand rail, one shouldn't have any accident.

Re-examination of Mr. Osborne

39. Mr. Osborne confirmed that photograph No. 7 was a photograph of the first step down from the landing and he agreed that this photograph was taken by the plaintiff. Mr. Osborne agreed with Mr. Breen that he couldn't identify where this photograph was taken, from his examination of the scene, and Mr. Osborne agreed that he has 40 years' experience as an engineer. Mr. Osborne was asked would training from the employer have assisted in terms of the fact that the plaintiff was descending the stairs with armfuls of post and he said training would have assisted in terms of being told always to hold the handrail. He was asked if this should involve making more journeys than one, if needs be and he indicated yes to that.

Mr. Patrick Weafer

40. This witness confirmed his occupation as a flooring contractor and that he had been doing this work for 40 years. He confirmed that he looked at the stairs in question and that there was nothing inherently wrong with it. He walked every single step and checked that there was nothing loose, tapping it with his hand and foot and he denied seeing any disintegration of the steps. He thought that they were fine. He didn't see anything that needed to be replaced. He claimed to have been contacted by Mr. Eddie Hurst. The witness under cross examination confirmed that Mr. Hurst is an inspector who works for the ESB looking after their buildings. He was asked to go out and look at the steps and give an opinion as to their safety. In relation to the letter which was unsigned and dated 23rd May, 2014, the year had been typed and was struck out and there is a "5" inserted to make it 2015 on the copy handed to the court. Mr. Weafer confirmed that his letter states 2014. He confirmed that he had a meeting with Eddie Hurst the day before the inspection. The letter states his opinion: "in my opinion having inspected the stairs there is nothing inherently wrong with the design and it shows no signs as presenting a slip or hazard to users".

41. This witness admitted under cross-examination that he had been told that there had been an incident in relation to the stairs, and that Eddie Hurst had told him, because he had been asked to inspect it. He explained that on inspection, David O'Neill pointed to one staircase, and said somebody had fallen down and would he examine it. He said he agreed when it was put to him and that he assumed someone was making a claim. This witness agreed there was one line in the letter where he said Eddie Hurst was referring to the meeting and he agreed that the letter in that context is inaccurate but that it doesn't interfere with what he saw and reported in the rest of the letter.

42. His letter further indicated "the measurements of the risers, goings and the width of the threads are within the required regulations and appear fit for purpose dimensionally". When asked for the notes of this examination he didn't have any notes and explained that he examined it and looked at and that it was fine he said there was no need to measure anything, that he didn't measure the steps because he said he was just there to look at the steps and see was there any damage done to them that would constitute a trip. He said the aim of his visit was related to the trip and to see was there any damage to the stairs.

Mr. Greg Duggan Engineer for the ESB

43. Mr. Duggan gave his qualifications to the court. This witness confirmed that he had an honours degree in Mechanical Engineering from the University of Limerick, awarded in 1986.

44. This witness examined the stairs on 20th November, 2015 and he took an extensive set of measurements and set of photographs and a general examination. He described the stairs to be of welded steel construction, very sturdy, and fully in compliance with Document K. There was general compliance with building regulations. Section B on fire safety denotes that an exit stairwell needs to be of high grip flooring. This witness asserted that these stairs were in compliance with the regulations.

45. With reference to the photographs taken by this witness, photograph No. 8 in particular, the evidence given was that the general height of the dimples of this flooring shows a good indication of the amount of wear, and that most typically the wear was at the top of the stairwell or at the bottom of the stairwell. He said that there was no noticeable wear on any of the dimples throughout the floor covering and that this is a very strong indicator that this stairwell was receiving relatively light use and the floor covering itself was in excellent condition. This witness tried to get an approximate comparison between what the level of grip was when the floor was dry and what the level of grip was when the floor was wet and he said there was no perceivable difference and he said that he would regard it as a very good grip and even now he would certify that as safe.

46. He referred to photograph No. 11 and said that the nose of each thread is made from a rubber type material, softer than the rest of the floor covering just to give it an even better grip. He said that there is the exception at the very front of the nose, but he said the horizontal part of the thread is about 50mm wide where the soles of one's feet land and he regards that as in excellent condition.

47. This witness felt that when he carried out his examination in November, 2015 the stains were at least a few months old and he suspects a lot longer. He compared that to Mr. Osborne's inspection in June, 2015 and he said the stains were identical in size and shape and that it was a solid indicator that there was no ongoing leak.

48. Under cross-examination, this witness agreed that he was accompanied on his inspection by Mr. Peter O'Loughlin of the ESB and Mr. David O'Neill of ESB. The witness confirmed that his report dated 12th April, 2017 is the only report. The witness relied in his report on a comment from Mr. David O'Neill from the ESB to the effect that "to the best of his knowledge no repairs or alteration had

been made to the incident stairwell”.

49. This witness agreed that there was wear on the front of the nosings and it was put to him clearly in photograph No. 6 of Mr. Osborne's photographs; a picture clearly presenting wear in the centre of the two steps near the nosing. He clarified the question referring it to both the upper and lower step although clearer on the lower step. This witness felt that the dimples on the floor covering all looked to be in very good condition. With regard to the noses the photograph is not sufficiently detailed to make out the little thread marks in the rubber and he felt, similar to the ones he discussed in his own set of photographs, there is wear along the front of the noses, but the horizontal parts of the threads which is what one's shoes go on, were in very good condition. This witness was specifically asked about the lower step in photograph No. 6 and he said that it was put to him that there are lines and bits of black and that the wear is very obvious and evident. His response was that he agreed there was wear on the front of the noses, but that the photograph wasn't sufficiently detailed. This witness did not agree with Mr. Osborne's evidence that wear can cause slippage and he said that each case had to be looked at individually and in this case the important aspect is that even though there was wear on the fronts of the noses it is not through to the substrate. He said if the rubber is worn down so that the metal was starting to become exposed that is when it is needed to be replaced but in his case here it is just wear. He said that the nose was worn but not worn out.

50. With reference to the thin piece of rubber thread, 2 metres described by this witness as being 2mm by 1mm or 2mm by 2mm and he said it is not structurally significant to the mechanical integrity or anything else of the thread and he would regard that of little more than as a cosmetic defect. This witness disagreed with the contention put to him that Mr. Osborne's opinion was that it was sufficiently bad to constitute a risk to individuals and a trip or fall could be caused as a result of it, but he disagreed. He said that there was wear on the fronts of the noses and were more so on the vertical sides of the noses and also all the threads along the noses continuously 100% covered with a non-slip or high grip covering. Mr. Osborne gave a contrary opinion to this witness in terms of the water on the surface. This witness said he put a bit of water on it and used part worn safety shoes and he felt his grip was the same as if it were dry. Mr. Osborne's opinion was put to him, that which was contrary to his view that if one were to have water on this surface it would cause it to be slippy, and he disagreed with that. This witness said he did a test, whereas Mr. Osborne did not. He said between the floor being wet and the test with the floor being dry he saw no perceivable difference in grip between the two and that is objective on his part. This witness gave evidence that the slabs on the skylight looked to him as if they were there to keep the skylight closed. He thought there was a skylight opening, an ingress of water through the skylight. He thought it was more likely that a leak of the flashing had occurred which the skylight is fitted into on the flat roof and that it is far more likely a source of a leak as well. He felt that any leak would be coming through the rectangular opening in the centre of the skylight and he said where the stains were it would indicate to him an ingress of water probably through the flashing around the sides of the skylight.

Evidence of Mr. David O'Neill

51. Mr. O'Neill indicated to the court that he is the ESB area manager located in Avenue Road, Dundalk and has done that work for the last eight years and that prior to that he was a project manager. He described himself as a chartered civil engineer with a masters in Industrial Engineering. This witness referred to his diary where he noted on the Wednesday 1st May, 2013: "Terry had an accident". This witness pointed out that he is responsible for making sure that all accidents are investigated. This witness said he got basic details that Terry had slipped on the stairs. He would have been aware that there was an allegation that there may have been water on the stairs. He confirmed he didn't hear this from Terry himself. This witness gave evidence that he used the stairs at 8am, 10:30am, 12:30pm, 2pm and 3:15pm. His evidence was that he recorded it because his responsibility is to try and understand why something has happened and to make sure it doesn't happen to someone else. This witness indicated that the stains on the skylight fabric had been there before 1995. He asked one of the cleaners had they ever seen a leak or had they ever cleaned spillage on the stairs and they said no. He kept a watch on it and had noticed nothing since. He confirmed that no remedial work was done on the skylight since the incident.

52. This witness indicated that he introduced today a hand written report dated 21st or 22nd August when an interview with the plaintiff took place after his return from work. He said Frank Coyne, Terry's direct supervisor, P.J. Rice the safety supervisor and himself, met with the plaintiff. They went to the top of the stairs and this witness indicated that Terry said he collect the post from two trays and that he came to the stairs. He was wearing his ESB shoes which are standard equipment given out to staff. Terry explained that he had post in both hands and he was not holding the hand rail He then said he walked down the stairs and turned at the landing to go down. He slipped and fell forward and he put out his hand to stop himself. The post fell. He waited a while and he thought that the plaintiff said he was at the bottom of the stairs. He collected the post and he then went to the post room. He said the plaintiff was unsure as to what happened but he said it was rust coloured water on either the step below the landing or on the step below that again and he was not sure if he slipped on the step or the water but he fell against the wall and at that stage he asked the plaintiff to point to where the water was. He said he stood where he said the stain was and looked up and it was directly under the stain in the ceiling tiles. The plaintiff said coffee might have been spilt. Terry described how he collected the post and walked off. He said that he went to the post room franked post and felt sore on his side. When he went home it was painful in the night so he phoned David Wallace. He said that he and Frank Coyne met three weeks later and went through it and jointly wrote the report. This witness indicated that the purpose of the report is to make key findings and cause. This witness indicated that some alterations were made to the post collection system. In the past there had been a lot more people in the office and a lot more customers before the year 2000. This witness said that P.J. Rice sent out the report and he understood that Terry amended it and that what had gone out to Terry there was a final report. It is put to this witness that the reference stays in that the plaintiff believed there may have been a spillage "slipped on wet steps where it is believed water had been spilled" the plaintiff insisted that he fell forward and this witness accepted that.

53. Under cross-examination Mr. O'Neill accepted that there was no training done in relation to carrying post down the stairs on the premises. This witness agreed also that there was no risk assessment carried out of that particular task. This witness took the view that there was not any reference to that particular task in the ESB safety statement relating to the premises because it wasn't discovered either. This witness agreed that there wouldn't have been specific training in relation to carrying the post.

54. With reference to the meeting where Mr. Rice, Mr. Coyne, Mr. Morgan and this witness were present, this witness said that it represented bullet points, and that they may not have recorded other points.

55. It is put to this witness that the language he uses in the document "lost his balance on the first step down from the half landing and believes he made contact with the wall when he lost his balance". It is put to him that this reference was made twice to transform what happened into something other than a slipping accident to a simple accident where he lost his balance. In those circumstances the ESB would not be responsible if he simply lost his balance. His response to this was that he was not aware that there was going to be a legal case and that what he had was an aide-memoire for what happened. He made a key finding that he slipped and lost his balance and it is put to this witness that how could this be a key finding or cause when the plaintiff never said it. They came to this conclusion because they said they weren't able to determine specifically what caused him to slip because there was no evidence of any water there and they accepted there had been wear and tear on the nosing so the term "slipped/lost his

balance" covered everything.

56. It is put to him that there is no finding in relation to the spillage and this witness replied that he couldn't say there was no spillage. All he could say was what the plaintiff said it to him/them. It was put to this witness that the plaintiff did inform him that the floor was wet where he fell and that he had simply bypassed that in preparing this statement. It is put to this witness that when Mr. Morgan got a copy of the document he understood it to be a preliminary report, he made his annotations on it and sent it back and he understood that his comments would be taken into account and a final corrected report would then issue. This witness denied that he had seen the document with Mr. Morgan's annotations. This witness says he never saw this written document with the notes on the report, or that it had come back. It is put to this witness that the recommendation "revised post collection system and remove two collection bins from the first floor" showed that his view was that this was a contributing factor to this accident. He pointed out he had been reviewing the post delivery and collection system in any event.

57. Inspection "by a competent person to determine if stairs covering needs to be replaced". His response in relation to that was that they had identified wear on the nosing and no change was made to the stairs. It is put to this witness that Mr. Osborne took a different opinion on that and this witness disagreed with Mr. Osborne on that point. While this witness said that they never shied away from the fact that the plaintiff said there was water on the step he is questioned as to why there is no finding in his report on that issue. He said that the only way water could have gotten on to the step was either through a leak in the ceiling and he was certain that there was no leak as he had monitored the floor on an ongoing basis and he said the alternative was if someone spilled water on the step. The only record of someone asking the question "why did you not get towels from the toilet", and this witness agreed that Frank Coyne's specifically asked that and it was put to this witness that the plaintiff did in fact wipe it up and he argued that he told them he did wipe it up but that it wasn't in the notes.

58. Mr. O'Neill gave evidence that given that the plaintiff was going to be out for a period of time he changed the system of collection of post and he arranged for the bins to be taken away and the clerical support person to collect the post. The reason the trays were taken away was that he had been looking at a system of post collection and delivery in Dundalk and he thought that there was so little post going through the trays that there was no need to have them so he took them away. The clerical support staff then franked the letters downstairs and they were delivered into the post room individually. This witness stressed that the ESB is very particular about safety. He said training is reviewed every so often and they refer to a job site safety plan for a tool box which means that before a network technician does any task or job he is actually meant to assess it. This witness indicated that every month all network technicians are brought in and given a briefing in terms of general work but also given a safety briefing where they identify near misses, accidents that had happened to other staff members, they would discuss that and the whole idea being that they would be learning from the process. This witness gave evidence that the employees must assess the risk in terms of each task and he said that the manual handling training is given every two, three or four years and intends to be part of a general safety briefing. All employees would have a safe pass card and that they have regular monthly briefings to remind people of the type of accidents and risks and hazards that they are facing.

Evidence of Mr. Peter Rice

59. Mr. Peter Rice gave his history with the ESB that he was an apprenticeship electrician back in 1971 and he worked till May, 2014. He said at retirement he was in safety and technical services for five years logging incidents. He said he was using the west staircase five times a week up and down the stairs. He never saw water on the stairs and he said he noticed rust coloured stains but he could only vouch for that for the previous five years and he thought he first saw them around 2010. The plaintiff telephoned Mr. Wallace the following morning and he accepted that while the plaintiff was trained fully as a network technician he wasn't trained as a postman. There was a meeting on August 24th to interview the plaintiff and investigate the accident. This witness recalled telling the plaintiff to go away and look at the document and to come and discuss it and to mark things he wasn't happy about. He agreed that the plaintiff said he had reservations but he told him to look at it and come back to them and that they would take it from there and to mark them on the sheet. He says he has no recollection of getting that sheet back from the plaintiff. It was suggested to this witness that the plaintiff went back to him a couple of times but he did not get back to the plaintiff about his amendments but this witness indicated that he had never seen his amendments till now. He has no recollection of the plaintiff handing him the written amendments to the sheet. This witness denied that he would ignore documentation which would come in and when it was suggested to him that he got the document from the plaintiff but just didn't do anything about it, he said that would have been part of the duties that he performed.

60. It was put to this witness that if we had the correct pages we would know the date upon which the final approved report issued with the recommendations on it. This witness was to hear from the plaintiff before that part of the report was included in the report and he said he couldn't explain it, that it may have happened after his retirement. This witness in response to the question as to why there was nothing in the report about liquid, said that the plaintiff was unsure that there was liquid or what form of liquid there was on the stairs, or it was not included because there was no water there at the time and they didn't see any signs of a spillage.

61. In relation to the nosing issue, this witness said it was a precaution to have it inspected by a competent person to determine whether it needed to be replaced and to make sure that there wasn't excessive wear on the nose thread.

Submissions on liability on behalf of the plaintiff

62. Mr. Fitzsimons S.C. stressed the duty of care of an employer towards the employees whether or not the duty is breached depends on the facts on each single case. In this case there are definitely issues of fact which the court will have to determine to establish liability. Mr. Fitzsimons S.C. indicates that the first issue is whether the plaintiff slipped or did something else happen whether he tripped or lost his balance. Counsel submits that the plaintiff slipped, and he refers in this regard to the notes of David O'Neill taken at the meeting with the plaintiff attended by Mr. Rice and Mr. Coyne. There is no reference in these notes to him losing balance. Mr. Fitzsimons refers to the printed preliminary report p. 3 that he slipped/loss of balance, but there is no evidence on this submission for the use of that term no basis for it and it is not stated by the plaintiff and his case is that he slipped.

63. In this case if a person slips there must be a cause for the slip and it is pointed out that he was wearing the correct shoes. The investigation preliminary report refers to the plaintiff believing there was liquid there. It is deemed to be therefore relatively contemporaneous although this is contested. There are issues regarding brown liquid but the plaintiff can't recall using that term or is it just water from a skylight. The court is urged to accept the plaintiff's recollection he said he didn't see it as he was coming down but when he went up and looked after he fell he saw the liquid there. He went away to do his work and deliver his post and in accordance with the policy he cleaned it up himself. The fact that he did that meant there was no evidence of there being any liquid in the area. It is urged upon the court that the plaintiff was a trusted ESB employee of 37 years standing and he comes into the court still as an employee and indeed has been looked after by the ESB and he has been accommodated notwithstanding significant ongoing disability.

64. The court is asked to compare the plaintiff's evidence to that of witnesses/employees who were not there when the accident

happened. It is the plaintiff's evidence that there was liquid there and he believes it may have contributed to what happened.

65. Mr. Osborne, an experienced engineer, gave his view in relation to the stairs and the worn nature of the nosing and he is supported by the findings in the ESB preliminary report under the heading "key findings and causes of the accident": "there is evidence of wear on the nosing on a number of steps. This should be inspected by a competent person to be determined if it needs to be replaced". This submission sets out that such a paragraph would not have been included under this heading unless the three experienced individuals who carried out the inspection were not of the view that it was a factor in what occurred. Their evidence is consistent with the views expressed by Mr. Osborne. It is a fact that the defence engineer Mr. Duggan expressed a different view that is for the court to decide but it is submitted that the court should prefer the evidence of Mr. Osborne. Photographs No. 6 and No. 7 of his photographs in particular No. 7 were referred to. The plaintiff, at p. 38, indicated that he took that photograph in or about September, 2013 that wasn't there when Mr. Duggan examined the stairs in May, 2014 that a defect that we see and it is suggested that it could have been stuck together to remove it but he said the photograph is consistent with the findings of the preliminary report about the wear on the nosing. While the two engineers disagree the court is urged to prefer that of Mr. Osborne. He suggests that the nosing was effectively a part cause of the plaintiff's fall. On the issue of water, Mr. Duggan is quite definite saying that David O'Neill told him it was raining on the day and this raises the question of why Mr. O'Neill now says he didn't recollect rain on the day. There is no suggestion that he asked Mr. Duggan to amend his report and why not, if this statement in the Duggan report is incorrect.

66. Counsel urges the court to note that the plaintiff was coming down the stairs, he wasn't holding onto the railings, there was a sign up telling him that, and a case in contributory negligence is made against him on that account. There is evidence that he did not receive any training on that issue. He was trained as a network technician, he wasn't trained as a postman, but he was doing the postman's work in going up and down stairs and a little bit of training would have helped avoid and may have helped in relation to the accident. The plaintiff relies on the evidence of Mr. Osborne and s. 8.2(g) of 2005 Act. They submit that there was a breach of that. The court is asked to note that the system for bringing down post down the stairs was recommended to be changed in the preliminary report and that is a recommendation resulting from the accident. Effectively an admission that the system that was in use was causative where the accident was concerned.

67. A case of contributory negligence is raised against the plaintiff. There is no evidence supporting these assertions that a case may be made in relation to the hand rail but the plaintiff submits that because of the system and absence of training that the plaintiff was not to blame on that account and there should be no finding. They submit that if there is to be a breach of statutory duty finding that any finding of contributory negligence should be minimal.

Submission on behalf of the defence

68. Mr. Mohan S.C. pointed out that, firstly, it is accepted by the plaintiff that the ESB is fastidious when it comes to emphasis on safety, protocol and investigation. Secondly, that the plaintiff is an experienced technician/employee. Thirdly, it is accepted that the plaintiff did suffer an injury on the day in question. The plaintiff seeks to, on the balance of probability, prove to the court that there was a leak that came from a skylight as a result of which water was present, upon which he slipped and fell and that that is at the core of the plaintiff's case, and the main case that the plaintiff makes. The court is urged to note the plaintiff told Mr. Wallace about the accident and he says he told Mr. Wallace that there was a leak but Mr. Wallace doesn't accept that. Mr. Wallace says he said he simply fell, the area manager Mr. O'Neill was able to write into his diary there was nothing there on the day that he can recall and that he used to steps very regularly. It is put to the court, on the balance of probability, that no water came in from the skylight if it was never fixed. As to whether it is raining or not is considered to be a red herring by the defence. The plaintiff did not clean it up, the position of the defence and although the plaintiff says "well I cleaned it up immediately afterwards", they say they have a contemporaneous note which puts that question to him and suggests in fact the reverse that he left a hazard. There is a conflict as to whether the hand written note is filled in, a typed one is done and it is sent to the plaintiff, the plaintiff gets to fill in his comments and it doesn't arrive back. There is a transparency here which there isn't in other organisations. The plaintiff accepted he wasn't holding the handrail. The plaintiff says he saw wet on a later date and that he ought to have reported it to his line manager but reported it to a temporary employee, who he wasn't called as a witness, but to nobody else. Much is made of the fact that the plaintiff got up on a ladder and made his investigation. This is seen by the defence as at variance with what he states his injuries to be. He did not tell his own engineer of this fact and that it is something that came out in the evidence.

69. The thread issue on the stairs is of importance and while everyone accepts the threads were worn they weren't worn through in the view of defence. Mr. Duggan's point is that if you put your foot on the main part of the step and the tip of the foot maybe on the thread. He said that the steps were all in alignment properly maintained, properly serviced and properly cleaned. Nothing was done about the threads and because he says, on the balance of the evidence, it is not where the foot was and they weren't worn through, and therefore it couldn't be causative. The fact that the system was changed cannot be used against the defendants. The defence accepts that this is an ordinary common law case and also submits that if the court finds for the plaintiff he must be found significantly guilty of contributory negligence.

70. Mr. Fitzsimons S.C. indicates that the defence have referred primarily to the water issues, and he says it is the core issue in the case and that it is down to whether or not there was water on the step. Mr. Fitzsimons S.C. notes that water is wetness of some sort and is an important issue in the case, and the court will have to take a view on it, with regards to the conflicting evidence. He submits, however, that this is not the core issue, or it is not necessarily the beginning and end of the case. Mr. Fitzsimons S.C. indicates that in accordance with the evidence of Mr. Osborne, consultant engineer, in relation to the worn and disintegrating state of the nosing, that if the court accepts this evidence, the court is in a position to find that the plaintiff was caused to slip by the state of the stairs at the time. Mr. Fitzsimons S.C. says that the first issue of fact to be decided is whether the plaintiff slipped or did something else. But if he did slip, and if that is the court's view, then something caused it, in or and about the stairs, whether it be water, the nosing's state of wear, or a combination of both and of course the other general factor being that he was walking down the stairs without holding on to the handrails.

71. Mr. Fitzsimons noted that it was not put to the plaintiff that he did not perform his employment duties in accordance with instructions and the training he was given. It was not put to the plaintiff that he was trained and didn't comply, and that brings the issue into the case.

Evidence of Mr. Black

72. Mr. Black indicated that he was a supervisor over timber contractors. This witness said he met the plaintiff in the post room. This witness said that he thought Terry, the plaintiff, was talking about the west staircase but he was referring to the east.

Medical Evidence

73. The court was furnished with a number of medical reports. The first of these to be considered is that of Dr. Paschal Malone G.P., dated 31st March, 2015, who set out that in his report that the plaintiff attended his surgery on 9th May, 2013. His description to the

doctor was that on the 30th of April, 2013, while going down some stairs in an ESB building, he slipped on a wet step. He described to the doctor which is recorded in the report that he put out his left hand to save himself, he hit the wall with his body and fell down seven to eight steps and ended face down on the steps. He said that immediately after the fell he felt pain in his left shoulder, finished his work and went home. During the night the pain got worse. It was so painful that he attended Daisy Hill Hospital in the early morning of 1st May, 2013. He had an X-ray there and no bone injury was detected. He was given analgesics, a non-steroid anti-inflammatory medicine, plus physiotherapy. The doctor said he saw the plaintiff on the 9th May, 2013 in a lot of pain and with limited movement of his left shoulder. He referred him to the Beacon Clinic in Dublin, where he had an X-ray of the left arm and an MRI of his shoulder. No bone injury was detected, but there was inflammation of the acromioclavicular joint and examination showed tenderness over this joint.

74. The doctor indicated that he referred him to Dr. Paul Connolly at the Mater Private Hospital on 28th May, 2013, with a view to having a possible steroid injection to relieve inflammation/pain and improve movement of the left shoulder. The shoulder was injected on 5th June, 2013 and gave little or no improvement. The plaintiff continued to have pain in his shoulder with little or no movement because of pain. He was reinjected on 12th July, and 25th September, 2013 with no improvement. The plaintiff continued to take analgesics with little or no improvement in the shoulder. In June 2014, he had acromioplasty of the left shoulder and was given morphine tablets for pain. He was still taking morphine in September, 2014 for the pain which at time was extreme. His pain was worse at night and he was getting little or no sleep. Over the next six months the plaintiff received prescriptions for morphine medications to ease his pain. On 6th March, 2015, he described his pain as being severe, i.e. 7 on a scale of 1-10 (1 being the least painful and 10 being the most painful). Abduction of his left arm was very limited and the G.P. said that this had caused severe disruption to his life and that of his family. They now described him as a grumpy "old man" trying to live with constant pain. It is possible that he will have problems with his left shoulder for the rest of his life.

75. The report of Dr. Paul Connolly, Consultant Orthopaedic Surgeon, dated 14th November, 2016. He gave a history to the surgeon consistent with the history to his general practitioner. This consultant noted that the patient underwent an MRI scan of his shoulder on 9th May, 2013 and the findings showed inflammatory changes around the acromioclavicular joint on the left side, in keeping with recent tissue injury. There was no evidence of any dislocation of the joint of the shoulder and no fracture of subluxation was seen. There was an extensive inflammatory change and hematoma around the acromioclavicular joint and this is the reason why he was referred to Mr. Connolly. Despite joint injections on the 5th June, 2013 and 12th July, 2013 the plaintiff continued to have pain and discomfort and was referred to Dr. Darragh Hynes for assessment by Dr. Connolly. Dr. Hynes saw him in October, 2013. Dr. Hynes felt that some of the symptoms were indeed coming from the shoulder where he was describing pain to the top of the shoulder, as well as pain and discomfort in the elbow and left hand. He also thought that some symptoms may be originate from his cervical spine. He also notes that Dr. Darragh Hynes performed an injection on the shoulder in Cappagh Hospital, following this assessment.

76. The plaintiff had also been referred to Dr. Dermot Maloney, an Upper Limb Surgeon in Tallaght Hospital, who saw him in August, 2015. He also underwent surgery in July, 2016 with Dr. Maloney. The plaintiff is right handed and still working despite the fact that he is doing lighter duties. It is still painful and uncomfortable to lie on his left side in bed and he notes a restriction in movement. The plaintiff had acromioclavicular joint decompression in June, 2014 and another injection to the shoulder in January, 2015. On clinical examination the plaintiff can abduct his arm to about 80 degrees before it becomes painful and he can internally rotate the arm to the level 4. Getting his hand to the top of his head is uncomfortable for him. He has well healed small incisions on his shoulder consistent with previous arthroscopic surgery. He also underwent previous MRI of his cervical spine and this does show long standing where in a neck area. An MRI performed in December, 2013 shows mild to moderate disc bulge at the C3/C4 level of long standing. This surgeon felt that although the MRI of the neck shows a disc bulge at the C3/C4 level, which is chronic in nature, he is not convinced that this is contributing much to the plaintiff's symptoms. His assessment as of the date of his report to the plaintiff's pain and discomfort is very much located on his left shoulder and he had diminished range of movement in the left shoulder based on the assessment. It was difficult to get a valid opinion as he has since undergone operative intervention by two upper limb specialists.

77. A report was furnished from Dr. Darragh E. Hayes, Orthopaedic and Upper Limb Surgeon, dated 30th November, 2016. Again he is consistent in all the medical reports furnished; the plaintiff was consistent in describing the slip and fall on some wet stairs. This doctor undertook an X-ray guided injection on 7th October, 2013, and a further injection on 12th February, 2014. He reported that the initial injection had given him little benefit and given the ongoing pain in the acromioclavicular joint area of the left shoulder on clinical review on 2nd May, 2014 and his failure to respond to conservative treatment, this doctor recommended proceeding with surgery. This doctor gave a full assessment of the structure of the shoulder in surgery as a result of the surgery on 11th June, 2014. He noted that the subacromial space was very tight and the acromioclavicular joint was very swollen and the latter portion of his clavicle was excised and the subacromial space was much wider, following the surgical intervention. Despite this, when reviewed on 10th December, 2014 the plaintiff reported ongoing symptoms of pain and stiffness in the shoulder.

78. On 24th April, 2015, he returned for review. Clinical examination of the shoulder revealed slight restriction of range of movement, with loss of elevation, in particular to 90 %. Resistant abduction was very painful which would suggest the that subacromial space was still a significant pain source for him. Given that the patient failed to respond to treatment, he referred him to Dr. Diarmuid Moloney. He furnished a report dated 15th of December, 2016. He found the patient to have glenohumeral capsular restriction with external rotation range of 30 versus 50 and abduction range of 70 versus 90. The plaintiff has a reduction in his cervical spine range of motion, particularly latter inflection to the right is reduced. This doctor found a trigger point over the posterior-superior insertion of the deltoid into the acromion injections were the treatment prescribed and given and this doctor felt that he would require ongoing physiotherapy. Dr. Maloney was not sure whether any further surgical intervention would be useful given the longevity of the left shoulder problem which would have probably yielded a degree of centralisation of his pain. He felt that a pain management referral might be in order. It was the view of this medical doctor that the original injury may have caused a superior labral tear which was identified in the second arthroscopy. The pattern of the tear was a type two tear which would be consistent with traumatic injury rather than degenerative process per say. The patient's shoulder remains extremely irritable and he was unsure as to whether he would ever be able to completely eradicate the pain in his shoulder. As a result, management of the pain rather than eradication may be the goal in the case, while a return to functioning activity, although pre-morbid functioning, may never be possible.

79. The report of Dr. Phillip Hu, dated 11th July, 2017, described the plaintiff having pain in the anterior aspect of the left shoulder and in the posterior aspect of his trapezius muscle radiating to his left neck. He has occasional cramps in his biceps when he moves his arm in a certain way. Pain intensity is rated at between 8 to 9 out of 10 at worst, 4 out of 10 at best, and 6 to 7 out of 10 on average. He does not have many good days. He reports no relieving factors. Medications, injections and surgery did not help and the physiotherapy helped his function only. Any movement of his left shoulder aggravate the situation. He described himself as being able to sit for between 30 and 45 minutes, being able to stand for between 20 and 30 minutes, to be able to walk for 15 minutes and drive for 15 minutes before the pain becomes intolerable. He had fear of moving (kinesiophobia) and he is consumed by his pain. He is frustrated and low in mood. He described himself to this medical person as loving his job and wishing to continue in it as long as he could.

80. The impact on his life is described as impacting on his sleep and he usually gets four hours sleep per night and sometimes six hours, but this sleep is broken. He does not have Post Traumatic Stress Disorder. His sleep is aided by oxynorm 10 mg, which he takes up to three times a night. Regarding his mood, he is described as anxious and concerned and worried about his future. He had some symptoms of depression but these are not overt. He describes himself to this doctor as mentally being consumed by pain and that he is no longer able to play pitch and put, cycle with his wife, or be sociable. Fear of injury to his shoulder impacts on his manner of socialising. He found a scar over the left acromioclavicular joint and he said that the left upper limb muscles are slight atrophy and that he had tenderness all over the anterior aspect of the shoulder joint and that his range of movement is reduced by over 50% in all directions. The plaintiff had a super scapular nerve block on the 22nd June, 2017, but chronic pain in the shoulder was not responsive to multiple injections, acromioplasty and decompression. Over the course of the MRIs these show initially inflammation followed by a degenerative process over the left acromioclavicular joint. The plaintiff is taking strong morphine based medications and has developed psychosocial difficulties in terms of socialising and his mood. The intention is to preform selective nerve root blocks and pulsed radio frequency of the left C4 nerve root in an attempt to elevate his pain. This doctor thinks, however, that his function will not improve as he has had extensive physiotherapy over the last four years without significant improvement in his range of movement.

81. Colin O'Neil, senior Chartered Physiotherapist provided a report to the court dated 27th October, 2017. The physiotherapist found that on objective examination, the plaintiff had reduced range of movement of the glenohumeral joint in all directions. He had only 20% range of movement in all directions and also a very weak humeral and spatula strength with a lot of a tenderness on palpitation around the joint. The plaintiff received numerous physiotherapy sessions and his treatments consisted of pulley exercises programme, strengthening programme, ultrasound, stretching programme and rehab programme. After this course of physiotherapy, his range of movement improved to over 80% and strength has improved with the rehab programme. However, his level of pain was quite high after the course of physiotherapy and he claimed to have difficulty with everyday activities at home.

Finding of fact

82. This Court finds that the plaintiff came across as a very credible witness who certainly did not appear to this Court to overstate his complaints.

83. The Court notes that his description of the accident and how it occurred was consistent when he was meeting various medical doctors who treated him. The plaintiff did not exaggerate his injury in any sense. He did not institute proceedings for between 18 to 20 months after this accident. While there is controversy in the case in how the plaintiff contends that he slipped on a wet stairway, notes taken by David O'Neill in his workplace which were attended by Mr. Rice and Mr. Coyne, refer to him losing balance and counsel for the plaintiff refer to the printed preliminary report and p. 3 of that report where it was recorded that he "slipped/loss of balance". But that there was no evidence for the use of that particular term, "loss of balance". There is no basis for it in the case and that it was not stated by the plaintiff that he suffered a loss of balance, rather the case is that he slipped on a wet floor, or wetness of some kind. The plaintiff's case is that he did not see the wet as he was coming down the stairs, and when he went back up and looked after the fall he saw some form of liquid there. His belief is that that contributed to what occurred.

84. In addition the plaintiff relies on the evidence of a very experienced engineer, Mr. Osborne. He inspected the premises and photograph No. 7 is referred to in particular. It showed wear on the nosing, and key findings and causes of the accident were referred to by this witness as showing evidence of wear on the nosing on some steps. Although that is disputed and the defence engineer Mr. Duggan examined the stairs in May 2014, and particular difficulty arises in that when Mr. Duggan examined stairs then, there was the suggestion that the defect could have been stuck together to remove it, and the two engineers disagreed.

85. There is also a dispute between the parties as to whether it was raining on the day in question. Given that there was a skylight above these steps and given that Mr. David O'Neil indicated to Mr. Duggan, the defendant's engineer, that it was raining on the day, that one would question why Mr. O'Neill is now saying that there was no suggestion of that or of any requests that Mr. Duggan amend his report.

86. The Court finds as a fact that the plaintiff was not trained in terms of part of the role which he had been carrying out for a long number of years i.e. the collection of post. It is accepted by both sides that the ESB is fastidious in terms of its emphasis on safety, protocol and investigation. It is not disputed that the plaintiff has been employed by the ESB for many years while this Court is not able to resolve the conflicts on the evidence as to exactly how wetness came to be on the surface of the area where the plaintiff slipped and fell. Nonetheless the court views the plaintiff in the overall scheme of things to have been both consistent and credible. On the balance of probabilities, wetness caused the plaintiff to slip and fall. It is not possible for the Court to resolve the conflict as to whether it was wetness which came from a skylight or whether it was someone who had spilled something or caused the wetness at the locus of the accident. It is accepted by this Court as a matter of fact that photograph No. 7, the evidence of Mr. Osborne, and the evidence of the ESB preliminary report under the heading "key findings and causes of the accident" show "there is evidence of wear on the nosing on a number of steps. This should be inspected by a competent person to be determined if it needs to be replaced". Photograph No. 6 is also relevant but photograph No. 7 is particularly relevant in this regard. It is the view of this Court that there was a problem with the nosing combined with the wetness which caused the plaintiff to slip and fall very heavily indeed down a number of steps causing him a severe and continuous injury to his left shoulder.

87. This Court also finds as a fact that the plaintiff did not get specific training in relation to the task he performed over a number of years concerning the collection of the post. The court accepts the submission of Mr. Mohan S.C. that the court is not entitled to take into account a change in system and the court accepts fully that such a change in itself cannot be used against the defendant.

88. The Court finds that there has been a breach of statutory duty present in s. 8.2 of the Safety, Health and Welfare at Work Act, 2005 and that the plaintiff, while inadvertently carrying parcels in both hands, still did not amount to contributory negligence in the view of the absence of specific training and of the obligation of an employee to carry out a regular task (which went unchecked), and therefore a finding of contributory negligence cannot be made against the plaintiff. This accident was reasonably foreseeable and the defendants had given no specific training on collection and delivery of post. The witnesses who investigated the accident failed to properly record the plaintiff's version of events on the loss of balance point.

89. The Court prefers the evidence of the plaintiff, and of his engineer Mr. Osborne, to the evidence adduced by the defendant. He was a very credible witness.

90. As a result of the difficulties the plaintiff has suffered it appears to this Court he continues to receive treatment in respect of this injury and has ongoing pain. He came across as completely reasonable and I prefer his evidence to that adduced by, or on behalf of the defendant.

91. The measure of the damages in this case, appropriate to the pain and suffering suffered by this gentleman, to date and

continuing, it is appropriate that general damages are assessed then at €88,000 with €22,000 of agreed items of special damage giving a total award of €110,000.

92. This Court has had regard to the PIAB recommendations.