

THE HIGH COURT

[2021] IEHC 442

[Record No. 2016/8283 P.]

BETWEEN

DERMOT PRICE

PLAINTIFF

AND

LIMERICK CITY AND COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered ex tempore on the 24th day of June, 2021

Introduction

1. The plaintiff is 61 years of age, having been born on 26th February, 1960. He is currently employed by the defendant as a housing inspector.
2. The plaintiff commenced work with the defendant in or about 1997. At that stage he was working in a public library. In or about 2001 the plaintiff became the joint caretaker of a cemetery operated by the defendant at Castlemungret, Co. Limerick. The other man who had been working with the plaintiff at the cemetery, ceased employment with the defendant in 2009. Thereafter, the plaintiff was the sole caretaker in the cemetery.
3. In this action, the plaintiff maintains that he has suffered injury to his lower back and his right shoulder arising out of two accidents which occurred while he was carrying out his duties as caretaker at the cemetery.
4. Liability in respect of each accident is in issue between the parties. In addition, the defendant maintains that much, if not all, of the plaintiff's complaints in relation to his lower back and his shoulder, are referable to long-standing degenerative changes in those areas, which were attributable to his age and his previous sporting activity playing rugby as a young man.

The First Accident

5. The first accident occurred on 6th January, 2014. On that occasion, the plaintiff was attempting to unload a black refuse bin, which was of a type that is commonly found in public parks and other public spaces.
6. The black bin was made up of three separate components. The outer sleeve had two components, being a base, which was supposed to be secured to the ground; on top of which was placed the outer black sleeve which would rotate and lock into the base. At the top of the outer sleeve there were two openings to enable people to place rubbish into the bin. The third component of the bin comprised a steel metal drum which sat into the base of the bin and would be covered by the outer black sleeve. This inner steel drum had two handles at the top to enable it to be lifted out of the black casing, so as to permit it to be emptied into another receptacle, such as a wheelie bin.
7. On occasions, there would also be a black plastic refuse bag lining the inside of the steel metal drum. However, there were no such refuse bags lining the drum on the occasion of this accident.

8. The black bin is 1040mm high on the sides, with the domed top being a further 50mm higher. The metal drum measures 770mm high and 470mm in diameter.
9. On 6th January, 2014, the plaintiff had to unload a number of the black bins that were located in the cemetery. He stated that of the six black bins located in the cemetery, four of them were in one way or another in a defective condition. He stated that he had reported this state of affairs to his supervisor, Mr. David Fitzgerald.
10. When he came to the bin in question, he found that the very top portion, which contains the openings into which rubbish would be put, had been broken off. This meant that the bin itself was open at the top, thereby enabling people to cram a lot of rubbish into it. In addition, the base of the outer metal portion, was not affixed to the ground. The plaintiff managed to take off the upper portion of the outer black sleeve. He found that the handles on the inner steel drum were missing. He lifted the steel drum as best he could and rested it balancing on the base of the outer black sleeve. His intention was to lift the inner steel drum with his left hand holding the rim of the steel drum, with his right hand supporting the base of the drum.
11. When he went to lift the steel drum from the base in this manner, his left hand slipped from the top of the steel drum and the drum itself almost fell over, but he managed to catch it, or stop it falling, by using his right arm and hand. However in doing so, he suffered a wrenching injury to his lower back and right shoulder.
12. In preventing the steel drum from toppling over onto the ground, the plaintiff partially fell against a wheelie bin which was adjacent to the black bin. The plaintiff was assisted by a visitor to the cemetery, Mr. Noel Kiely. He helped the plaintiff back to the office, from where he telephoned his supervisor, Mr. Fitzgerald.
13. Mr. Fitzgerald came out to the cemetery approximately one hour later. He asked the plaintiff what had happened and was told that he had injured his back while taking the "liner" out of the bin. Mr. Fitzgerald understood this to refer to the black plastic bag, which would usually be used to line the inner steel drum. However, the plaintiff was referring to the steel drum itself. Unfortunately, this confusion in communication may have resulted in the defendant misunderstanding the circumstances of the accident at the outset.
14. The plaintiff was brought to his GP, where he was found to have muscle spasm in the lower back. A painkilling injection was administered. The plaintiff's injuries will be dealt with later in the judgment.
15. Following the issuing of proceedings by the plaintiff against the defendant, a joint engineering inspection was carried out on 20th June, 2016. Unfortunately, while the plaintiff gave clear instructions as to the defects in the particular black bin, the account of the accident which he gave to his engineer on that occasion was not accurate. The engineer got the impression that due to the defects in the bin, the plaintiff had had to lift

the entire of the black bin, including both the outer sleeve and the inner steel drum and that it was in lifting same that the plaintiff met with his accident.

16. In his evidence, the plaintiff was adamant that the accident had occurred in the manner described above, whereby he had managed to lift the steel drum out of the base in which it was sitting, notwithstanding the absence of handles at the top of the steel drum, and he had met with his accident while attempting to further lift the steel drum from its resting position on the base of the bin upwards towards the wheelie bin.
17. While the defendant's engineer had not attended at the joint engineering inspection, he had visited the locus on 16th March, 2017, where he had been briefed by Mr. Fitzgerald. Subsequently, on 11th August, 2017 he had met with Mr. Murphy, the claims investigator. He had taken a series of photographs of the cemetery and of the bins. It appears that he was aware of the case that was being made by the plaintiff and which was repeated by him in his evidence to the court, because he stated in the course of his report, "*I understand that the plaintiff will allege that the metal bin got caught in the black plinth*".
18. In relation to the absence of a black refuse sack lining the inside of the steel drum, the plaintiff stated that when he ran out of black bags, he would order more from the central depot, but that it could take a number of days for them to be delivered out to him; so that would explain the absence of a black refuse sack in the bin on this occasion.
19. The plaintiff was adamant that he had made complaints to Mr. Fitzgerald in relation to the defective condition of the black bins at the cemetery. He stated that a number of bins were defective in one way or another. Mr. Fitzgerald denied that any such complaints had been made to him.

Conclusions on the First Accident

20. The court is satisfied that the plaintiff is an honest and forthright man. Having observed him in the witness box, the court is satisfied that he has given a truthful account of his dealings with the defendant and of the circumstances of the two accidents.
21. The court is supported in this conclusion by the evidence of Mr. Fitzgerald, who conceded in cross-examination, that the plaintiff was a genuine man. He did not dispute his account of the accident. Furthermore, while the defendant's medical expert, Prof. Masterson, had stated in his first report that he felt that the plaintiff had engaged in "*exaggerated jerky movements*" when carrying out an examination of his range of movement in his lower back; the plaintiff's doctor, Prof. O'Farrell, was satisfied that the plaintiff had not tried to exaggerate his symptoms, or his level of disability.
22. Whatever about the findings that may have been made on examination when the plaintiff first saw Prof. Masterson, the court notes that at his most recent review by that doctor on 14th February, 2019, he demonstrated a good range of movement in his lower back and shoulder. This shows that he was being truthful with that doctor in terms of demonstrating his range of movement.

23. The court prefers the evidence of the plaintiff to that of Mr. Fitzgerald, in relation to the making of complaints in relation to the condition of the black bins at the cemetery. The court is satisfied and finds as a fact that oral complaints were made by the plaintiff to Mr. Fitzgerald concerning the state of the bins. That was very probably due to the fact that the top had been broken off the bin that was involved in this accident, with the consequence that people could overfill the bin with refuse.
24. It was not seriously contested that the absence of handles on the steel drum rendered it difficult to lift out of the outer base and rendered the task dangerous. Irrespective of whether complaints were made to it, there was a duty on the defendant both as the plaintiff's employer and as the occupier of the cemetery, to carry out periodic inspections of the cemetery, to include periodic inspections of the bins and to repair and replace those that were found to be defective.
25. The court finds that this particular bin was in a dangerous and defective condition due to the absence of handles on the steel drum. There were other defects in the bin, such as the absence of the top cover and the fact that the base was not secured to the ground, but these defects do not appear to the court to be relevant to the cause of this accident. This accident occurred due to the fact that the plaintiff could not properly grip the steel drum when attempting to lift it when it was perched on the side of the base, which he had to do in the course of emptying it into the wheelie bin.
26. The court is satisfied that liability for this accident must rest with the defendant for failure on its part to take account of complaints that had been made by the plaintiff in relation to the defective condition of the bins; for failure to inspect the bins at regular intervals and for failure to repair or replace the inner steel drum which was in a defective and dangerous condition due to the absence of handles on it.
27. The court finds that there was no contributory negligence on the part of the plaintiff in relation to the circumstances of this accident. He was faced with a bin that was full; it had to be emptied; he did the best that he could to extract the steel drum from the base and he had lifted it to the top of the base in the only way that was available to him in the absence of handles. It was clearly foreseeable that the bin could slip from his grip. It was not his fault that that actually happened.
28. Accordingly, the court finds that the defendant is liable for the injuries sustained by the plaintiff as a result of the accident on 6th January, 2014.

The Second Accident

29. The plaintiff was out of work for a period of two weeks following the first accident. Thereafter, he returned to his duties as caretaker at the cemetery.
30. One of his duties involved in bringing a number of large wheelie bins from various points within the cemetery to the gates of the cemetery, from where the bins will be collected on a weekly basis by the refuse collection company.

31. On 19th March, 2015 the plaintiff was in the process of moving the wheelie bins to the outer perimeter gate. The wheelie bin in question was a large industrial sized wheelie bin, which had a capacity of 1100L. The wheelie bins that are shown in the engineer's photographs are somewhat smaller, the original wheelie bins having been replaced by the defendant in the interim. The wheelie bins shown in the engineer's photographs are approximately 660L.
32. By reference to the plaintiff's engineer's photographs, and in particular photograph no.6, one can see the general locus of the accident. The plaintiff states that he was able to move the wheelie bin down the central pathway towards the electricity pylon, shown in the centre rear of the photograph.
33. The plaintiff states that he then pushed the wheelie bin to the right towards a gravel area which was on an incline leading up to the gate to the cemetery itself, which can be seen in the right rear of photograph no.6, with a van parked in front of the gate.
34. The plaintiff states that on the date in question, the industrial sized wheelie bins were overfilled, because the cemetery had been very busy in the preceding days due to it being Mother's Day. The plaintiff submitted a number of photographs which he had taken on his mobile phone, showing the wheelie bins in question and the level of rubbish both in them and around them in black plastic refuse sacks: see in particular photographs no.2 and no.3.
35. The plaintiff stated that he had no particular difficulty pushing the overladen wheelie bin to the bottom of the gravelled area. However, he realised that he would not be capable of pushing the wheelie bins up the gravelled area as it was on an incline. He telephoned Mr. Fitzgerald and explained that he needed help. Mr. Fitzgerald stated that he would get out to the cemetery as soon as he could, but that it may be the following day before he could get there.
36. However, in the events that transpired, Mr. Fitzgerald and another worker, Mr. Lenihan, arrived at the cemetery later that day at approximately 14:00 hours. Mr. Fitzgerald pushed one of the wheelie bins up the incline to the perimeter gate, Mr. Lenihan and the plaintiff pushed the other wheelie bin up the incline. The plaintiff stated that when he was about three quarters of the way up the incline, he felt an onset of severe pain in his right shoulder.
37. The plaintiff did not report to Mr. Lenihan or to Mr. Fitzgerald that he had hurt his shoulder on that occasion. However, he was required to seek medical attention and he went out of work for a period of 27 months thereafter. The court will return to the plaintiff's injuries in due course.

Conclusions on the Second Accident

38. The plaintiff's engineer was of the opinion that the defendant had been negligent in failing to carry out a task specific risk assessment in relation to moving fully laden wheelie bins

within the cemetery and in particular, having regard to the incline up to the perimeter gate.

39. It was accepted that the plaintiff had received general training in good manual handling techniques during the course of his employment with the defendant. The defendant's engineer stated that the essence of good manual handling techniques is twofold. Firstly, the employee should be shown proper manual handling techniques, so that he or she can lift and move weights without causing injury to themselves. Secondly, they must be taught to assess a load which they are required to lift or manoeuvre in the course of their employment. If they feel that the load is too heavy for them having regard either to its characteristics, or to the environment in which the job must be carried out, they should be taught to seek assistance.
40. The court prefers the evidence of the defendant's engineer in relation to the circumstances of this accident. The plaintiff did not complain that moving the wheelie bin was particularly onerous when he was pushing it along flat ground. He was able to push it down the pathway towards the electricity pylon and to the right without undue difficulty. It was when he got to the foot of the incline that he felt that he would require assistance. He did not attempt to push the wheelie bin up the hill. Instead he telephoned his supervisor and requested assistance.
41. That assistance was forthcoming when Mr. Fitzgerald and Mr. Lenihan came out to the cemetery. Mr. Fitzgerald stated that he was able to push one of the wheelie bins up the incline on his own without difficulty. The plaintiff and Mr. Lenihan pushed the other wheelie bin up the hill. The court is satisfied that in following that procedure, whereby the employee, being the plaintiff, had been given manual handling training; he had adhered to that training by assessing the task and on that assessment had come to the conclusion that he would require assistance; he had requested assistance and had been given it. The court finds that in the circumstances there was no negligence on the part of the defendant in respect of the accident that occurred on 19th March, 2015.

Quantum

42. The court was furnished with a booklet of medical reports and heard evidence from a number of witnesses. After the first accident, the plaintiff came under the care of his GP, Dr. Boylan. A pain relieving injection was administered to his lower back. The plaintiff was out of work for two weeks after that accident.
43. When the plaintiff's back problems did not subside, he was referred by his GP to Prof. Dermot O'Farrell, consultant orthopaedic surgeon. He arranged for an MRI scan to be carried out of the lower back on 24 September 2014. This revealed a disc protrusion at L4/5 and disc degeneration at L3/4 and L5/S1.
44. When the plaintiff's complaints continued, he was referred on to Dr. Brendan Conroy, consultant pain specialist, who first saw the plaintiff on 21st April, 2015. The plaintiff was admitted to hospital as a day case on 9th July, 2015, when bilateral L4/5 and L5/S1 facet

injections were administered under guided x-ray. These were injections of local anaesthetic and steroids.

45. When reviewed on 8th December, 2015, the plaintiff stated that he had received benefit from the injections for a period of approximately one month. However, his pain then returned. The doctor discussed with him the possibility of further treatment to his back. However, the plaintiff preferred to adopt a more conservative route by way of exercise, core strengthening and physiotherapy.
46. That conservative approach proved reasonably successful. When reviewed by Dr. Conroy on 28th November, 2017 the plaintiff stated that he was doing well. He was not taking significant medication for his pain. He was able to move and was active. The doctor was hopeful that by continuing to work on his core strength, he would avoid the need for further invasive treatment. The doctor made a provisional diagnosis of facet pain, which may have had a myofascial component. He was satisfied that the conservative approach for dealing with the condition appeared to be working well.
47. While the plaintiff's initial complaints following the accident in January 2014 related primarily to his lower back, the plaintiff stated that he had also experienced pain in his right shoulder. This became progressively worse in the following months. The plaintiff stated that he mentioned it on occasion when he visited with his GP, although it was not formally recorded by the GP in his notes as a specific complaint until January 2015. The plaintiff's GP accepted that the shoulder injury could have been mentioned to him prior to it being formally recorded in the notes, due to the fact that his back complaints were the main focus of attention in the immediate aftermath of the accident. The plaintiff came under the care of Prof. O'Farrell in relation to the shoulder. He arranged for an MRI scan to be carried out of the shoulder in February 2015.
48. The MRI scan revealed the presence of degenerative changes in the acromioclavicular joint and some rotator cuff tendinopathy, with partial tears of the supraspinatus and a full thickness tear of the anterior sub-scapularis and infraspinatus.
49. Prof. O'Farrell administered three sub-acromial injections. He carried out a manipulation of the right shoulder under general anaesthetic in August 2015. That confirmed the presence of adhesive capsulitis in the shoulder consistent with a frozen shoulder. Following that, treatment consisted of a home exercise programme, which the plaintiff did intensively.
50. When examined by the Prof. O'Farrell on 30th January, 2018, the plaintiff complained of pain in the right shoulder when he lay on the shoulder, or when reaching for a seatbelt. He also experienced pain in the shoulder with any type of exertion of the upper arm and when lifting.
51. The plaintiff was reviewed by Prof. O'Farrell on 25th May, 2021, at which stage he reported that his lower back was sometimes painful for 2 to 3 days at a time. He couldn't work in his garden. He had difficulty getting out of the car and getting out of bed caused

strain on his shoulders and lower back. He was unable to lift anything heavy, as that would exacerbate his neck and back pain. He was unable to sleep on his right shoulder due to pain, which would wake him.

52. In terms of medication he was taking anti-inflammatory medication on an intermittent basis. Examination of his lumbosacral spine confirmed the range of motion as 80% of normal. He had a similar range of motion in the right shoulder. Treatment was in the form of analgesic medication and an intensive home exercise programme, which was supervised by a physiotherapist.
53. Prof. O'Farrell's opinion was that the plaintiff had developed chronic pain in his lower back and right shoulder as a result of the injuries sustained in the accident in January 2014.
54. In evidence, the defendant's expert, Prof. Masterson, stated that he was of opinion that having regard to the plaintiff's previous history of playing rugby as a young man and the presence of degenerative changes in his lower back and shoulder as evidenced on the MRI scans, he was of the view that the plaintiff's present condition was caused by his pre-existing degenerative changes and sporting history.
55. Prof. O'Farrell did not agree with that assessment. He stated that while the plaintiff had played rugby with Shannon and Garryowen rugby clubs in his younger days, at a time when the game was amateur, it was noteworthy that he had not experienced pain in his lower back or right shoulder prior to the time of the accident. He had had difficulties with his left shoulder which had been treated by Prof. O'Farrell in 2012. On this basis he remained of the opinion that the plaintiff's difficulties were related to the accident.
56. In resolving this conflict of opinion evidence, the court prefers the evidence of Prof. O'Farrell. That evidence was supported by the evidence of the plaintiff's GP, who confirmed that in all the years that he had been treating the plaintiff, he had not had symptoms in his lower back or right shoulder. It seems to the court that the essential point here is not the existence of pre-existing degenerative changes, but the fact that they were asymptomatic prior to the accident in January 2014. Accordingly, the court prefers the evidence of Prof O'Farrell that the plaintiff's pain and suffering to date has been caused by the accident due to the trauma thereof being superimposed upon pre-existing asymptomatic degenerative changes.
57. In relation to the future, Prof. O'Farrell very fairly stated that in his opinion the plaintiff's ongoing symptoms of intermittent low back and shoulder pain, which are likely to persist into the future, could be seen as being due 50% to the accident and 50% to his pre-existing degenerative changes. It seems to the court that that is a very fair analysis of his situation going forward.
58. The fact that the plaintiff did not make extensive complaint in relation to his shoulder injury immediately after the accident is explainable for two reasons: firstly, it is accepted that the plaintiff was in very significant pain at the time of the accident on 6th January

2014. That pain related to his lower back. It is understandable that the plaintiff did not focus very much on his shoulder in the following months.

59. Secondly, the court accepts the evidence of Prof. O'Farrell that in relation to shoulder injuries, it is often the case that they can begin at a niggling level, but can deteriorate over time. It is clear that that happened in this case, as the plaintiff had been referred by his GP to Prof. O'Farrell in relation to the shoulder complaint prior to the second incident in March 2015, which the plaintiff thought of as being an exacerbation of his shoulder condition.
60. The fact that the second accident was not one which gave rise to immediate significant symptoms on the day, nor was it due to any negligence on the part of the employer, does not detract from the fact that the plaintiff had had increasing complaints in relation to his right shoulder in the months preceding that incident in March 2015. Thus, the court is satisfied that the shoulder injury must be seen as a continuum, which began with the accident in January 2014 and got progressively worse in the months thereafter, culminating in the deterioration after March 2015.
61. The final aspect that arises for consideration under the heading of general damages, is in relation to the psychiatric injuries suffered by the plaintiff. In his evidence, the plaintiff stated that due to his pain and disablement and in particular due to his inability to work for a prolonged period after March 2015, he became quite depressed. He required treatment from his GP, who prescribed medication. He also had some counselling. During this time, possibly due to a combination of his inability to take exercise and as a side-effect of the medication, he put on a considerable amount of weight of approximately 4.5 stone.
62. The plaintiff also experienced difficulties in his marital relationship due to a combination of his physical and psychiatric injuries. The plaintiff continued to require medication for his psychiatric injuries, in particular for depression, until mid-2018. Also of relevance to this aspect were the matters referred to by the plaintiff in his replies to the defendant's notice for particulars. It is not necessary to elaborate on these in this judgment. The court has taken that aspect into account in reaching a valuation of this aspect of his injuries. Fortunately, the plaintiff's mental health issues have resolved. He has shed the excess weight. He looks fit and healthy for his age.

Special Damages

63. Most of the items of special damages were agreed, subject to the findings of the court on liability. However, there was one item on which there was no agreement. That was in relation to what sum, if any, should be awarded for loss of pension benefits suffered by the plaintiff due to his prolonged absence from work. In this regard, the parties were agreed that in order for the plaintiff to recoup his loss of pension entitlements by payment of one sum, that would require a payment of €17,954.43.
64. It was submitted on behalf of the defendant that, strange as this may seem, if the plaintiff were to defer his payments over a three-year period, his loss of pension would be

recouped by the payment of €9,197.07. The defendants submitted that as the plaintiff would be fully compensated by a payment of that sum spread out over the three-year period, it was reasonable that that sum should be awarded in respect of his loss of pension entitlements, should the court determine liability in his favour.

65. On behalf of the plaintiff it was submitted that that was not appropriate. It was submitted that he should be awarded the sum that would enable him to recoup his pension losses by payment of a single sum, not the lesser amount, spread out over a three-year period, because that would effectively put him on the hazard, whereby he could lose his pension entitlements should he be unable to continue working for any reason prior to the expiry of three years.

Award

66. Having regard to the findings made by the court in relation to the extent of the plaintiff's injuries and the causation thereof, the court is satisfied that the appropriate sum to award for general damages to date is the sum of €45,000.
67. In relation to general damages for the future, the court is satisfied that the plaintiff will experience intermittent pain in his lower back and shoulder for the foreseeable future. This will not interfere hugely with his life, save that he will always be unfit for heavy work, or strenuous activity.
68. The court accepts the opinion of Prof. O'Farrell that in terms of his future pain and disablement 50% of that would be referable to the injuries sustained in the accident, with the remainder being due to his pre-existing degenerative changes. At full value the court would award €15,000 for future pain and suffering; which, allowing for the apportionment suggested by Prof. O'Farrell, means that the plaintiff is entitled to the sum of €7,500 for future pain and suffering.
69. The court accepts the argument put forward by the defendant in relation to the appropriate sum to award for loss of pension entitlements. It is undoubtedly true that the plaintiff is to some extent put on the hazard by being awarded the lesser sum, which must be repaid in three equal instalments over three years. However, the reality is that this plaintiff has no underlying serious illnesses; he is working in secure employment with the defendant which involves only light work. In these circumstances, the court is satisfied that it is not unreasonable that he should be awarded the sum of €9,197.07 for loss of pension entitlements.
70. To this sum must be added the agreed sum for loss of earnings of €26,827.52 and the agreed sum for other items of special damage of €6,854.63.
71. This makes an overall award in favour of the plaintiff of €95,379.22. The court grants the plaintiff judgment for that sum against the defendant.