

THE HIGH COURT

2007 529 P

BETWEEN

EDGAR McGUINNESS

Plaintiff

and

THE MARINE INSTITUTE AND CARA ROWDEN

DEFENDANTS

JUDGMENT of Ms. Justice Dunne delivered on the 9th day of March 2009

The plaintiff is a Fisheries Assessment Technician employed by the first named defendant. On the 4th October, 2004, he was on board a motorised fishing vessel, the "Catherine R", owned by the second named defendant, when he was injured at sea off the Irish coast, having been struck by a number of boxes of ray on board the vessel.

It would be helpful to set out a timeline in relation to these proceedings at this stage.

Letters of claim to the defendants 27th April, 2006.

PIAB Form A forwarded to PIAB 8th May, 2006.

PIAB acknowledges receipt of Form A for the purposes of s. 50 of the Personal Injuries Assessment Board Act 2003, ("PIAB Act") 9th May, 2006.

PIAB writes to second named defendant putting her on notice of the plaintiff's claim and notifying her that she has 90 days within which to state whether she is consenting to an assessment of the claim or not 29th May, 2006.

PIAB sends reminder to second named defendant of the 90 day period within which to consent to an assessment 7th July, 2006.

Solicitors for second named defendant acknowledge to the plaintiff's solicitors that they are aware of a claim made to PIAB 12th July, 2006.

Letter from PIAB to second named defendant noting that there has been no response to earlier correspondence 23rd October, 2006.

Letter from PIAB to plaintiff's solicitor informing them pursuant to s. 17 of PIAB Act that it would not be appropriate to assess claim and confirming that the time to take legal action will remain on hold for a further six months and attaching authorisation 23rd October, 2006.

Personal Injuries summons issued 25th January, 2007.

Appearance entered by second named defendant 20th February, 2007, solicitors for second named defendant inform plaintiff's solicitors there may be an issue pursuant to s. 46 of the Civil Liability Act 1961, ("the 1961 Act") as to whether the plaintiff's claim is statute barred or not 16th February, 2007.

Defence of second named defendant pleading, *inter alia*, that claim is statute barred by virtue of the provisions of s. 46(2) of the Civil Liability Act 1961, 18th September, 2007.

The Application

Following the delivery of the defence herein a notice of motion was issued on the 7th November, 2007, seeking "an order dismissing the plaintiff's action on the grounds that it is statute barred by virtue of the provisions of s. 46(2) of the Civil Liability Act 1961". That application was grounded on an affidavit of Finola Cronin sworn herein on the 5th November, 2007. That is a short affidavit which set out the provisions of s. 46(2) of the 1961 Act, and stated that "for the plaintiff's action not to be statute barred the personal injuries summons has had to be instituted by the 4th October, 2006".

A replying affidavit was sworn herein on behalf of the plaintiff by Máirín McCartney on the 9th April, 2008. That affidavit deals with a number of factual matters which relate to the prosecution of this case. She outlined the steps taken as set out above in the timeline. Around the 23rd October, 2006, PIAB wrote to the plaintiff's solicitors notifying them that as of that date, no response had been received from the second named defendant. That letter enclosed an authorisation pursuant to s. 17 of the PIAB Act 2003. The letter added:

"The time allowed under the law for the claimant to take legal action in connection with this claim was put on hold from the time PIAB received the completed application on 09/05/2006 and will remain on hold for a further six months from the date of attached authorisation."

Ms. McCartney then made the following observation at para. 8 of her affidavit:-

"The legislature inadvertently omitted s. 46(2) of the Civil Liability Act 1961, from the provisions of s. 50 of the Personal Injuries Assessment Board Act 2003. This inadvertence allowed the statutory period of time to continue running against the plaintiff contrary to what is stated by the Personal Injuries Assessment Board in its letter of 23rd October, 2006."

The averment as to the inadvertence of the legislature is a somewhat unusual averment to find in an affidavit. Ms. McCartney then dealt with a number of issues which are more properly the subject matter of legal submissions. For that reason I propose to consider them in that context.

The Law

I now propose to set out the provisions of s. 46 insofar as they may be relevant to this application.

"S. 46(1)(a) Where, by the fault of two or more vessels, damage is caused to one or more of those vessels or to another vessel or to the cargo of any of those vessels or any property on board, and an action is brought for such vessel, the liability of each vessel in respect of such damage shall be in proportion to the degree in which such vessel was in fault and accordingly there shall be no right of contribution in respect of such apportioned liability: provided that –

(i) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally among the vessels in fault;

(ii) nothing in this subsection shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law.

(b) For the purposes of paragraph (a) of this subsection the liability of a vessel for damage shall mean the liability of those responsible for the proper navigation and management of the vessel.

(c) Paragraph (a) of this subsection shall not apply to a claim for loss of life or personal injuries.

2. Where, by the sole or concurrent fault of a vessel damage is caused to that or another vessel or to the cargo or any property on board either vessel, or loss of life or personal injury is suffered, by any person on board either vessel, then, subject to subsection (3) of this section, no action shall be maintainable to enforce a claim for damages or lien in respect of such damage, loss of life or injury unless proceedings are commenced within two years from the date when such damage, loss of life or injury was caused; and an action shall not be maintainable to enforce any claim for contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings are commenced within one year from the date of payment.

3. Any court having jurisdiction to deal with an action to which subsection (2) of this section relates may, subject to any rules of court, extend the period referred to in that subsection to such extent and subject to such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court or within the territorial waters of the country to which the plaintiff's vessel belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity. . . ."

It is submitted on behalf of the second named defendant that s. 46(2) of the 1961 Act is applicable to a situation where a person is injured on a boat or vessel. The plaintiff contends that s. 46(2) applies only to situations where a person is injured as a result of a collision between two or more vessels. In the event that s. 46(2) does apply to the facts of this case, the plaintiff has made a number of other submissions which would only fall to be considered if there was a finding that s. 46(2) applies to the facts to this case including the question of the exercise of the discretion contained in s. 46(3). The plaintiff has also raised the issue of the constitutionality of s. 46(2) although no argument was led on that point and would not be relied on in the event that this Court does not find that the plaintiff's claim is statute barred. In effect, the plaintiff sought to reserve its right to raise that issue at the conclusion of the issue before me, if necessary.

It is clear that the interpretation of s. 46(2) of the 1961 Act is central to the arguments in this case. If the interpretation of s. 46(2) of the 1961 Act is as contended for on behalf of the second named defendant then it is clear that the time limit in that provision is such that the plaintiff is statute barred. It is not a case to which the provisions of s. 50 of the PIAB Act apply. It provides:-

"S. 50 In reckoning any period of time for the purposes of any limitation period in relation to a relevant claim specified by the Statute of Limitations 1957 or the Statute of Limitations (Amendment) Act 1991, the period beginning on the making of an application under section 11 in relation to the claim and ending 6 months from the date of issue of an authorisation under, as appropriate, section 14 , 17, 32 or 36, rules under section 46(3) or section 49 shall be disregarded."

Thus, it is clear that in cases to which s. 50 of the PIAB Act apply there is what might be described as a freezing of the limitation period beginning with the formal making of an application under s. 11 and ending six months from the date of issue of an authorisation. As s. 46 (2) of the 1961 Act, is not one of those mentioned in s. 50 of the PIAB Act, it clearly has no application to the provisions of that section. I might just comment briefly on the averment in the affidavit of Ms. McCartney to the effect that this was an inadvertent omission by the legislature. It has to be borne in mind that for good reason, a different limitation period has applied to proceedings in respect of maritime collisions. The Statute of Limitations 1957 originally provided for a limitation of three years in respect of actions in negligence for personal injuries. Notwithstanding that, in 1961, the legislature saw fit to impose a two year limitation period in relation to personal injuries actions as a result of maritime collisions. Clearly the legislature at that time saw a distinction between what might be described as an ordinary personal injuries action and a personal injuries action occurring as a result of a maritime collision.

It is worth noting that s. 46(6) provides:-

"This section shall be construed as one with the Merchant Shipping Acts, 1894 to 1952."

One of the matters considered and provided for in s. 46(3) relates to the possibility of arresting a defendant vessel and it is clear that if such steps are to be taken, it is not at all inappropriate to have a shorter limitation period on the taking of such a step. That being so it comes as no surprise to see that such a distinction continues to be maintained in respect of ordinary personal injuries actions and those arising out of maritime collisions by the omission of a reference to s. 46(2) of the 1961 Act from s. 50 of the PIAB Act.

The provisions of s. 46(2) of the 1961 Act were considered in two cases decided before the High Court. The first of those cases is *Carleton v. O'Regan* [1997] 1 I.L.R.M. 370. In that case the facts were that the plaintiff was the owner and skipper of a vessel "The Una Alan" and the defendant was the owner and skipper of the "Janora" both of which fished out of Castletownbere, Co. Cork. On the 24th August, 1991, the "Una Alan" was struck by the "Janora" as the latter was approaching the quay. On the following day the defendant admitted that the collision occurred but did not think that he had done any damage at the time. As the damage did not affect the seaworthiness of the "Una Alan", it was decided to defer repairs until the next annual overhaul of the trawler, which commenced on the 27th October, 1992. Correspondence ensued between the plaintiff's insurer and the defendant's insurer. On the 20th August, 1993, the plaintiff's insurer sent a fax to the defendant's insurer stating that repairs had been completed, payment for which was made in March 1993, but that it was awaiting details of a claim for loss of fishing. In light of this the plaintiff's insurer asked for an extension of the statutory time limit as there were only three days remaining at that stage. On the same date the defendant's insurer responded by saying that because repairs were deferred for over a year it could not see how there could be any valid claim for loss of fishing and said that it would respond to the request for an extension to time in due course. On the 24th August, 1993, the limitation period ran out without an extension being agreed and in subsequent correspondence the defendant's insurer pointed out that it now considered the claim to be statute barred and was closing its file. The plaintiff issued a plenary summons dated the 5th November, 1993, and the question before the court was whether it should exercise its discretion to extend the time limit for the commencement of the action and the same was tried as a preliminary issue. It was held by Barr J. in refusing to extend the limitation period for the commencement of the action beyond that specified by statute, *inter alia* as follows:-

"There may be special circumstances which justify extending the period of limitation. The factors to be taken into account are the degree of blameworthiness, the length of delay, whether the circumstances which caused the delay were beyond the control of the party who had been dilatory, and whether justice would be done between the parties if the application were granted."

In reaching the conclusion a number of English decisions were approved. It was also held that the letter dated the 5th November, 1992, sent by the defendants insurers to the plaintiff's insurers demonstrated that although liability was not in issue there was a serious dispute between the insurers on quantum. The fact that one aspect of the case, namely liability, was not in issue could not be regarded as the special circumstance or good reason justifying the plaintiff's failure to issue a summons within the specified period. It was also held that the correspondence established that in the days leading up to expiration of the limitation period the parties were a long way from agreement on quantum and no basis for negotiating a settlement on that issue had been established.

When dealing with the provisions of s. 46(2) and the discretion under s. 46(3) to extend time Barr J. at p. 374 of his judgment noted:-

"The foregoing provision carries over into the Act of 1961 a similar discretion granted to the court by s. 8 of the Maritime Conventions Act 1911, which remains in force in English law. The latter section also provides for a similar limitation period of two years from the happening of the event which give rise to the claim."

He then went on to deal with a number of English decisions arising under the provisions of s. 8 of the 1911 Act. Having referred to a number of decisions from the English courts and having ascertained the principles derived from those in relation of to the exercise of discretion under s. 8 he went on to state at the conclusion of his judgment on p. 378 as follows:-

"Applying the principles laid down by Sheen J. to which I have referred, it is clear that the plaintiff has not shown special circumstances or 'good reason' for not issuing the summons within time and, as already stated, he has not given any explanation for failure to do so within the limitation period. Finally, the delay was not beyond the control of the party who had been dilatory."

There are two aspects of that particular decision which I think it is worth commenting on. The first aspect to note in respect of that case is that the event giving rise to the proceedings was a collision between two vessels. The second aspect of the decision which is of interest is that it traces the origins of the provisions of s. 46 back to the provisions of the Maritime Conventions Act 1911. It is also noteworthy that each of the decisions relied on by Barr J. in the course of reaching his decision in the case namely, the *Albany and the Mary Josaine* [1983] 2 Lloyd's Reports 195, the *Gaz Fountain* [1987] 2 Lloyd's Reports 151, and the *Al Tabith and the Alanfushi* [1993] 2 Lloyd's Reports 214, involve a collision between two or more vessels, a point emphasised on behalf of the plaintiff.

The second case in which s. 46(2) was considered is the case of *Lawless v. Dublin Port and Docks Board* [1988] 1 I.L.R.M. 514. The plaintiff in that case was employed by the defendant as a crewman on the tug "Cluain Tarbh" in Dublin Port. The plaintiff claimed that the collision was caused by the negligence of the tugs master for whose conduct the defendant was responsible. The proceedings were instituted in the Circuit Court on behalf of the plaintiff by Civil Bill dated the 2nd February, 1996. The defendant raised preliminary issues under s. 46(2) of the Civil Liability Act 1961, contending that the plaintiff was statute barred in commencing proceedings and that in the particular circumstances the court ought not to extend the time. In the Circuit Court, Judge Matthews held on the 21st January, 1997, that the plaintiff's claim was statute barred pursuant to s. 46(2) of the Civil Liability Act 1961, because of the plaintiff's failure to bring proceedings within two years as prescribed by this section. Furthermore there was nothing in the circumstances of the

plaintiff's case which would bring it within the ambit of s. 46(3) of the 1961 Act, under which the court had discretion to extend time. The plaintiff appealed to the High Court. The first issue was whether the plaintiff was obliged to commence his action against the defendant within two years on the relevant accident as provided for under s. 46(2) of the Civil Liability Act 1961 or whether the three year limitation period for personal injuries under s. 11 of the Statute of Limitations 1957, applied. It was submitted by the plaintiff that s. 46(2) of the 1961 Act, applied only to actions *in rem* and not to a claim *in personam* as in this action. He also claimed that if s. 46(2) of the 1961 Act included claims *in personam* the purported limitation of two years in respect of such claims was unconstitutional on the basis of principle of fair procedures and equality before the law. The case came before Barr J. who held that:-

- "1. Construing s. 46(2) of the Civil Liability Act 1961 as enacted, on the basis of the patently unambiguous meaning of the relevant words used in that subsection, it applies to all forms of action in negligence and was not limited to claims *in rem*.
2. The difference in limitation periods based on location of the place of injury arising from s. 46(2) of the 1961 Act, if constitutional, where the action is brought *in personam* is an obvious statutory *lacuna* which could be put right by the court in exercising its discretion under s. 46(3) in the plaintiff's favour.
3. Having extended the period for commencement of the plaintiff's action up to and including the date of actual commencement of the action, it was unnecessary for the court to make any formal ruling on the constitutionality of s. 46(2) of the Civil Liability Act 1961."

The first point to note in that case is that the injury occurred to the plaintiff as a result of a collision with a quay wall. In other words this is a case in which only one vessel was involved just as in the present case. The second point to note is that the issue raised in that case on behalf of the plaintiff was to the effect that the provisions of s. 46(2) apply only to actions *in rem* and not to a claim *in personam*. That of course is not the issue that arises in these proceedings. There was no argument before Barr J. to the effect that the provisions of s. 46(2) could only be applicable in cases where there was a collision involving two or more vessels. It is however, interesting to note the history of the section as described by Barr J. at p. 518 of his judgment in that case. He stated:-

"Section 46 of the Civil Liability Act 1961 (the Act) is contained in part 3 which relates to concurrent wrongdoing and it has a marginal note 'maritime cases'. Subsection 1 relates to damage caused by the fault of two or more vessels which results in damage to one or more of them or to another vessel or to the cargo of any of them or any property on board. Where an action is brought in that regard 'the liability of each vessel in respect of such damages shall be in proportion to the degree in which such vessel was in fault'. This subsection re-enacts with amendments s. 1 of the Maritime Conventions Act 1911, which gave statutory effect to the Convention of Brussels 1910 relating to collisions at sea."

It is interesting to look briefly at s.1 of the Maritime Conventions Act 1911 which is the equivalent of s. 46(1) it provides:-

"Where, by the fault of two or more vessels, damage or losses caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

Provided that:

- (a) If having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and
- (b) Nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and
- (c) Nothing in this section shall effect the liability of any person under contract of carriage or any contract, upon any person from which he is exempted by any contract or by any provision of law or as affecting the right of any person to limit his liability in the manner provided by law."

Section 8 of that Act is in similar terms to s. 46(2) and s. 46(3) of the Civil Liability Act 1961. It provides as follows:

"No action shall be maintainable to enforce any claim or lien against the vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injury suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced therein or commenced within one year from the date of payment . . ."

The proviso is then set out in similar terms as s. 46(3).

It is also worth briefly looking at the preamble to that Act which states:-

"Whereas at the conference held at Brussels in the year 1910, two Conventions, dealing respectfully with collisions between vessels and with salvage were signed . . . and it is desirable that such amendments should be made in the law relating to merchant shipping as will enable effect to be given to the Convention . . ."

The Maritime Conventions Act 1911 only applies to collisions between two or more vessels. That seems to me to be the

clear meaning of the words contained in s. 1 and s. 8 of the 1911 Act which refers to the fault of two or more vessels. It is important to note, as pointed out previously, that all of the decisions opened to me from the United Kingdom in which that Act has been considered involve collisions involving two or more vessels. I was not referred to any case under those legislative provisions which, as pointed out by Barr J. is still the law in the neighbouring jurisdiction, and which do not involve collisions between two or more vessels. It is in that context that I want to consider the construction of s. 46 of the Civil Liability Act. Section 46(2) is the provision at issue in these proceedings. In the course of s. 46(2) reference is made to "damage . . . caused to that or another vessel" and the section then goes on to refer to "property on board either vessel" or loss of life or personal injury suffered "by any person on board either vessel". It is submitted on behalf of the plaintiff that the use of the reference to "either vessel" twice within the subsection means that s. 46(2) is limited to claims involving collisions between more than one vessel. In support of this contention reference is also made to the provisions of s. 46(1) which is in similar terms to s. 1 of the Maritime Conventions Act 1911, which refers to "the fault of two or more vessels" resulting in damage to one or more of those vessels or to another vessel etc. It is contended on behalf of the plaintiff that on a literal interpretation of the provisions of s. 46(2) the clear intention of the section is that it applies only to those situations where two or more vessels are involved in the collision or incident giving rise to the action for damages. It was further submitted that if a literal interpretation was not possible to resolve any ambiguity or lack of clarity in the section that a purposive interpretation would yield the same result.

In construing section 46(2) of the 1961 Act, I think it is interesting to look at a further passage from the judgment of Barr J. in the case of *Lawless v. Dublin Port and Docks Board*. At p. 519 he considered s. 46(2) and went on to say as follows:-

"In the interest of clarity I set out hereunder subs. (2) stripped of verbiage which is irrelevant to this case.

'Where, by the sole fault of a vessel personal injury is suffered by any person on board [the] vessel then, no action shall be maintainable to enforce a claim for damages in respect of such injury unless proceedings are commenced within two years from the date when such injury was caused.'"

The word in square brackets "the" which appears in that paraphrase of the section is interesting to note. If I were to adopt the same approach as Barr J. and to strip out the excess verbiage in s. 46(2) in the interest of clarity, this is how it would read:

"Where, by the sole or concurrent fault of a vessel personal injury is suffered by any person on board either (my emphasis) vessel then, no action shall be maintainable to enforce a claim for damages in respect of such injury unless proceedings are commenced within two years from the date when such injury was caused."

If one looks at the section in that way, I think it is clear that s. 46(2) can only have application to personal injury actions suffered by an individual on board one of two or more vessels. In considering the interpretation of s. 46(2) I think it is also of assistance to compare with s. 46(1). Section 46 as a whole seems to me to lay out the statutory scheme applicable to collisions between vessels. Looking at the scheme as a whole as contained in s. 46 it seems to me that it is clearly the intention of the Oireachtas that the provisions of s. 46 are only intended to apply to circumstances involving collisions arising from the fault of two or more vessels. On that basis I am satisfied that the arguments of the plaintiff herein are correct insofar as they relate to the interpretation of s. 46(2).

If the interpretation of s. 46(2) is as I have indicated, then it follows that the plaintiff herein is not statute barred. On the other hand if it is the case that I am mistaken in my view and that this is a case in which the plaintiff is statute barred by reason of the provisions of s. 46(2) then, it seems to me that I should indicate my view in relation to the proviso contained at s. 46(3) of the 1961 Act. I have no hesitation in saying that in this case I would exercise my discretion under s. 46(3) in favour of the plaintiff. The plaintiff in this case made application to PIAB under s. 11 of the PIAB 2003. An authorisation was not issued until the 23rd October, 2006 by PIAB. If the second named defendant herein is correct by that time the two year time limit contained in s. 46(2) had elapsed. The plaintiff could not have issued proceedings without an authorisation from PIAB. In those circumstances the time limit had elapsed in circumstances where the plaintiff was not in a position to issue proceedings. This was a circumstance outside the control of the plaintiff. It was submitted in the course of argument on behalf of the second named defendant that the plaintiff's solicitors could have written to PIAB asking them to expedite the provision of an authorisation on the basis that a limitation period was about to expire. I do not think that this assists the case of the second named defendant in relation to the question of the discretion under s. 46(3).

It is without doubt the case that the interpretation of s. 46(2) is not without difficulty. To quote Barr J. in the case of *Lawless* referred to above at p. 52:-

"It was not unreasonable for his advisors to have concluded that s. 46 of the Act of 1961 in its entirety refers to actions *in rem* only. The plaintiff's explanation for delay is reasonable and differs substantially from that in *Carleton v. O'Regan* [1997] 1 I.L.R.M. 370 and to the reasons for delay in the various authorities referred to therein. In all of them the period of limitation was not in issue and the only question in each was whether there had been special circumstances or good reason for the delay in launching proceedings."

It seems to me that, applying the test identified by Barr J. in *Carleton* set out above, the delay was beyond the control of the party who had been dilatory, namely, the plaintiff. Further, it is my view in this case that it was not unreasonable for the plaintiff's advisors herein to have concluded that s. 46 of the Act refers only to actions involving collisions between two or more vessels. I have now so concluded, but if I am wrong in my conclusion then it seems to me that this is a case in which the court should exercise its discretion to extend the period referred to in s. 46(2).

In the circumstances, the second named defendant is not entitled to the relief claimed herein.