Neutral Citation: [2015] IEHC 63

THE HIGH COURT

[2012 No. 11854 P]

BETWEEN

WILLIAM FEENEY

PLAINTIFF

AND

ALBERTO ANDREUCETTI AND JENNY ANDREUCETTI AND BY ORDER MICHAEL REILLY TRADING AS ELM CONSTRUCTION

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered the 10th day of February, 2015

Background

1. The plaintiff is the owner and occupier of a dwelling house at number 44 Farmhill Road, Goatstown, Dublin 14. The first and second-named defendants are the owners and occupiers of the adjoining dwelling house, number 46. The houses are semi-detached.

2. On the 24th January, 2012, the third-named defendant, a building contractor, was carrying out works on the roof of number 46. Shortly after the completion of these works, a fire broke out on the roof of number 46 which spread to number 44 occasioning substantial damage to both properties. In the related proceedings, Andreucetti v Reilly, I gave judgment on the 19th December, 2014 and found that the fire had been caused by the negligence of Mr Reilly.

The Issue

3. In these proceedings, it is clear the plaintiff must succeed against Mr. Reilly given my findings in the previous case. It is common case that Mr. Reilly was an independent contractor retained by Mr. and Mrs. Andreucetti who argue that in the normal way they would have no liability for the negligence of such contractor. The plaintiff says that the Andreucettis are liable at common law for an escape of fire unless they can avail of s. 1 of the Accidental Fires Act 1943, which provides that there is no liability for the accidental escape of fire. The plaintiff argues that the escape in this case was not accidental but negligent and the Act does not apply.

4. The Andreucettis argue that whilst it may be the law in England that an occupier is liable for the escape of fire caused by the negligence of an independent contractor, the court is not bound to take the same view in this jurisdiction. They submit further that the English law is anomalous and ought not be applied as it would be unjust to impose liability on an innocent party and contrary to public policy as evidenced by the analogous provisions of the Occupiers' Liability Act 1995. They contend that the court is at large to determine this issue as it has not previously arisen for consideration in this jurisdiction.

Development of the Law relating to Escape of Fire

5. It has for centuries been a feature of English common law that liability for the escape of fire exists without regard to fault. Ogus in his treatise "Vagaries in Liability for the Escape of Fire" (1969) 27 Cambridge Law Journal 104 notes that a rigid approach to liability for the escape of fire was adopted by the courts since at least the 1400s. In *Balfour v. Barty-King* [1957] 1 All ER 156, a decision of the English Court of Appeal, Lord Goddard C.J. referred to the strict stance taken in *Beaulieu v Finglam* (1)(1401), Y.B. 2 Hen. 4, which is translated in Fifoot's History and Sources of The Common Law and states that the court held that a man:

> "… shall answer to his neighbour for each person who enters his house by his leave or knowledge, or is a guest, if he does any act, with a candle or aught else, whereby his neighbour's house is burnt."

6. Lord Goddard considered the decision in *Turberville v Stamp* (2) (1697), 1Ld. Raym. 264; 12 Mod. Rep. 152, where the court held that:

> "According to law and custom in England, every man is bound to keep his fire safely and securely by day and night, lest for want of due keeping any damage in any manner happen..."

7. Lord Goddard considered that these cases appear to assert an absolute duty to keep fire safe. He referred to Blackstone's Commentaries which said that this provision, which was necessary to exempt householders from liability not caused by negligence, seems to show that by the common law there was an absolute duty to prevent the escape of fire.

8. In 1707, the first statute on liability for fire was enacted, 6 Anne c. 31, section 6 thereof providing that there would be no liability on a person for fire damage caused to the property of another in circumstances outside his control. A similar provision was introduced in Ireland in 1715 in a statute entitled "An Act for preventing Mischief that may happen by Fire" (2 Geo. 1, c. 5) (Ir.) which provided in s. 1:

> "Whereas by the common law of this kingdom every person or persons, in whose house, chamber, or out-house, any fire should accidentally happen, was compellable to make recompense and satisfaction for all damages suffered or occasioned thereby, to the impoverishment and utter ruin frequently of such persons: for remedy whereof, be it enacted … that no action, suit, or process whatsoever, shall be had, maintained, or prosecuted against any person or persons, in whose house or chamber any fire shall … begin, or any recompense or satisfaction be made by such person or persons for any damage suffered or occasioned thereby: any law, usage, or custom, to the contrary notwithstanding."

8. The Fires Prevention (Metropolis) Act 1774 re-enacted the provision in the Act of 1707 in England but with a broader interpretation of land. In *Johnson v. BJW Property Developments Limited* (2001) EWHCJ 1112, Judge Thornton QC, sitting in the Technology and Construction Court of the Queen's Bench Division of the High Court of Justice in England, gives a very useful summary of the historical development of the common law regarding the escape of fire:

> "19. Since Anglo-Saxon times, the common law has treated fire damage caused by an escape of fire as being actionable

by an adjoining owner without proof of fault. This liability was based on custom and on the special duty imposed on house holders to keep their fires safe. This liability became known in the Year Book cases as a liability for the escape of ignis suus. The strictness of this liability was the result of a land based feudal economy with closely knit domestic housing arrangements that were susceptible to catastrophic loss from fires that got out of control. The early history was well summarised by Lord Goddard CJ in [Balfour] at page 502:

> 'From very early times it seems to have been recognised in our law that there is a special duty to guard against the escape of fire. It is perhaps not without interest to observe that in dealing with the meaning and derivation of "curfew", the Oxford English Dictionary points out that its imposition was not an act of political repression. It was a precautionary measure, that people should not retire for the night and leave their fires burning. The Encyclopaedia Britannica says that curfew was rung at Oxford in the days of Alfred the Great. In days when houses were built mainly of timber and when thatch was the commonest roofing, a spark might, and indeed in a country village may still, do almost incalculable damage.'

20. However, the losses resulting from the Great Fire of London in 1666 fuelled the growing belief that had already started to develop that it was anomalous that a man should be liable for fire damage that had not been caused by his fault. This led to statutory intervention, first in section 6 of the Act of 1707 (6 Anne, c. 31) and then by the section that replaced it, section 86 of the Fires Prevention (Metropolis) Act 1774 (14 Geo. 3, c. 78). Despite the apparently localised ambit of this latter Act, the critical section has always been interpreted as being of general application across England and Wales (*Richards v Easto* (1846) 15 M & W 246 at page 251, Parke B)."

9. It has long been recognised in this jurisdiction that there is strict liability at common law for the escape of fire. In *Rutledge v. Land* [1930] I.R. 537, a fire broke out in the defendant's room which spread to the plaintiff's office below. O'Byrne J. in the course of his judgment said (at p. 540):

> "... I am of opinion that, whatever its origin may have been, the fire which caused the damage occurred accidentally, and was not due to any negligence or want of care on the part of the defendant or of any person in his employment or for whose actions he was responsible.
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> The plaintiff, nevertheless, contends that, according to the common law, every person is responsible for damage caused by fire originating on his property, and Mr. Geoghegan submitted that this doctrine was subject to only one exception: namely, where the fire was caused by the act of some third party. I am satisfied that this contention is well founded, but the hardships, which might be occasioned by such a rule of law, are obvious, and the Legislatures, both of this country and of Great Britain, passed statutes for the purpose of providing against such hardships."

9. The court went on to hold that the Act of 1715 applied to the facts and accordingly the defendant was not liable.

10. In *Richardson v. Athlone Woollen Mills* [1942] 1 I.R. 581, the former Supreme Court had to consider the defendant's liability for a fire accidentally caused which originated in its factory. The defendant contended that it was not liable as the 1715 Act applied. The court, by a three to two majority, decided that the Act did not apply because the word "house" in the Act denoted a dwelling house but did not include a factory and accordingly, the common law rule applied and the defendant was strictly liable for the escape of fire. It is clear that the court considered that the common law principles long settled in England applied equally in this jurisdiction. In the course of his dissenting judgment, Sullivan C.J. said (at p 589):

> "I do not find it necessary to discuss the common law of England as to liability for damage caused by accidental fire, illustrated by the cases cited in the course of the argument, or the statutes of the English Parliament that altered the law:—6 Anne, c. 31, and 14 Geo. 3, c. 78. I think it is sufficient to say that the Irish statute recites that by the common law of this kingdom the person in whose "house" a fire accidentally happened was liable to pay compensation for the damage caused thereby, and that the statute is a remedial one, enacted with the object—as it declares—of preventing the impoverishment and utter ruin that frequently resulted from the enforcement of such liability."

11. Meredith J. was of the view that the common law applied here as in England, saying (at p. 591):

> "In my opinion, therefore, the Act only limits the common law liability in the case of the accidental burning of a dwelling-house or dwelling-houses and is of no assistance to the defendants."

12. O'Byrne J. commented on the relationship between negligence and liability for fire, saying (at p. 594):

> "It is difficult, at this stage, to say with any certainty upon what principle the common law doctrine was based. One theory is that it was based upon presumed negligence; but the mere statement of the doctrine would appear to negative the idea of negligence. A more reasonable theory would appear to be that it had its origin in some such principle as that recognised in the well-known case of *Fletcher v. Rylands* , viz. , that if a person keeps upon his land anything which is likely to do mischief if it escape, he is answerable for all the damage which is the natural consequence of its escape. No doubt, these cases are sometimes treated as being founded upon negligence; but negligence, either in the keeping, or in connection with the escape, of the commodity, does not form any part of the gist of the action. If, as I am inclined to think, the doctrine was founded upon that principle, it may well have been considered unduly harsh and improper to continue it in connection with the keeping of domestic fires in dwelling-houses, where they were absolutely essential for the ordinary purposes of life."

13. Following upon this decision of the Supreme Court, and as a direct consequence of it, the Accidental Fires Act 1943 was enacted. Section 1 therein provides:

> "1.-(1) Where any person (in this section referred to as the injured person) has suffered damage by reason of fire accidentally occurring (whether before or after the passing of this Act) in or on the building or land of another person, then, notwithstanding any rule of law, the following provisions shall have effect, that is to say:-
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> (a) no legal proceedings shall, after the passing of this Act, be instituted in any court by the injured person or any person claiming through or under him or as his insurer against such other person on account of such damage; ...
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> (2) Nothing contained in sub-section (1) of this section shall be construed as affecting legal proceedings for the enforcement of any covenant or agreement contained in any lease or letting of a building or land.

(3) In this section he word "*building*" includes any structure of whatsoever material or for whatever purpose used."

14. It seems clear therefore that the common law rule of strict liability for the escape of fire has always applied in this jurisdiction save insofar as modified by statute. The only exception recognised by the common law appears to be where it is shown that the fire was caused by a stranger. In order to avail of the statutory defence, it must be shown that the fire occurred "accidentally".

15. Liability for a fire caused by the negligence of an independent contractor retained by the occupier of land has been considered in several English cases commencing as far back as 1894. In *Black v. Christchurch Finance Co* [1894] A.C. 48, the defendants employed an independent contractor to burn scrub on their land and the fire spread to the adjoining land of the plaintiff. Lord Shand said (at p. 54):

> " … A proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property … if he authorises another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences."

16. In *Balfour*, the defendants engaged contractors to unfreeze pipes in their premises. The contractors' workmen used a blow-lamp to thaw the pipes which caused a fire that spread to the plaintiff's property. The Court of Appeal held that the defendants were liable for the ensuing damage because the fire was caused by negligence and therefore did not begin "accidentally" within the meaning of the 1774 Act.

17. In dealing with the meaning of that term, Lord Goddard said (at p. 159):

> "The precise meaning to be attached to 'accidentally' has not been determined, but it is clear from these last two cited cases that where the fire is caused by negligence, it is not to be regarded as accidental. Although there is a difference of opinion among eminent text writers whether at common law the liability was absolute or depended on negligence, at the present day it can safely be said that a person in whose house a fire is caused by negligence is liable if it spreads to that of his neighbour, and this is true whether the negligence is his own or that of his servant or his guest, but he is not liable if the fire is caused by a stranger.
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> Who then is a stranger? Clearly a trespasser would be in that category, but, if a man is liable for the negligent act of his guest, it is, indeed, difficult to see why he is not liable for the act of a contractor whom he has invited to his house to do work on it, and who does the work in a negligent manner."

18. The Court of Appeal revisited this issue in *H & N Emanuel v. Greater London Council and another* [1971] 2 All ER 835 where Lord Denning MR said (at p. 838):

> "After considering the cases, it is my opinion that the occupier of a house or land is liable for the escape of fire which is due to the negligence not only of his servants, but also of his independent contractors and of his guests, and of anyone who is there with his leave or licence. The only circumstances when the occupier is not liable for the negligence is when it is the negligence of a stranger… The occupier is liable because he is the occupier and responsible in that capacity for those who come by his leave and licence."

19. On the question of strangers, Lord Denning had the following to say (at p. 839):

> "Who then is a stranger? I think a 'stranger' is anyone who in lighting a fire or allowing it to escape acts contrary to anything which the occupier could anticipate that he would do: such as the person in *Rickards v Lothian*. Even if it is a man whom you have allowed or invited into your house, nevertheless, if his conduct in lighting a fire is so alien to your invitation that he should qua the fire be regarded as a trespasser, he is a 'stranger'. Such as the man in Scrutton LJ's well known illustration:
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> > 'When you invite a person into your house to use the staircase you do not invite him to slide down the banisters…"

20. In the course of his judgment in *Johnson*, Judge Thornton continued his analysis of the development of the modern law on liability for fire in the context of vicarious liability:

> "33. An owner or occupier of land has always been vicariously liable for the damage caused by an escape of fire which has been negligently started by the acts of others lawfully in occupation of the land. The strictness of the common law ignis suus liability for an escape of fire was such that an occupier could only escape liability where the act of a stranger caused the escape of fire from his house or land. This was established as early as 1401 in *Beaulieu v Finglam*. The restriction of strict liability by the Acts of 1707 and 1774 did not effect this vicarious liability save that the escape had to have occurred other than accidentally. It follows that this strict or vicarious liability for the escape of fire developed long before the tort of negligence had developed as a separate tort.
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> 34. The tort of negligence developed in the nineteenth century and, with it, there also developed the corollary doctrine that a person was not to be held liable for damage caused by the negligence of his independent contractor. The inter-relationship of this general exemption from liability for damage caused negligently by an independent contractor with the contrary ancient vicarious liability in fire cases where the escape was caused non-accidentally by anyone other than a stranger was not directly addressed for nearly 150 years after the development of negligence liability in the early nineteenth century and, when it was, the Court of Appeal held in two important decisions in 1956 and 1971 that the ancient strict liability for the negligence of independent contractors survived in fire cases. […]
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> 39. Thus, an owner's or occupier's ancient vicarious liability for a fire spreading and escaping onto adjoining premises due to the non-accidental acts of anyone who is not a stranger survived both the Acts of 1707 and 1774 and the contrary trends in the general development of the law of negligence in the nineteenth and twentieth centuries against the imposition of vicarious liability for negligence. Indeed, the liability of an owner or occupier for the damage caused by the escape of fire resulting from an independent contractor's negligence is the last vestige of the ancient strict liability for the escape of ignis suus.
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> 40. Whether this aspect of strict liability for the escape of ignis suus, namely vicarious liability for fire damage where the escape was caused other than accidentally by others, should have survived from the fifteenth century into the twenty

first century is a matter of policy. The Court of Appeal, in the two decisions already cited, clearly decided that this aspect of strict liability should survive."

21. For a recent exposition of the development of the law in this area, see the judgment of the Court of Appeal in *Stannard v. Gore* [2012] EWCA Civ 1248 and in particular the very detailed judgment of Lewison L.J.

Conclusions

22. Counsel for the Andreucettis, Mr. Walsh SC, argues that the court should not impose liability on his clients for the negligence of their independent contractor, Mr. Reilly, as they are an innocent party and it would be unjust to do so. He says that the policy of the Oireachtas in such matters is to be gleaned by analogy from the provisions of the Occupiers' Liability Act 1995, which exempts occupiers of premises from liability to entrants who are injured by a danger on the premises caused by the negligence of an independent contractor.

23. However, it has to be said that the fact that similar legislation exists in England has notaffected the approach of the courts in that jurisdiction. I do not accept the submission that the imposition of liability on the Andreucettis necessarily works an injustice. The plaintiff can surely complain of the same injustice if they are found not to be liable.

24. In the final analysis, it seems to me that it comes down to which of two innocent parties must bear the loss. The courts in England and Ireland have consistently taken the view that it should be the occupier of the property from which the fire escapes. It may well be that the genesis of the policy behind this common law rule has been somewhat lost in the mists of time. However, if the Oireachtas had seen fit to abolish the rule in 1943, it would have been a simple matter to do so.

25. Instead, it chose to limit the application of the rule by its exclusion in relation to fires accidentally occurring and no more. A fire occurring through negligence, on the part of anyone save a stranger, cannot in my view be said to be accidental. The fact that the negligence in question is that of an independent contractor is not germane. The rule long predates the development of the law of negligence and is quite unrelated to later authorities which establish that a party is not liable vicariously for the negligence of an independent contractor.

26. In my opinion, the rule can be rationalised in the modern context when one considers that whilst the party engaging the contractor may not be able to dictate precisely how the contractor goes about his work, he does at least have control over matters such as the selection of an appropriate and competent contractor, the determination of what level of skill and expertise the contractor claims to have and whether the contractor has adequate public liability insurance. The occupier is the sole arbiter of who he allows to enter his property and what activities, hazardous or otherwise, he permits there. Clearly the injured party can have no influence in these matters.

27. I am satisfied therefore that the plaintiff is entitled to succeed against all defendants and there will be judgment accordingly.