Neutral Citation [2015] IEHC 523

THE HIGH COURT

[2014 No. 4613P]

BETWEEN:

DECLAN NUGENT

PLAINTIFF

AND

MARIE FOGARTY

DEFENDANT

JUDGMENT of Kearns P. delivered on the 30th day of July, 2015

These proceedings relate to liability for a fire which occurred on the defendant's dwelling house premises on or about the 27th July, 2010. The plaintiff's claim against the defendant is for damages for loss and damage suffered by the plaintiff to his adjoining dwelling house by reason of the negligence of the defendant.

BACKGROUND

The plaintiff is the owner of the premises at 125 Coolevin, Ballybrack, Co. Dublin. The defendant is the owner and occupier of the premises at 126 Coolevin, Ballybrack. The two properties adjoin one another in a row of terraced houses.

On or about the 27th July, 2010 a fire broke out in the attic of the defendant's property and spread to the plaintiff's property, causing considerable damage. Damages were agreed between the parties in the sum of €96,748.43. There was no dispute between the relevant experts who attended and examined the scene as to both the seat and proximate cause of the fire. The fire broke out in the attic at a point adjacent to downlighter fittings and was caused by plastic bags containing clothing being placed on the attic floor close to such a fitting. The lower part of the downlighters was in the bathroom ceiling. The heat generated by the appliance caused one of the bags of clothing to ignite.

By letter dated 10th September, 2010 Mr. Ian Doyle of OSG Chartered Loss Adjusters, on behalf of the defendant, wrote to Mr Declan Feely of Cunningham Lindsey Chartered Loss Adjusters, for the plaintiff, indicating that *"we wish to advise that OSG are not going to pursue the manufacturer of the appliance for recovery of the Insurer's outlay as the cause of damage has been confirmed as being accidental in nature…Under the Accidental Fires Act 1943 no recovery is possible in this instance due to the accidental nature of the damage as well as there being no negligence on the part of the policyholder or her family."*

The matter came before this Court on 23rd June 2015 and evidence was heard from the defendant and her daughter as well as the experts who visited the site and prepared reports. The Court ruled that the fire was caused due to the negligence of the defendant or her daughter. The bags contained the clothing of the defendant's recently deceased husband and had undoubtedly been placed in the attic by either the defendant or her daughter. There was evidence from both that the deceased had warned both of the dangers of leaving anything flammable in the vicinity of the downlighter fittings in the attic floor.

Negligence having been established, the matter was then adjourned to allow the parties time to prepare legal submissions in relation to the interpretation and application of the Accidental Fires Act, 1943. It is this issue with which this decision is concerned.

THE ACCIDENTAL FIRES ACT, 1943

Section 1 of the 1943 Act deals with the restriction on legal proceedings in respect of accidental fires and provides as follows –

> *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:—*
>
> *(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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> *(b) if, in case the fire occurred before the passing of this Act, any such legal proceedings were instituted after the 16th day of November, 1942, and before the passing of this Act, and are pending at such passing, such legal proceedings shall be discharged and made void, subject to such order as to costs as the court in which such legal proceedings are pending or a judge thereof thinks fit to make.*
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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 the word "**building**" includes any structure of whatsoever material or for whatever purpose used.*

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff submits that the crucial words in section 1 are "fire accidentally occurring". It is submitted that it seems clear that the phrase 'accidentally' means without negligence and that this view was expressed in McMahon & Binchy's *Law of Torts* as follows –

> *"It seems clear that the 1943 Act confers immunity (in the absence of negligence on the part of the Defendant) even where there has been no spread of fire from the Defendant's premises to those of the victim…"*

Counsel relies on the recent decision of Noonan J. in *Feeney v Andreucetti & Ors*. [2015] IEHC 63 where the cause of a fire was the omission of a building contractor carrying out works on an adjoining property. Noonan J. referred to the decision of the English Court of Appeal in *Balfour v. Barty-King* [1957] 1 All ER 156 where Lord Goggard CJ cited the following remarks from *Beaulieu v Finglam* (1) (1401), Y.B. 2 Hen. 4 –

> *"…[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."*

Counsel submits that this absolute duty of care which was placed on the occupier at common law was modified initially by the 1707 Statute, introduced in Ireland in 1715 as 'An Act for preventing Mischief that may happen by fire".

In *Feeney*, the court considered the meaning of the term 'accidentally' and noted the following views of Lord Goddard in Barty-King –

> *"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."*

Counsel submits that the position of the defendants in the Feeney case was much stronger as they had hired an independent contractor to carry out works. However, in the present case, only the defendant and her family had access to the attic where the fire originated. In addition, the danger posed by the downlighters was well known to the family and there does not appear to be any reason why the property which ignited could not have been stored safely. Unless there were exceptional reasons for doing so, it was submitted that the Court should not depart from the views so recently expressed by a colleague judge in the High Court.

It is submitted that it does not matter whether the bag of clothing was placed on top of the downlighter or nearby and that no sensible explanation has been offered as to how property stored at a different portion of the attic could have moved to the point where they came into contact with the down-lighters. The presence of the downlighters was a permanent hazard and as the risk was known to the family there was a requirement to ensure safety by making sure that there was a zone of separation between items such as flammable bags of clothing and the source of heat. It is submitted that in taking into account what is meant by 'non-accidental' or 'negligent' the Court is entitled to weigh in the balance the enormous risk which was caused by placing flammable material so close to a source of heat.

In the case of *Ramblers Way v Mr. Middleton Garden Shop* [2012] IEHC 473 an electric heater had been left switched on in the vicinity of flammable materials. The person concerned had not forgotten to switch off the heater but rather, had turned the thermostat to zero as opposed to plugging out the device altogether. The court held that the fire did not accidentally occur and that the defendant had been negligent by failing to plug out the heater in accordance with the instructions and by leaving it close to flammable materials. It is submitted that the facts of the present case are closely analogous and that the clear risk of danger was known to the defendant and her family. It is contended on behalf of the plaintiff that the fire could have been avoided by undertaking a simple and safe practice.

Counsel submits that there is an excessive reliance placed on whether or not the bag of clothing was 'thrown' on top of the downlighter. Ultimately, the proximity of the bag to the source of heat is what caused the fire in circumstances where the defendant knew of the danger and so it is submitted that the manner in which they came to be stored in this way is immaterial, particularly as the Court has already made a finding of negligence.

It is submitted therefore that the fire which occurred in the present case was not 'accidental' within the meaning of the 1943 Act.

DEFENDANT'S SUBMISSIONS

It is submitted that section 1 of the 1943 Act precludes a plaintiff from issuing proceedings against the owner/occupier of a premises from which a fire has escaped to cause damage to the plaintiff's premises where the fire damage was caused by reason of "fire accidentally occurring." While the 1943 Act does not define "fIre accidentally occurring", the Oxford Dictionary defines 'accident' as –

> *"An unfortunate incident that happens unexpectedly and unintentionally, typically resulting in damage or injury"*

The advanced online Oxford Dictionary defines 'accident' as –

> *"An unpleasant event, especially in a vehicle, that happens unexpectedly and causes injury or damage"*

It is submitted that the definition of an accident does not speak to the cause of the event or link it to an act or omission of some person. Rather, the emphasis is on the lack on intention or lack of expectation. Counsel submits that 'intention' is crucial, and that something may occur as a result of some negligent or careless act, but where there is no intention it may still be defined as an accident. It does not follow that gross negligence or recklessness will not be caught by the definition of an accident.

It is submitted that unless the impugned act of the defendant can be properly characterised as an intentional and deliberate act which causes the fire and unless it can be demonstrated that the fire which occurred is a direct result of the intentional and deliberate act of the defendant, with no intervening act occurring, it may be defined as a fire accidentally occurring.

In the present case, the defendant placed bags of clothing on the floor of the attic in the vicinity of the downlighters and they remained there for a number of weeks before the fire occurred. The defendant did not engage in any other act. The defendant's assertion that the bags of clothing had somehow fallen on top of the downlighters was not challenged by the plaintiff and the defendant also maintains that the bags were not thrown on top of the lighting units, but rather, was placed nearby. Mr Joesph O'Neill, forensic engineer, gave evidence to the Court, which was effectively unchallenged, that plastic can 'creep' or move over time and it is possible that this occurred, causing the bags to fall into the area proximate to the downlighter.

It is submitted therefore that two additional and subsequent events had to occur following the placing of the bags in the attic by the defendant in order for the fire to take hold, namely, the falling of the bag of clothing and the switching on and leaving on of the light. Without these two acts, the fire could not have occurred.

It is submitted that as the fire was not a necessary and unavoidable consequence of an intentional, expected or deliberate act of the

defendant, the fire which occurred does not fall outside the scope of the Act. While the defendant has been found to have been negligent, the fire which occurred some weeks later was nonetheless a chance event and would not have occurred but for the intervening acts of the movement of the bag of clothes and the leaving on of the light. Section 1 of the Act, it is submitted, does not distinguish between an accident which occurs without negligence and an accident which occurs because of negligence.

Counsel contends that at common law it is clear that because of the position at common law with regard to strict liability for the escape of fire and because of the tort of negligence developed at common law in the 19th century, it is clear that in order to successfully invoke the protection of the 1943 Act it is necessary for the defendant owner/occupier of the premises from which the fire escaped to establish that the fire was caused by "reason of fire accidentally occurring", that is to say, it was not deliberately caused by the owner or occupier and did not result from any negligent act on the part of the owner/occupier or his servants or agents.

It is submitted that the decision on *Feeney v Andreucetti* [2015] IEHC 63 as relied upon by the plaintiff concerned a different issue, namely the liability of third party contractors in the event of a fire. Nevertheless, it is acknowledged that Noonan J. suggested that negligence would deprive a defendant from the immunity afforded by the 1943 Act. It is submitted that as a matter of logic this approach cannot be correct as it implies that in all cases where an explanation is forthcoming as to the cause of the fire, the Act will not apply.

In McMahon and Binchy *Law of Torts* (4th ed.) the authors observe –

> *"It seems clear that the 1943 Act confers immunity (in the absence of negligence on the part of the Defendant) even where there has been no spread of fire from the Defendant's premises to those of the victim. Thus, if a fire on the Defendant's premises inures or damages the person or property of another premises at the time – in a public building, such as a library or hospital, for example – the 1943 Act will apply…"*

Counsel refers the Court to an article by Osborough entitled Liability in tort for Unintended Fire Damage (1971, 2 IJR 205) which states –

> *"Unintended fire damage may be the product of negligence or it may not and the question this arises as to whether the expression "accidental" means the same as "unintended". Blackstone, writing of the English accidental fires legislation of 1774, thought that it did: on this view, the negligent author of fire damage would be completely exonerated from liability. Judicial opinion, however, unanimously rejects Blackstone's approach. In England it has been made clear that the immunity conferred by the equivalent Act extends only to fires which are caused by mere chance or are incapable of being traced to any cause. In Ireland, too, it has been assumed that any immunity is lost once negligence is shown. This assumption is explicit in accidental fires immunity cases such as Rutteldge v. Land, Gaynor v. McGinn and Woods v. O'Connor…*
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> *It may be tilting at windmills to express doubts as to the soundness of an interpretation which is so generally applied and is, in addition, just in its results but there is one point worthy of note. The Northern Ireland accidental fires legislation of 1944, unlike its Southern counterpart of the preceding year, expressly reserves the right of the damage victim to sue, inter alia, in negligence, A plausible explanation for this legislative variation is that the Northern Ireland draftsman believed that, in the absence of such express reservation, his legislation might have been interpreted to confer an immunity in respect of damage attributable to all non-intentional fires. The implications for the legal position in the Republic should be obvious."*

Counsel refers the Court to a number of UK authorities including the decision of Judge Thornton QC in *Johnson v BJW Property Developments Limited* (2001) EWHCJ 1112 where the following is stated at paragraph 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…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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> *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."*

Counsel also refers the Court to the passage in *Balfour v Barty-King* [1957] 1 QB 496 as relied upon by the plaintiff. It is submitted that in the recent English Court of Appeal decision of *Stannard v Gore* [2012] EWCA Civ 1248 Lewison LJ conducted a detailed review of the law and arrived at the same conclusions as these earlier cases.

In light of the foregoing, counsel contends that the immunity from suit conferred by the 1943 Act may be available in a case where negligence has been found and that the facts of each case will determine whether the fire occurred accidentally. Unless section 1 of the Act is interpreted to include an accident which occurs without negligence and an accident which occurs because of negligence, where there are intervening acts between the negligent act and the act which causes the fire, the entire purpose of the 1943 Act will have been frustrated.

It is submitted that if this interpretation is not adopted, it is difficult to conceive of any set of circumstances where the 1943 Act can be successfully applied as it is invariable the case that some previous act in a chain of acts can be viewed as negligent or as a result of negligence with the result that the application of the 1943 Act to an otherwise chance fire is precluded.

DISCUSSION AND DECISION

The Court has already found that the fire which caused damage to the plaintiff's property occurred due to the negligence of the plaintiff. The only question which remains for this Court to consider therefore is whether or not such a fire, caused as it was by negligence, can come within the scope of a "fire accidentally occurring" as set out in section 1 of the 1943 Act.

Section 1 of the 1943 Act provides that where a person has suffered damage by reason of fire accidentally occurring in or on the land of another person, then no legal proceedings can be instituted by the injured person against such other person. Counsel on behalf of the plaintiff has submitted that this immunity from suit cannot include proceedings related to fires such as that in the present case, which was caused by the negligence of the defendant. The defendant, on the other hand, contends that, in certain circumstances, the Act includes fires which occur because of negligence.

I have carefully considered the submissions of both parties on this issue of statutory interpretation and am satisfied that the plaintiff's interpretation of section 1 of the 1943 Act is the correct one. The defendant has urged the Court to adopt an interpretation of the term 'fire accidentally occurring' which encompasses some intentional or deliberate act. However, based on the existing case law and indeed the definitions of the word 'accident' relied upon by the defendant, the Court finds that this interpretation of the Act cannot be correct.

In *Feeney v Andreucetti*, Noonan J. carried out an extensive review of the development of the law relating to the escape of fire. While that case concerned the liability of a third party contractor, the Court held that –

> *"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 facts in the case of *Ramblers Way Ltd. v. Mr Middleton Garden Shop Ltd*. are similar to those in the present case. There, the fire was also caused by heat generated from an electrical appliance which had been left on, namely an electric heater. Hedigan J. found that this conduct on the part of the defendant to have been negligent and, consequently, outside the scope of the 1943 Act.

While this Court is not strictly bound to follow decisions of other judges of the High Court, it is well established that there must be strong and compelling reasons to warrant any contradiction or departure. The jurisprudence in this area was recently considered by this Court *in Wicklow County Council v Kinsella & Anor.* [2015] IEHC 229. In *Re Worldport Ireland Ltd*. [2005] 2 JIC 1604 Clarke J. considered the circumstances where it might be appropriate for a court to depart from a decision of a court of equal jurisdiction –

> *"Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is clear error in the judgment, or where the judgment sought to be revisited was delivered [at a] sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all the relevant authorities and which was, as was noted by Kearns J. (in Re Industrial Services Co. (Section 218 application) [2001] 2 I.R. 118), based on forming a judgment between evenly balanced argument. If each time such a point were to arise again, a judge were free to form his or her own view, without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the ratio in Industrial Services and decline to take the view as urged by counsel for the Bank that the case was wrongly decided."*

The decision in *Feeney* included an extensive review of the legal authorities and the development of the law relating to the escape of fire, and I am satisfied that there is no clear error which warrants this Court departing from it. Similarly, there is no persuasive reason why the decision of Hedigan J. in *Ramblers Way Ltd*. should not be followed.

The notion that a finding of negligence causes a fire to fall outside the scope of the legislation is well established and, indeed, is referred to in the passage of Osborough as relied upon by the defendant which states –

> *"In England it has been made clear that the immunity conferred by the equivalent Act extends only to fires which are caused by mere chance or are incapable of being traced to any cause. In Ireland, too, it has been assumed that any immunity is lost once negligence is shown."*

While the fire which occurred in the present case was undoubtedly very unfortunate, it was nevertheless caused by the defendant's negligence and cannot therefore be said to be a 'fire accidentally occurring'. Counsel for the defendant submits that if this position is correct it is impossible to conceive of any set of circumstances where the 1943 Act can be successfully applied. However, the Court rejects this contention. Cases where the courts, applying well established principles of negligence, find that a fire was not caused by negligence are likely to come within the scope of the 1943 Act. A non-exhaustive list of examples might include where there is interference with electrics or wiring by weather or animals, where something enters a homeowner's chimney and causes a fire, or the spontaneous explosion of an aerosol canister.

In the present case however, the defendant was aware of the propensity of the downlighters to overheat and nevertheless stored flammable material insufficient proximity to cause them to ignite. Whether or not the bags were thrown directly on top of the units is immaterial. To include such negligence in the definition of a 'fire accidentally occurring' would bring a whole range of negligent acts within the definition of the Act such that a person's duty to exercise appropriate caution and duty to their neighbours would be significantly lessened. This could not have been the intention of the legislature.

In light of the foregoing I am satisfied that the plaintiff is entitled to succeed.