THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 9

Record No. 2016/528

Peart J.
McGovern J.
Baker J.

BETWEEN/

MARY HEANUE

PLAINTIFF

- AND–

THE COUNTY COUNCIL FOR THE COUNTY OF MAYO

APPELLANT

- AND –

CLARE ISLAND FERRIES & CLEW BAY CRUISES LIMITED

- AND –

CHRISTOPHER O'GRADY

RESPONDENTS

JUDGMENT of the Court delivered on the 23rd day of January 2019 by Mr. Justice McGovern

1. This is an appeal against an order of the High Court (Hanna J.) determining liability on an issue of contribution or indemnity between the appellants and the respondents in proceedings taken by the plaintiff.

2. On the 20th December 2011, the plaintiff was a passenger on a ferry known as the "Pirate Queen" ("the vessel") owned by the first named respondent, on a passage from Inishturk to Roonagh Pier in County Mayo. The second named respondent was the skipper of the vessel. The appellant was responsible for the upkeep and maintenance of lights on and in the vicinity of the pier and, in particular, a green navigation light at the end of the pier and navigation aids known as "leading lights". The accident, which was the subject matter of the proceedings, occurred sometime around 6.30 in the evening and in darkness. While attempting to berth the vessel at the pier, she went aground on rocks causing slight damage to the vessel and injury to the plaintiff.

3. Shortly after the vessel went aground she was lifted off by the swell and made her way safely into the harbour at Roonagh Pier.

4. On the 11th May 2015, the respondents settled the plaintiff's claim for €73,215 together with costs which were agreed at €47,691.18, being a total of €120,941.18.

5. The trial of the issue as to whether or not the respondents were entitled to contribution or indemnity from the appellant commenced on the 12th January 2016. After what can only be described as a very lengthy hearing of thirteen days, the High Court judge apportioned liability two thirds against the appellant and one third against the respondents.

Factual background relevant to the issues

6. The following factual issues are relevant to this appeal:

(a) What navigational lighting aids at Roonagh Pier were not working at the time of the accident?

(b) Is the appellant responsible for the failure of any navigational lights?

(c) Did the failure of any navigational lights cause or contribute to the accident?

7. Two matters are not in dispute. In the first place, the respondents accept that they were partially to blame for the accident and have not cross-appealed the finding of the High Court judge against them other than the ruling on costs. Second, the appellant accepts that it had responsibility for the placing of navigational lights at Roonagh Pier and their repair and maintenance.

8. In the High Court, Mr. Joe O'Malley, a crew member on board the vessel, gave evidence that he received a text in the course of the voyage from Inishturk to Roonagh Pier to say that the green navigational light on Roonagh Pier was not working. This evidence was not disputed and did not become an issue on the appeal. Nor was it in dispute that one of the leading lights was not working. The leading lights were navigational aids involving two poles each separately mounted with an opposing triangle (for day time use) and a vertical light beam (to be used at night). The skipper of a vessel entering the harbour at night would know he was on the correct line when the lights were in alignment one above the other. In the High Court, Mr. Christopher O'Grady ("the skipper") gave evidence that the lower leading light was out of order and, again, this was not seriously challenged on the appeal. Rather, the appellants contended that the absence of navigation lights was of no significance and did not contribute to the accident because the skipper of the vessel did not rely on them.

9. From the evidence heard by the High Court judge, it appeared that there were three ways in which a vessel coming from Inishturk to Roonagh Pier could make the final approach. The three ways (or a combination of them) were:-

(i) to rely on the leading lights and come in on a bearing of 144□;

(ii) to rely on radar; and

(iii) to rely on a visual approach.

10. Obviously a visual approach was more problematic at the time of the accident since it was dark and there was poor visibility due to weather conditions. However, the skipper had a searchlight on board which could assist in that type of approach. There was a body of evidence to suggest that, as one got closer to the pier, radar would have been of limited assistance due to the immediate proximity of the land as a background feature. The preponderance of evidence was to the effect that a combination of a visual approach aided by navigational lights and augmented by a searchlight in poor visibility was the preferred approach. However there was also evidence to suggest that, coming from the Inishturk direction, there would be limited time available to pick up the leading lights if one made an approach too close to the end of the pier.

11. On the evening of the accident, the evidence established that the vessel was quite close to the end of the pier when the skipper tried to make the final turn to starboard in order to berth the vessel in the harbour.

Issues on the appeal

12. The appellant appeals the entire of the order of the High Court judge including the order for costs. The trial judge directed that the appellant pay 50% of the respondent's costs of the trial of the claim for contribution and indemnity, having previously determined the issue of liability two thirds against the appellant and one third against the respondents.

13. This appeal, insofar as it concerns the trial judge's findings of fact can be determined on the basis of the judgment of the Supreme Court in *Hay v. O'Grady* [1992] 1 I.R. 210, as re-iterated more recently by the Supreme Court in *M.C. & Or. v. F.C. & Ors.* [2013] IESC 36 prior to the creation of the Court of Appeal. In the *M.C.* case, MacMenamin J. set out the role of the Supreme Court as a court of appeal and the same principles apply to this Court in the exercise of its appellate jurisdiction. In para. 3 of his judgment, MacMenamin J. stated:-

> "3. …This Court exercises an appellate jurisdiction from the High Court. The jurisdiction of this Court on such appeals is addressed in the case of *Hay v O'Grady* [1992] I.R. 210. This Court does not engage in a complete re-hearing of a case on appeal. It proceeds rather on the facts as found by the trial judge and his inferences based on these facts. As *Hay v O'Grady* makes clear, if the findings of fact made by a trial judge are supported by credible evidence, then this Court is bound by those findings, even if there is apparently weighty evidence to the contrary. This Court will only interfere with findings of the High Court where findings of primary fact are not supported by evidence, or cannot in all reason be supported by the evidence (see also *Pernod Ricard and Comrie plc v Fyffes plc* (Unreported, The Supreme Court, 11th November 1988)). Furthermore, in *Hay v O'Grady*, McCarthy J. pointed out that an appellate court will be slow to substitute its own inference of fact for that of the trial judge, where such inference depends upon oral evidence or recollection of fact. In drawing of inferences from circumstantial evidence, an appellate tribunal is, of course, in as good a position as the trial judge (see also *O'Connor v Dublin Bus* [2003] 4 I.R. 459; *Quinn (A Minor) v Mid Western Health Board and Another* [2005] 4 I.R. 1).
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> 4. It is necessary to re-iterate that (sic) these basic principles as the appeal, presented by F.C., the first named defendant in person, appeared to be premised on the assumption that there were some segments of evidence before the High Court judge which should have lead him to a different conclusion. The questions are whether the findings of fact are based on evidence; and whether inferences are correctly and factually drawn…".

14. The trial judge heard an extensive amount of evidence in this case. In dealing with the issue of costs he stated:

> "I must take account of the fact that this case did go on much longer probably than it should have, but I don't think anyone specifically wasted the time of the Court and I don't think there should be any penalty."

15. Having read the transcripts, I have to say that I share the trial judge's concern about the length of the trial of the issue in the High Court. What is clear is that each of the parties to the issue was permitted to set out their position at great length and in very considerable detail through the many witnesses who gave evidence. Some of them were witnesses as to fact and some were expert witnesses.

16. In a lengthy judgment running to 65 pages and 264 paragraphs, the High Court judge set out in great detail the evidence before him and his conclusions on the evidence.

17. The appellant argues that the fact that one of the leading lights was not working was irrelevant because the skipper of the vessel did not rely on them. However, Mr. Christopher O'Grady said that when he left Inishturk for Roonagh he expected all the lights to be functioning and in particular the landing lights by which he meant the leading lights. A crew member, Mr. Joe O'Malley, informed him in the course of the voyage that he had received a text from the skipper's son to state that the pier headlight was out of order. From further evidence throughout the trial it became clear that this was a green light at the end of the pier which was for the purpose of designating the location of the pier in darkness. The skipper described how he would have no difficulty in making a landing using the leading lights and coming in on a bearing of 144□. He described that as he came around the end of the pier he discovered that the lower of the two leading lights was out of order and he decided to instruct Mr. Joe O'Malley, because of limited visibility, to focus a searchlight directly ahead so they could pick up the pier. Under cross-examination the skipper gave evidence that he could land at the pier if the harbour lights were working. He went on to describe how the vessel proceeded with the aid of the search light:-

> "..when we discovered that the landing light was not working and the guide-in lights were not working."

18. He insisted that there would have been no difficulty in landing at Roonagh Pier if the lights had been working properly.

19. On Day 4, while still under cross-examination, the second named respondent went into some detail about how he would pick up the leading lights on entering the harbour and described how the lights were not operating properly on the night in question and how that was the situation which faced him as skipper of the vessel. At one point he stated that the reason why the vessel was off course was directly due to the leading lights not working. He made it quite clear that the vessel could have effected a landing at Roonagh Pier if the navigational lights were working. In answer to the trial judge on Day 4 he stated:-

> "Well, if the lights had been working I would have no difficulty in landing at Roonagh that night. That was my approach."

20. In view of the evidence given to the Court by the second named respondent the trial judge was entitled to conclude that he intended to rely on the leading lights and that the fact that they were not working contributed to the accident. It does not matter whether or not this Court would have accepted the evidence of Mr. O'Grady on this point. When one looks at the entire transcript and the evidence referred to by the trial judge in his judgment it is clear that there was credible evidence from which he was entitled to conclude that the skipper intended to rely on the lights and that the failure to have properly functioning navigational lights contributed to the accident.

21. The judgment of the trial judge showed how he considered all the evidence carefully and that included the evidence given by a number of experts. For example, Captain Hopkins, whom the judge described as a highly qualified and experienced mariner, insisted that a vessel could join the leading lights line at any point before entering the harbour. Mr. Alan O'Grady, the son of the skipper, gave evidence that he often travelled from Inishturk to Roonagh Pier and would enter along the acquisition line, joining it approximately 100 to 200 metres out from the harbour. Mr. John Connolly, a marine surveyor, visited the scene, spent some time on the vessel with Mr. Chris O'Grady and inspected the navigational lights. He informed the judge that the cause of the vessel going off course was the lack of leading lights and he also gave evidence that there was no planned maintenance system to maintain the navigational lights at the time.

22. Captain Kavanagh, a master mariner and lecturer in the National Maritime College, gave evidence that the leading lights would not be used when approaching from the west or the Inishturk direction. He suggested that one would not be able to use the leading lights in the last stages of the approach. Captain Kavanagh never visited the scene of the accident and the trial judge was entitled to weight up any conflict between the evidence of Captain Hopkins and Captain Kavanagh and reach the conclusion which he did.

23. At the end of the day, the trial judge accepted the evidence of Mr. Mark O'Malley and Mr. Chris O'Grady and his son, Alan O'Grady, that the green pier light was not working, and he accepted the evidence of the skipper that he expected the leading lights would be working as he entered the harbour. At para. 245 of his judgment, he concluded that had the pier green light been working the accident would probably not have occurred. At para. 246 he stated:-

> "I am further satisfied and accept the evidence of Captain Hopkins that had the leading lights both been working Mr. O'Grady would have been afforded a clear line into the harbour and the accident would not have occurred."

24. Where the trial judge has made findings of primary fact, this Court cannot interfere with those findings unless they are unsupported by evidence or cannot in all reason be supported by the evidence. That clear statement of the law, as set out in *Hay v. O'Grady* and *M.C. & Or. v. F.C. & Ors.*, remains the position.

25. The appellant argues that, even if the navigation lights were not working, it was not responsible since it had taken all reasonable steps to ensure that a back-up system existed for the replacement of faulty light bulbs. Furthermore, the appellant argues that there was no evidence that the navigation lights were out of action for any appreciable length of time.

26. Towards the end of his lengthy judgment, the trial judge set out in some detail the evidence about the maintenance system operated by the appellant in respect of navigation lights at Roonagh. The evidence in the High Court established that in respect of each of the leading lights there was a carousel with six bulbs so that when the activated light failed another replacement bulb would slot into place. The trial judge referred to the evidence of Mr. Michael Connolly to the effect that all six bulbs on the lower leading light had burned out and three of the six on the upper light had burned out and that there was no planned maintenance system in place to maintain the navigation lights at the time. Mr. Connolly criticised the maintenance regime. While other witnesses defended the regime on behalf of the appellant, the trial judge at para. 258 of his judgment set out six different incidents which, he said, demonstrated a systematic shortfall on the part of the first named defendant in maintaining the navigation lights. A review of the evidence establishes quite clearly that the trial judge was entitled to come to that conclusion and had evidence to support it. I would therefore reject the claim made by the appellant that it was not responsible for the failure of the navigational lights. It should be said that the criticism made by Mr. Connolly also extended to the maintenance of the green light at the end of the pier.

27. At para. 260 of his judgment the trial judge said:-

> "260. On the balance of probabilities, I am satisfied that absent lighting and a deficient system of repair and maintenance presented a significant danger to the Pirate Queen as it approached Roonagh and materially contributed to the resultant accident."

28. While there was evidence before the High Court that would have entitled him to reach a different conclusion it cannot be said that his actual conclusion was unsupported by credible evidence.

29. The appellant urged the Court to follow the decision of the Supreme Court in *Conole v. Redbank Oyster Company Limited & Anor.* [1976] 1 I.R. 191 and to hold that the negligence of the respondents was the causa causans of the injury and loss suffered by the plaintiff. The High Court judge disagreed. I believe he was correct in that conclusion. The facts of this case are different to *Conole*. The *Conole* case concerned a vessel which was delivered to the owner in an unseaworthy condition capsizing with significant loss of life. The Court held that, although the vessel would not have capsized but for its unseaworthiness (the *causa sine qua non*), the proximate cause of the accident (*causa causans*) was the fact that the owner, knowing that it was unseaworthy, proceeded to sea by overloading the vessel with an excess number of passengers. The case before this Court is quite different. There was evidence given to the Court and accepted by the trial judge that the skipper of the vessel was not aware that the leading lights were not working until he got around the end of the harbour and that, in fact, he had intended to rely on them.

30. I am satisfied that there was no novus actus interveniens. The respondents in their written submissions point to the fact that the courts in this jurisdiction "…are no longer obsessed with seeking a single cause for accidents or injuries. They are willing to admit that there maybe two or more causes sufficient to attract liability." (McMahon & Binchy, *Law of Torts* (4th ed., Bloomsbury, 2013) p. 117). The respondents rely on the judgment of the Supreme Court in *Hayes v. Minister for Finance* [2007] 3 I.R. 190. On the basis of the principles set out in *Hayes*, the respondents argue that if the appellant wishes to rely on the principle of *novus actus interveniens* it must show that the actions of the second named respondent on the night in question in seeking to bring the vessel into Roonagh Pier were either wholly unforeseeable, criminal or reckless in the subjective sense. There was no evidence to support such a conclusion. I accept that submission.

31. The thrust of the appeal in this case is against findings of fact made by the trial judge and the inferences he drew from those facts and consists of an attempt to persuade this Court to reach different conclusions on the evidence. As I have already stated at para. 13 supra, the jurisprudence established by *Hay v. O'Grady* and re-iterated more recently in *M.C. & Anor. v. F.C. & Ors*. does not allow this Court to approach the matter on that basis.

Conclusion
32. While this case presented a considerable body of evidence to support the position adopted by each of the parties in the High Court, the trial judge resolved the issues of fact in a way which imputed responsibility for the accident to both the appellant and the respondent in varying degrees. The respondents have not cross-appealed the trial judge's findings against them. There was credible evidence to support the judge's findings against the appellant both in terms of its fault and the degree of fault.

33. The trial judge ordered that the appellant pay the respondent 50% of the costs of the respondents. While the respondents argued that they should have been awarded the entire costs of the issue, that would not seem to be fair since they were found to be one-third responsible for the accident and have not cross-appealed on that issue before this Court. While there was not much argument on this issue before this Court we have available the transcript of the 2nd June 2016 when the argument as to costs of the issue was canvassed before the High Court judge and his decision on the point was given. The judge referred to the fact that there had been an apportionment between the parties and that in all the circumstances the appropriate order was that the appellant should pay 50% of the costs of the respondents. The respondents argued that they had, in fact, settled the action with the plaintiff and there was some reference to correspondence which was "without prejudice save as to costs".

34. It seems to me that if the costs were to follow the event they should have been proportionate to the degrees of liability on the issue. In departing from that yardstick, the trial judge merely said "…I think, 50/50 is probably appropriate in all of the circumstances of this case". It seems to me that the default position should have been to direct that the appellant pay two thirds of the respondents' costs of the issue in the High Court and that he would have to give some reason from departing from that position. In my view he failed to give sufficient reason for doing so.

35. I would dismiss the appeal save on the issue of costs where I would vary the High Court judge's order so as to provide for the appellant paying two thirds of the respondents' costs of the issue in the High Court.