THE SUPREME COURT

The Appeal No. 133/2007

Denham J.
Fennelly J.
McKechnie J.

BETWEEN:

PATRICK J. LYNCH

PLAINTIFF/APPELLANT

AND

BINNACLE LIMITED
TRADING AS CAVAN CO-OP MART

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Fennelly delivered the 9th day of March 2011

1. On 24 October 2003, the plaintiff/appellant (I will call him "the appellant") was employed as a yard man and drover at the cattle mart operated by the respondent in Cavan. He had been working at the mart for more than 30 years. He also had a small farm. He was forty five years of age at the date of the accident. He suffered a severe direct kick to the scrotum when he entered the single pen where a Limousin bullock was held.

2. White J on 7 December 2006 dismissed the appellant's claim for damages against the respondent. This is his appeal.

3. The essence of the appellant's claim at trial was that the respondent was negligent in operating a system of work which required the him to pass by a bullock from the rear in a small single pen in order to open a gate at the far or front end of the pen so as to allow the bullock to go into the sales ring.

4. On the day of the accident, three separate sales were taking place. The appellant was involved with bullocks in an area consisting of a number of pens divided by tubular steel railings. The cattle were initially enclosed in holding pens in groups of about 10. They were brought from there in groups to a dividing pen, which gave access to two single pens. One animal was driven into each of these single pens, which had an entrance gate at the rear, from the dividing pen. It also had an exit gate at the front, leading to the weighing scales and thence to the sales ring.

5. The system was that the appellant would drive one animal into each of the single pens and close the rear gate behind the animal. Another mart employee, Mr Jackie Drury, was placed at the exit gate from the pens. He would open each gate in turn so as to allow the animal onto the weighbridge before going into the sales ring. A third employee, Mr Ford, was placed at the far end of the weighbridge so as to allow each animal into the sales ring.

6. Some time prior to the appellant's accident, Mr Drury told the appellant that he had to go off on business and Mr Ford said that he had to go to the other ring to sell his sucklers. The result was that the appellant was left on his own for about a half an hour. He was dividing the cattle and trying to get them in one by one. Because there was nobody to help him, he had to open the rear gate of the single pen and walk up behind and past the bullock in it in order to open the gate at the far end to allow the animal out and onto the weighbridge. As he was going by the particular Limousin bullock, the animal drew out and kicked him in the testicles.

7. In cross-examination, the appellant said that he was not too happy about having to do the job without the other two men but "there was no one else." He said that there was no one about to get any assistance from.

8. Mr Leonard Briody, B. Eng., M.I.E.I. gave expert evidence on behalf of the appellant. In his description of the system, he said that there is a man in the neutral space between the weighing scales and the exit from the pens. He opens the weighing scales gates. He then closes the weighing scales gates and waits until the scales are free to go again. He said that cattle are more nervous when they are on their own, as distinct from being in a group. Limousin cattle, in particular, are excitable by nature. The safe method, having put an animal into a single pen, is to open the gate from the other side: the animal will go through a clear passage in front of him.

9. In Mr Briody's view, it would be an un-safe system for the appellant to have to work with no other employee there to help him: "an animal enclosed on his own individually in a pen is excitable, unpredictable, so it would be unsafe to pass by it to go on to open the gate in front of that." He added: "there should have been another employee ahead of the pen to open the exit gate and allow the animal out."

10. When questioned by the trial judge, Mr Briody said that the system was a safe one, so long as both the other employees were there. Asked how the respondent could be faulted for the absence of Mr Drury and Mr Ford, he said that they could have ensured that persons did not absent themselves without permission and without a replacement being available.

11. The appellant's evidence on liability was confined to that of himself supported by that of Mr Briody. The respondent called no expert evidence. Two witnesses were called by the respondent, neither of whom had seen the accident. Some of that evidence suggested that the appellant was in front of a number of bullocks being driven by one of those witnesses. Ultimately, their evidence was immaterial in view of the findings of the learned trial judge.

12. The learned trial judge said that "with more than a degree of hesitation" he was "prepared to conclude that the appellant sustained his injury in the manner that he stated in evidence."

13. He gave the following reasons for rejecting the appellant's claim:

"It has been argued that the conduct of Mr Ford and Mr Drury in absenting themselves was tortious and that the respondent was vicariously liable for such tortious acts. An

employer is clearly vicariously liable for the tortious acts of its employees, but I really do not see anything tortious in the conduct of either Mr Ford or Mr Drury.

"Is there any evidence from which I could conclude that the respondent knew, or ought to have known of the danger to which the appellant was exposed on the day in question? Evidence has been given before me that persons employed by the respondent absent themselves from time to time for shorter periods, but there is no evidence before me that this was a common or habitual feature of practice, nor is there any evidence that the respondent knew of or condoned employees temporarily absenting in themselves from their posts.

"There is nothing to suggest that either Mr Ford or Mr Drury sought to obtain the permission of the management to absent themselves on the day in question. Further, there is no evidence before me to suggest that the events of 24 October 2003, namely, two drovers absenting themselves at the same time, were anything other than unique.

"Accordingly, I am driven to the conclusion that the appellant is the author of his own misfortune, and that there is no negligence on the part of the respondent."

14. Mr Richard Lyons, Senior counsel, on behalf of the appellant submitted that the learned trial judge was incorrect in his conclusions that there was nothing tortious in the conduct of either Mr Ford or Mr Drury and/or that the respondent was not vicariously responsible for the acts of those two persons in absenting themselves from their posts.

15. This, indeed, is the issue to which the appeal reduces itself. On the evidence of Mr Briody, the system of work provided by the respondent was safe so long as the appellant had the assistance of the other two employees. On the other hand, without that assistance it was not a safe system. The respondent called no expert evidence to contradict this view. Indeed, it was not seriously contested. This does not mean that, as a matter of law, the operators of livestock marts are obliged generally to have any particular number of employees available to organise the leading of cattle into the sales ring. It merely means that that was the state of the evidence in this case.

16. At one point on the hearing of the appeal, Mr Joseph McGettigan, Senior Counsel, for the respondent sought to argue that an employee such as the appellant would always have to

go into the pen with the animal and that that was normal practice. Thus there was nothing unusual about what happened in this case. There was, however, no such evidence in the court of trial. No such proposition was put to Mr Briody.

17. Thus, the case must be considered on the assumption that it was unsafe, i.e., it was dangerous for the appellant to be expected to move the animals towards the sales ring in the way he did. He had to open the gate at that back of the single pen, get the bullock into the pen, then go in himself, pass by the animal and open the gate at the far end. In this way, he was exposed to the hazard that the animal would kick him, which is what happened. If another employee had been available to open the exit gate to let the animal out towards the weighbridge, he would not have had to get into the pen at all and the accident would not have happened.

18. Since the decision of this court in Bradley v Córas Iompair Eireann [1976] I.R. 217 it has been established that, in cases of employers liability, negligence can be established in either of two ways: firstly, by establishing a departure from known and accepted standards in the particular trade or industry; secondly, by demonstrating a failing so obvious as to be unreasonable. Henchy J cited two principal authorities. In Morton v. William Dixon Ltd [1909] S.C. 807, Lord Dunedin pronounced what Henchy J considered to be “the most commonly cited statement of the necessary degree of proof” as follows:

". . . I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.”

19. That prescription was, as Henchy J put it, “glossed” by Lord Normand in Paris v Stepney Borough Council [1951] A.C. 367 at 382:

"The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances. But it does not detract from the test of the conduct and judgment of the reasonable and prudent man. If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether

the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it."

20. The consequence of these principles is, in practice, that a plaintiff will rely on the evidence of an expert in order to establish the appropriate applicable standard. Mr Lyons cited the following passage from the judgment of Murray J, as he then was, in McSweeney v J. S. McCarthy LTD [Supreme Court unreported 28th January 2000]:

"It is well-established that an employer is under a common-law duty to provide his employees with a reasonably safe system of work. I know of no principle which exempts an employer from this duty only because their employee(s) are experienced, or know or ought to have known, of the dangers inherent in the work. Certainly, there are many factors which come into play in assessing whether, in the circumstances of the particular case, the system of work was reasonably safe or not. Among these are the experience of the workmen concerned, the level of danger involved, its complexity and so on."

21. The employer is thus under a duty at common law to "provide his employees with a reasonably safe system of work." This duty is laid directly on the employer and is non-delegable. As Hardiman J said in his judgment in O'Keeffe v Hickey [2009] 2 I.R. 302 at 325, the "distinction between a non-delegable duty of an employer and a vicarious liability of the employer for his employees is a subtle one." I believe this distinction is at the root of the problem in this case. The learned trial judge looked for a distinct tortious act of the employees, Mr Drury and Mr Ford, with vicarious liability of the employer for that act as the sole basis of imposition of liability, but neglected to note that the duty to provide, using the expression of Murray J, a safe system of work is incumbent directly on the employer and is not capable of being delegated.

22. The authors of McMahon & Binchy, Law of Torts, (2nd ed. Butterworths, 1990 pars 18.33 state that "[s]ince Wilsons & Clyde Coal Ltd. v English [1938] A.C. it has been recognised that an employer's duty of care to his or her employees is "non-delegable.""

23. Wilsons & Clyde Coal concerned an accident in a colliery in Scotland. The owner had delegated the management of the colliery to an agent. The respondents sought to rely on what is now the defunct defence of common employment to defeat the claim of a miner injured in their mine. Lord Macmillan explained the nature of the duty of an employer to his employees in the following terms at page 75:

"Now I take it to be settled law that the provision of a safe system of working in a colliery is an obligation of the owner of the colliery. He cannot divest himself of this duty, though he may - and, if it involves technical management and he is not himself technically qualified, must - perform it through the agency of an employee. It remains the owner's obligation, and the agent whom the owner appoints to perform it performs it on the owner's behalf. The owner remains vicariously responsible for the negligence of the person whom he has appointed to perform his obligation for him, and cannot escape liability by merely proving that he has appointed a competent agent. If the owner's duty has not been performed, no matter how competent the agent selected by the owner to perform it for him, the owner is responsible."

24. O'Flaherty J in Connolly v Dundalk Urban District Council (unreported Supreme Court 18th November 1992, on appeal from the High Court judgment of O'Hanlon J reported at [1990] 2 I.R. 1) expressed the matter in the following terms:

" The common law duty is to take reasonable steps to provide safe plant and a safe place of work - I speak of the place of work as being part of the employer's property…… are such that they cannot be delegated to independent contractors so as to avoid the primary liability that falls on employers to make sure that these duties are carried out. These are responsibilities which cannot be put to one side; they must remain with the employer. They are owed to each individual employee."

25. If the employer retains an independent contractor who, by his negligence, causes injury to the employee, "the employer retains a primary liability for the damage suffered though if he is not himself negligent he may obtain from the contractor a contribution to the damages and cots which he has to pay which will amount to a full indemnity."

26. In the final analysis, I believe that the appellant is entitled to succeed in his appeal. This result can be reached alternatively through the route of vicarious liability or non--delegable duty. On the first basis, it can be said that it was the duty of the appellant's fellow workers to assist him in the tasks of getting the animals from the pens into the sales ring. When they abandoned their task, they were acting within the course of their employment. They committed a breach of the duty of care owed to the appellant and the employer is vicariously responsible. I cannot see how this form of liability can be affected, as the trial judge appears to have thought, either by reason of the failure of the two men to seek permission or the fact that, as he believed, the absence of both men at the same time was unique. Alternatively, insofar as the otherwise safe system of work was not in operation on the day of the accident, the employer bears primary responsibility. The

system was well described by the appellant and his engineer. The respondent called no evidence to explain how two men could leave their posts without permission or explanation. I would decide the primary issue of liability in favour of the appellant.

27. The respondent submits that, even assuming the respondent to have been liable, the appellant was guilty of contributory negligance. Two points, in particular, are made: firstly, that the appellant took inadequate care for his own safety by stepping into the single pen behind the Limousin bullock, thus exposing himself to the risk of being kicked; secondly, he should have sought assistance from other staff, rather than proceeding, as he did, to look after all the cattle going into the bullocks sale single-handed. In my view, there was contributory negligence on the part of the appellant. At the same time, it must be kept in mind that the prime duty to ensure that the system of work was safe rested on the respondent. The appellant was, in effect, continuing to keep the sales going for his employer. He also gave evidence, when pressed in cross-examination, that there was no other staff available. The appellant was an experienced handler of cattle and should have appreciated the risk of going into a pen alone with a single bullock. I would assess the contributory negligence at 33%.

28. I would remit the matter to the High Court to assess damages.