

THE HIGH COURT

1983 No. 3887P

BETWEEN/

PATRICK McDONAGH AND
BORD IASCAIGH MHARA

PLAINTIFFS

AND

WEST OF IRELAND FISHERIES LIMITED
AND PATRICK HOGAN

DEFENDANTS

Judgment of Mr. Justice Blayney delivered the 19th day of
DECEMBER 1986.

The Plaintiffs claim damages for damage and loss sustained by them when their motor fishing vessel the Aine Ide was damaged in Rossaveal Harbour, County Galway, at the beginning of June 1981. The claim is brought in both trespass and negligence.

At the relevant time, the first named Plaintiff (to whom I shall refer as Mr. McDonagh) was the owner and the second named Plaintiff (to whom I shall refer as B.I.M.) was the Mortgagee of the Aine Ide which prior to the 3rd June, 1981 had been berthed in Rossaveal Harbour for approximately one month. On that date it was berthed at the old pier, parallel to the pier but outside another boat, the Sea Alder, which was on its starboard side, and both were on the landward side of the portion of the pier which had been damaged about nine months to a year previously. Where the boats were berthed became uncovered at each low tide so that at that state of

the tide and until approximately one hour before high tide they were always aground resting on the sea-bed.

Mr. McDonagh lives about six miles from Rossaveal. On the 4th June, 1981, which was a Thursday, he and his wife went to Dublin. Before he left, the Aine Ide was sound and undamaged. When they returned, three days later, it had clearly been damaged as there was water in the boat up to the same level as the water outside it.

There is some doubt as to the day they returned. Mr. McDonagh said it was the 6th June, 1981 and that it was a Sunday. But the 6th was in fact a Saturday. I think it more likely that Mr. McDonagh was correct about the day rather than the date, and this seems to be confirmed by Mrs. McDonagh's evidence which was to the effect that she had rung home on the Saturday and been given information about the boat. If they had been going home on the Saturday it is unlikely that she would have rung home that day. So I find that they returned home on Sunday, the 7th June.

Mr. McDonagh went immediately to look at the Aine Ide. The boat was nearly in the same place it had been berthed previously, perhaps a few feet away, but Mr. McDonagh's evidence was that the mooring was not the same. A ring to which one of the mooring ropes had been tied had been pulled out of the pier, and some of the pier had come away with it. The boat was resting on the ground and there was water inside it almost as high as the water outside it. The cause of this was subsequently ascertained to be that five planks had been cracked below the water line in the starboard side aft.

On Monday the 8th June Mrs. McDonagh spoke on the telephone to the second named Defendant Patrick Hogan (to whom I shall

refer as the Defendant as the action is not proceeding against the first named Defendant, West of Ireland Fisheries Limited). She said the Defendant told her that he had had to move the Aine Ide in order to berth a ship called the Severn Princess so as to put machinery on it.

Mr. McDonagh also spoke to the Defendant. His evidence was that the Defendant told him he had moved the Aine Ide, that he had let it down the pier. Mr. McDonagh asked him how he got it back. He said he got it back with a kind of winch, and when pulling it back, the ring pulled out of the pier.

Mr. McDonagh also gave evidence of having examined the rocks and of having found on them paint which he said corresponded with the paint on the Aine Ide. He said he showed the paint to Mr. William Southern a Marine Surveyor, who also gave evidence, and he took photographs of the paint which were put in evidence.

The Defendant's evidence was to the following effect. The Severn Princess is owned by a Company called Oceanic Services Limited. He is a Director of the Company and a 25% shareholder. The other share holders are his wife and George Ryder and his wife. The Company got an order to transport a loading shovel and a crane to the Aran Islands. In order to load them onto the Severn Princess, they had to berth on the landward side of the damaged portion of the pier at the place where the Sea Adler and the Aine Ide were berthed. The loading took place on the 3rd and 4th June, 1981. On each of those days the crew of the Severn Princess consisted of the skipper, Trevor Ryder, the Defendant, who acted as engineer in charge of the engines, and John Morar, who was the deck-hand. The procedure each day was the same. At around high water the Severn Princess moved

up to where the Sea Adler and the Aine Ide were berthed; they took off the stern lines of the two boats, passed them on to the Severn Princess and then attached them to her port side. The Severn Princess moved up far enough for the machinery to be loaded and then returned to its berth on the seaward side of the damaged portion of the pier. The stern lines of the Sea Adler and Aine Ide were then returned to the pier and tied up where they had been before but with this difference that on the 4th June one of the stern lines of the Aine Ide was not tied to the ring to which it had previously been attached, as the block to which that ring had been fixed had been loosened. John Moran's evidence was that instead of tying it to that ring, he tied it to a pole.

Mr. Trevor Ryder's evidence was to the same effect. He said he moved up the pier to get the loading door of the Severn Princess ahead of the damaged part of the pier. He remembered saying that the bow lines of the Aine Ide and the Sea Adler were not to be touched, and he believed they were not touched. On the 4th June they followed the same procedure as the day before. There was nothing wrong with the Aine Ide that he could see. The forward ropes were not touched. Before leaving he checked the stern ropes. Three were attached exactly as they had been; the fourth, which had been attached to the ring in the block that had been loosened, he tied to a solid point, he could not remember what. He said that apart from this the Aine Ide and the Sea Adler were in exactly the same position as they had been in before they were moved to allow the Severn Princess berth.

It was suggested by the Plaintiffs' witnesses that the Severn Princess could not have berthed inside the Sea Adler and

the Aine Ide without the bow ropes of those two boats being displaced. I do not think the issue is critical to my decision in the case but I accept the evidence of the Defendant, and Mr. Ryder and Mr. Moran on this point. I find that they did berth the Severn Princess inside the other two boats without undoing their bow ropes.

The Plaintiff's claim is based on both trespass and negligence but Mr. McGovern did not press the trespass issue and I think rightly so. In order to constitute a trespass, the injury must be forcible and must also be direct and not merely consequential (see Salmond and Heuston on the Law of Torts 18 edition 1981 at page 5). The injury to the Aine Ide was clearly not direct; in so far as it possible to ascertain how it was caused, it was probably due to her settling on some obstruction on the sea-bed. Such an injury, not being direct, would not have constituted a trespass.

On the issue of negligence, Mr. McGovern relied on the principle of res ipsa loquitur and also on the decision of the present Chief Justice in Ross .v. Dunphy (unreported 13th February, 1978) I will deal separately with his submissions on each though it seems to me that Ross .v. Dunphy is no more than an illustration of the application of the principle of res ipsa loquitur.

The facts in Ross .v. Dunphy were as follows. The Defendant's yacht, when returning to its moorings, through the admitted negligence of the Defendant, collided with and made a hole in the hull of the Plaintiff's motor cruiser about 12 inches above the water line. On the following day the Defendant decided it was desirable to move the boat from its moorings and an agent of the Defendant's towed it to an area

where it was tied up in a position in which it was afloat at full tide but in which most of it was on the mud at other tides. The motor cruiser was moved to this new mooring position without any communication having taken place with the Plaintiff. Three days later the boat was found to have become freed from at least part of its moorings and to have been dashed against the steps of a boatyard as a result of which it sustained further damage which caused it to sink.

The Defendant admitted responsibility for the initial damage but denied liability for the more extensive damage sustained three days later. The Chief Justice set out his conclusions on the legal position as follows at page 6 of his Judgment:-

"I am, however, satisfied that as a matter of law the Defendant having taken the boat into his sole possession and control without the knowledge or consent of the Plaintiff, even though that may have been bona fide done for the purpose of trying to prevent further damage to it and the boat, whilst in such custody and control, becoming damaged by a separate accident, that the onus is on the Defendant to establish, to my satisfaction, as a matter of probability that the second accident occurred without negligence on the part of him, his servants or agents. I am not satisfied that he has discharged this onus of proof."

Mr. McGovern submits that that statement of the law applies equally on the facts of the present case: that the Aine Ide was moved without Mr. Kavanagh's consent or knowledge; that it came into the Defendant's custody and control; that the onus was therefore on him to prove as a matter of probability that the damage to the Aine Ide had occurred without negligence on his

part, and he had failed to discharge that onus.

In my opinion the facts of the present case are distinguished from Ross .v. Dunphy. I consider that the Aine Ide never came into the Defendant's custody and control. While I do not think that he can deny, as he tried to, that he took part in the moving of the Aine Ide, it seems to me that he can deny having any part in the tying up of the boat after it had been moved back into its berth outside the Sea Adler. The tying up was done by the deck hand, John Moran, and checked by the skipper, Trevor Ryder. The Defendant had nothing to do with it. He was acting as engineer down in the engine room looking after the engines. It was not part of his duties to see that the Sea Adler and Aine Ide had been properly tied up. That was the job of the deck-hand and the skipper. And since they were employees of Oceanic Services Limited, one could say that the Aine Ide, after being tied up, was in the custody and control of that Company. But it was not in the custody and control of the Defendant.

There is a further distinguishing factor also. In Ross .v. Dunphy, if there was negligence on the part of the Defendant's agent, there was no doubt that that negligence was the cause of the damage. There was clear evidence as to precisely how the damage was caused. That is not the position here. There is no evidence as to how the planks of the Aine Ide became cracked. No connection has been established between the tying up of the Aine Ide after it had been moved out and back on the 4th June and the damage subsequently sustained and it seems to me that such a connection would have to be established before any onus to disprove negligence would arise.

For these reasons I consider that the statement of the law

in the Judgment of the Chief Justice cannot be applied to the facts of the present case.

Mr. McGovern's second submission is that the maxim *res ipsa loquitur* applies so that the onus is on the Defendant to show that the damage was not caused by any fault on his part amounting to negligence. The Plaintiffs have to rely on this maxim because they are not in a position to produce any positive evidence of negligence and if the maxim does not apply, the position will be that the Plaintiffs have failed to discharge the onus of proof resting on them and the action must be dismissed.

Mr. McGovern submitted that the way in which the maxim applies is that once he proved, as he did, that the Defendant took part in the moving of the boat, the onus then shifted to him to prove that he had not been negligent. The basic question is whether on the facts the maxim applies. Not without considerable hesitation, the conclusion I have come to is that it does not.

The law in regard to when the maxim comes into operation is in my opinion correctly stated in *Charlesworth on Negligence* (6 Edition 1977) at paragraph 266:-

"The maxim comes into operation: (1) on proof of the happening of an unexplained occurrence; (2) when the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff; and (3) the circumstances point to the negligence in question being that of the defendant rather than that of any other person."

It seems to me that the first two of these conditions may

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be satisfied in the present case. The damage to the Aine Ide is an unexplained occurrence, and it is something which would not have happened in the ordinary course of things without negligence on the part of somebody other than the Plaintiff. But in my opinion the third condition is not satisfied. I consider that the circumstances do not point to the negligence being that of the Defendant rather than of any other person. As so little is known about how the damage occurred, it is difficult to say that the circumstances point to the negligence being that of any particular person, but all I have to consider is whether they point to the negligence being that of the Defendant, and it seems to me that they do not. As I said earlier, when considering the case of Ross .v. Dunphy, I take the view that while the Defendant could not deny having taken part in the moving of the boats, he did not take any part in tying the boats back in their berth. If any damage had been sustained by either of the boats while being moved, or while out of their berths, and such damage could be shown to have been caused by the Severn Princess, I consider that the Defendant would have been liable, but the securing of the boats back in their berths was not carried out by him and was not part of the responsibility which he had as the engineer. It was the responsibility of the deck-hand and the skipper. And in carrying out the securing and checking it they owed a duty of care to the Plaintiffs to ensure that the ropes holding the Aine Ide were properly attached. Since the Defendant did not carry out this work, and had no responsibility for it, if he were to be held liable it could only be on the basis of his being vicariously liable. But neither Mr. Moran nor Mr. Ryder was his servant or agent. All three were the servants of

Oceanic Services Limited. So he could not have been vicariously liable for their acts or omissions. He could not be made to answer for any negligence on their part. It follows in my opinion that the circumstances do not point to the negligence causing the damage being that of the Defendant, and for that reason the maxim *res ipsa loquitur* cannot be invoked as against him.

On more general grounds also it seems to me that this is not a case in which the maxim can be invoked. In Russell .v. L.& S.W. Railway (1908) 24 T.L.R. 548, 551 Kennedy L.J. explained the meaning of *res ipsa loquitur* as follows:-

"The meaning, as I understand, of that phrase..... is this, that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence. The *res* speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is, some want of reasonable care under the circumstances".

And later in his Judgment he said:-

"*res ipsa loquitur* in this sense; the circumstances are more consistent, reasonably interpreted without further explanation, with your negligence than with any other cause of the accident happening."

On the evidence as it stands, assuming that there was negligence in tying up the Aine Ide after it had been moved out and back into its berth on the 4th June, 1981, is it possible to draw any inference that such negligence was the cause of the damage to the Aine Ide; it seems to me that it is not. There is no evidence, as there was in Ross .v. Dunphy, that the boat broke from its moorings and it is not being suggested that the damage was sustained where the boat was berthed, but rather opposite the place where the pier was damaged as that is where the paint was found. But there is no evidence of the boat ever having been there, and if it did get there, there is no evidence of how or when it did so. In these circumstances it seems to me that to conclude that the damage was caused by negligence in the moving or tying up of the Aine Ide is a matter of conjecture rather than inference and that is not sufficient to bring the maxim into operation. There is no doubt that the circumstances raise a suspicion but in order to raise a prima facie case there must be more than that; there must be facts from which a legal inference of negligence may be inferred. I adopt the statement of the law in Charlesworth at paragraph 249:-

"In some cases the facts of an accident are unknown, and the plaintiff to succeed must then prove facts from which an inference of negligence on the part of the defendant may be reasonably inferred. "It is a mistake to think that because an event is unseen its cause cannot be reasonably inferred." The facts, however, must be such as to put the matter beyond a mere surmise or conjecture; they must lead to an inference which is a reasonable deduction from the facts actually observed

and proved."

In my opinion the facts here do not put the matter beyond surmise or conjecture with the result that the Plaintiffs have not satisfied the onus of proof resting on them and their action must be dismissed.

John Stanger

19. 12. 1986.