

THE HIGH COURT
(ON APPEAL FROM THE CIRCUIT COURT)

IN THE MATTER OF THE LOCAL GOVERNMENT (IRELAND) ACT 1898

BETWEEN:

McCARTHY CONSTRUCTION LIMITED

APPLICANTS
(RESPONDENTS TO THE APPEAL)

AND

THE COUNTY COUNCIL OF THE COUNTY OF WATERFORD

RESPONDENTS
(APPELLANTS ON THE APPEAL)

Judgment of Mr. Justice Lynch delivered the 6th day of July
1987.

This is an appeal by Waterford County Council from a ruling by the learned Circuit Court Judge of the South Eastern Circuit that a finding or concession that a fire was malicious in proceedings brought against Waterford County Council by the owners of hotel premises destroyed by the fire bound the County Council in separate proceedings brought by the owners of property which was in the hotel premises at the time and was destroyed by the same fire.

The fire occurred on the 30th of April, 1978 and destroyed the Majestic Hotel, Tramore, County Waterford. Preliminary notices of application for compensation for alleged malicious injuries were duly served on behalf of the owners of the hotel premises and on behalf of McCarthy Construction

Limited, the above named Applicants. The application for compensation under the Malicious Injuries Code as then obtaining brought by the owners of the hotel premises came on for hearing in Waterford Circuit Court in July 1980. Following a trial which lasted several days the Circuit Court found on the 31st of July 1980 that the fire had been malicious and accordingly awarded a sum of £845,000 which was the agreed measure of the damage suffered by the owners of the hotel premises.

Waterford County Council appealed to the High Court on Circuit against the finding by the learned Circuit Court Judge that the fire was malicious. The appeal came on for hearing on the 23rd October, 1980 and on the 24th October, 1980 (the second day of the said hearing) the parties to the said appeal, that is to say, the owners of the hotel premises and Waterford County Council compromised the case between them and an Order was accordingly made to the following effect;

"The appeal of the Respondents from the Order of the Circuit Court Judge for the South Eastern Circuit Court of Waterford made herein and dated the 31st day of July 1980 coming on for hearing on the 23rd day of October 1980 on Notice of Appeal dated the 7th day of August 1980 and the Court having been informed on the 24th day of October 1980 that terms of settlement had been agreed between the parties

The Court doth therefore Order by consent that the said Order dated the 31st day of July 1980 be and the same is hereby affirmed but varied as follows:-

(a) that the sum of £845,000 awarded to the Applicant

by the said Order for the damage complained of in the notice of application dated the 19th of September 1978 be reduced to £422,500.

(b) - (the rest of the Order is not material)."

The present Applicants, McCarthy Construction Limited, did not serve their notice of application to the Circuit Court until the 28th day of March 1983 by which time of course, the proceedings by the owners of the hotel premises both in the Circuit Court and in the High Court on Circuit had been concluded. Thereafter, delays occurred due to the anticipated length of time which it was estimated the case by the Applicants would require. Ultimately the matter was listed on the 14th of February 1986 for argument as to whether the finding that the fire was malicious in the proceedings by the owners of the hotel premises bound Waterford County Council in the proceedings by these Applicants. At the sitting of the Circuit Court in Waterford on the 14th of February 1986, the learned Circuit Court Judge found that Waterford County Council were so bound and against that finding Waterford County Council have now appealed to the High Court sitting in Dublin, no oral evidence having been given in the Circuit Court in Waterford on the trial of this issue.

The appeal was argued before me in Dublin on Friday the 19th of June 1987 and I reserved my decision. Counsel for the Applicants, McCarthy Construction Limited, submitted that the issue of liability for the fire was res judicata. He conceded that the Consent Order in the High Court on Circuit was a compromise in an amount of 50 per cent of the damage agreed

to have been suffered by the owners of the hotel premises and Counsel accepted that his clients, the Applicants, must likewise abate their loss by fifty per cent. He submitted that the status of the fire was established by the decision of the High Court on Circuit in the proceedings by the owners of the hotel premises and to that extent the judgment he submitted was a judgment in rem. The fact that it was a judgment by consent did not affect its capacity to be a judgment in rem.

Counsel for Waterford County Council submitted that any hardship due to delay or otherwise was through no fault of the County Council and therefore any such hardship (if any) could not affect the issue whether res judicata applied or not. Counsel further submitted that the Consent Order in the High Court on Circuit in the proceedings by the owners of the hotel premises recognized that a substantial issue had arisen on the question of malice and that what happened in the High Court on Circuit was that the parties compromised that substantial issue on a commercial basis. He further submitted that if the proceedings had been other than under the then Malicious Injuries Code such a compromise could have been made privately whereby the Circuit Court judgment would simply have been vacated and terms of settlement would have been endorsed on Counsel's briefs. The reason why a Court Order was necessitated was because in proceedings under the Malicious Injuries Code as then obtaining the County Council had no power to compromise and therefore had to have a judgment to entitle them to make the payment agreed upon or at any rate the powers of compromise (and indeed the practice which then obtained in many local authority areas of compromising) was very dubious

having regard to the decision in Fitzgerald .v. Queen's County (1899) Volume 33 I.L.T.R. 176. Such power was subsequently conferred on local authorities by Section 16 of the Malicious Injuries Act 1981. Counsel further submitted that if a local authority were estopped from denying malice in respect of any damage caused by a fire or other similar event where malice was established in proceedings by one party who had suffered damage then the local authority might be prevented in subsequent proceedings by a different party arising out of the same fire or event from relying on further evidence which might have come to hand since the first proceedings were determined and which might show that the event was not malicious. Counsel further pointed out that there would have to be mutuality and if such an estoppel arose against the local authority it would have to apply against all other persons injured by the fire or event in case that the first application for compensation failed.

I find the reasoning of the Court of Appeal in Northern Ireland in the case of Sharon Shaw .v. James Sloan and Adrian Gribben and Frank Gribben (1982) N.I. 393 persuasive and I adopt it.

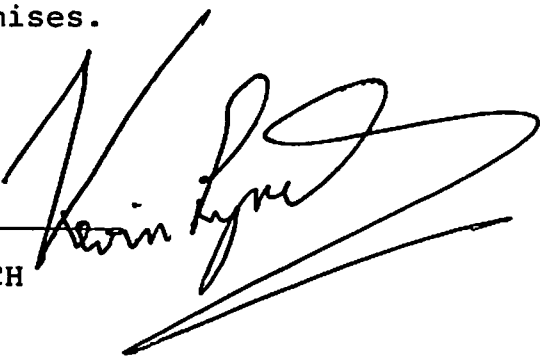
In the present case the Applicants seek to rely on a judgment obtained by another person with whom the Applicants are not in privity. If this contention were valid then the converse would also have to apply and it is perhaps easier to see how injustice could be worked in the converse case where the first claim for compensation fails than where the first claim for compensation succeeds. In the case of an

extensive fire, many persons who have no privity in law with each other may suffer loss as a result of the fire. If one of such persons should then bring a claim against the local authority under the Malicious Injury Code and should fail to establish malice because of the insufficiency of the evidence adduced by him then all other persons injured by the fire would be barred from maintaining a claim also even though the first Applicant might have omitted to call an important witness either because he was wholly unaware of the existence of this witness or wholly misunderstood the purport or importance of his evidence. If that were to happen, how could another person who had no privity with the first Applicant and who had much better prepared his case and proofs be estopped from making his claim for the loss suffered by him in the fire? To deprive such a person of his right of access to the Courts for relief for loss suffered by him in circumstances which he could prove clearly to entitle him in law to such relief would be a grave injustice. Once this situation is perceived it must follow that where the first Applicant succeeds against the local authority there must be mutuality so that in claims by other persons injured by the fire the local authority must be able to fight the issues of malice and all other issues all over again if they think it appropriate and proper to do so. For all I know in the present case Waterford County Council may have discovered that the fire which destroyed the Majestic Hotel, Tramore, on the 30th of April 1978 was started by a person so deprived of mental capacity as to be wholly without responsibility for his or her actions and thus for all I know

Waterford County Council may be in a position to prove conclusively that this fire was not a malicious injury in law.

Whilst there is a great deal to be said for treating one of several cases arising out of the same circumstances as a test case to bind all other cases, that was not agreed nor done in this case. There can be no question but that Waterford County Council maintained their denial of malice as between themselves and the Applicants at all times and never lured the Applicants into a false sense of security. Waterford County Council never conveyed to the Applicants that they need not concern themselves about the proof of malice in their claim against the County Council. The Applicants were not misled by anything done by Waterford County Council into weakening their proofs of malice in their claim against the County Council and there can therefore be no question of any estoppel by conduct as against Waterford County Council.

In these circumstances I reverse the Order of the learned Circuit Court Judge by simply vacating the Order which he made on the 14th of February 1986 and referring the case back to him so that all issues therein may be tried and determined without regard to the determination of the claim by the owners of the hotel premises.

SIGNED _____
KEVIN LYNCH 

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APPEARANCES

For the Applicants
(Respondents to the Appeal)

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For the Respondents
(Appellants on the Appeal)

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AUTHORITIES

Halsbury 4th Edition, Volume 16 paragraphs, 1527 and 1537

Spencer Bower and Turner on Estoppel.

Fitzgerald .v. Queen's County (1899) 33 I.L.T.R. 176

Shaw .v. Sloan and Gribben (1982) N.I. 393.

The Reverend Rachel .v. The Reverend McGrath (1889) 24 L.R. 665.

Royal Bank of Ireland .v. O'Rourke (1962) I.L.T.R. 112.