RECENT DEVELOPMENTS IN THE LAW OF TORTS

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I. INTRODUCTION

Tort law is now in a state of crisis. A strong spirit of hostility to the old 'compensation culture' is abroad. Politicians are now in the process of introducing radical changes, designed to reduce insurance premiums by reducing the entitlements of injured plaintiffs. The Personal Injuries Assessment Board is not the last word. It seems that a range of strategies is in contemplation, including shortening the limitation period for personal injury litigation and greater proactivity in relation to perjury and exaggerated claims.

If these proposals had been seriously mooted a decade ago, one might have envisaged a serious confrontation between the Oireachtas and the courts. Today, I am not so sure. The Supreme Court today is willing to defer significantly to executive and legislative choices in relation to socio-economic policy. It is far from clear that the Court would strike down legislation restricting the rights of victims of torts, on the basis that the legislation violates the constitutional right of access to the courts, the right to litigate or the principle of equality.

I will be laying particular emphasis on the Supreme Court's recent pronouncements on tort litigation. In short, they involve a narrower restatement of the duty of care in negligence, far more overt reference to policy and pragmatic considerations than formerly and a willingness to penalise plaintiffs heavily by a significant reduction of damages for relatively trivial contributory negligence. I cannot yet discern a similar change of course in the High Court or Circuit Court. One suspects that it may develop shortly.

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II. THE DUTY OF CARE

A. The Impact of the Glencar Decision

You will recall that in *Glencar Exploration p.l.c. v. Mayo County*[1] Council the Supreme Court repudiated McCarthy J.'s test in *Ward v. McMaster*[2] for determining the duty of care, holding, quite surprisingly that this test, which had been applied in several Supreme Court and High Court decisions, had been merely an obiter dictum. McCarthy J. had adopted Lord Wilberforce's 'two-step' test in *Anns v. Merton London Borough Council*[3] whereby the court asks:

> First ... whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or reduce, or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ....[4]

McCarthy J. had compressed this formula into a duty:

> … arising from the proximity of the parties, the foreseeability of the damage, and the absence of any compelling exception based upon public policy.[5]

Whilst not wishing to exclude the latter consideration, McCarthy J. considered that it would "have to be a very powerful one" if it was "to be used to deny an injured party his right to redress at the expense of the person or body that injured him".[6] McCarthy J.

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[1] [2002] 1 I.L.R.M. 481 (S.C.).
[2] [1988] I.R. 337 (S.C.).
[3] [1978] A.C. 728 (H.L.).
[4] [1978] A.C. 728 at 751-752 (H.L.).
[5] [1988] I.R. 337 at 349 (S.C.).
[6] [1988] I.R. 337 at 349 (S.C.).

expressed hostility to the 'incrementalist' approach, originating in the High Court of Australia, which had found favour with the House of Lords. Such an approach eshews broad principle and proceeds by small steps, seeking to find close analogies between cases.

In *Glencar*, in contrast to *Ward v. McMaster*,[7] the Supreme Court preferred the incrementalist approach. Keane C.J. did not strike down McCarthy J.'s modification of the 'two-step' test in Anns but instead added a third step, requiring the Court, before imposing a duty of care in negligence, to be satisfied that it would be "just and reasonable" to do so. *Glencar* is of crucial significance for a number of reasons. First, and most obviously, it restricts the scope of the duty of care by requiring plaintiffs to overcome three rather than two hurdles. Secondly, its preference for incrementalism and its scepticism about grand theory makes it harder to establish a duty of care in previously unlitigated fact-situations and calls into question certain widely held assumptions as to the scope of the duty in such areas as pure economic loss, affirmative duties and the functions of public authorities.

B. Psychiatric Injury, Irrational Fears and Policy Barriers

In *Fletcher v. Commissioners of Public Works in Ireland*[8] the plaintiff, who worked as a general operative in Leinster House, was, through the carelessness of his employer, exposed to significant quantities of asbestos dust in the course of his employment. Breathing in this dust opened up the risk in later life of contracting a very painful and potentially lethal disease called mesothelioma. The risk was very low but the plaintiff, on becoming aware of it, developed a psychiatric injury. O'Neill J. imposed liability but the Supreme Court reversed.

The short reason for overturning O'Neill J.'s verdict was that the Supreme Court considered it inadvisable on policy grounds, for negligence liability to extend to a psychiatric injury resulting from an objectively irrational, even if reasonably foreseeable, fear. There are certainly respectable policy arguments for drawing the line where the Supreme Court did and several decisions in the United States of

[7] [1988] I.R. 337 (S.C.).
[8] Supreme Court, unreported, 21 February 2003.

America, discussed in *Fletcher*, so hold. Nevertheless, aspects of the Supreme Court's analysis are less than convincing and augur badly for many victims of negligence who, up to now, would have had their claims viewed with favour by the courts.

It has to be acknowledged that the application of the law of negligence to claims involving psychiatric injury has not been very satisfactory. The traditional approach, in Victorian times, was to view such claims with hostility and suspicion: hostility because mental illness was regarded as shameful, suggestive of lack of moral backbone, and suspicion because psychiatric injury was considered capable of being feigned. The Irish courts led the way in removing some of these prejudices. In *Bell v. G.N.Ry. Co.*[9] the Irish Exchequer Division had the confidence to repudiate the conservatism of the Privy Council in *Victoria Railway Commissioners v. Coultas*[10] and uphold an award of damages in favour of a train passenger who suffered psychiatric injury when the train in which she was travelling was involved in a life-threatening accident caused by the railway company's negligence. Palles C.B. criticised the Privy Council in *Coultas* for:

> … assum[ing], as a matter of law, that nervous shock is something which affects merely the mental functions, and is not in itself a peculiar physical state of the body. This error pervades the entire judgment.[11]

To date, all claims for 'nervous shock' in Irish courts - and there have been very few - have succeeded. In other common law jurisdictions, however, some plaintiffs' claims have been rejected, not because there was any doubt as to their authenticity, but because the courts considered it necessary to invoke policy barriers to keep the potential number of claims within manageable bounds. Thus, in *Alcock v. Chief Constable of South Yorkshire Police*[12] some relations of those killed in the Hilisborough stadium tragedy, who suffered psychiatric injury when they went to the morgue to identify their

[9] (1890) 26 L.R. (Ir.) 428 (Ex.Div.).
[10] (1888) 13 App. Cas. 222 (H.L.).
[11] (1890) 26 L.R. (Ir.) 428 at 441 (Ex.Div.).
[12] [1992] 1 A.C. 310 (H.L.).

loved ones, could not receive compensation because the House of Lords drew an artificial time barrier, holding that, although they had gone to the morgue with all due expedition, claims after a couple of hours would not be entertained.

In *Fletcher*, two judgments were delivered, by Keane C.J. and Geoghegan J., with both of which Denham, Murray and Hardiman JJ. concurred. The two judgments emphasise the need for policy limitations in the context of the claim in question and express a preference for a pragmatic rather than principled approach. Keane C.J. referred to:

> … the undesirability of awarding damages to plaintiffs who have suffered no physical injury and whose psychiatric condition is solely due to an unfounded fear of contracting a particular disease. A person who prefers to rely on the ill informed comments of friends or acquaintances or inaccurate and sensational media reports rather than the considered view of an experienced physician should not be awarded damages by the law of tort.[13]

Secondly, to impose liability would have "implications for the health care field".[14] Keane C.J. quoted in support of this concern a passage from Baxter J.'s judgment for the majority in the California Supreme Court decision of *Potter v. Firestone Tyre & Rubber Co.*[15]:

> Access to prescription drugs is likely to be impeded by allowing recovery of 'fear of cancer' damages in negligence cases without the imposition of a heightened threshold. To wit, thousands of drugs having no know harmful effects are currently being prescribed and utilised. New data about potentially harmful effects may not develop for years. If and when negative data are

[13] *Fletcher v. Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 35 of the unreported judgment.
[14] *Fletcher v. Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 35 of the unreported judgment.
[15] (1993) 25 Cal. Rptr. 2d 550 (S.C.).

> discovered and made public, however, one can expect numerous law suits to be filed by patients who currently have no physical injury or illness but who nonetheless fear the risk of adverse effects from the drugs they used. Unless meaningful restrictions are placed on this potential plaintiff class, the threat of numerous large, adverse monetary awards, coupled with the added cost of insuring against such liability (assuming insurance would be available) could diminish the availability of new, beneficial drugs or increase their price beyond the reach of those who need them most.[16]

Keane C.J. noted that it had "also [been] pointed out that there would also be serious implications for medical negligence cases grounded on the fear of the plaintiffs having contracted a disease as to the result of having been prescribed a particular drug".[17]

One may question whether either of these policy arguments has any particular force. As to the first, it is of course reasonable for a court to reject a claim based on ignorant and irrational fears of sustaining future injury. It is quite another thing for a court to deny compensation for a psychiatric injury, foreseeably brought about by the defendant's negligence, on the basis that the psychiatric condition springs from an irrational fear. It is a characteristic of many psychiatric illnesses that those suffering from them are not rational.

As to the second policy argument, this relates to the area of strict products liability rather than negligence. A drugs manufacturer who used due care in the development of new drugs will have nothing to fear from the imposition of liability on negligent employers who cause their employees to suffer from foreseeable psychiatric illness. In any event, the Liability for Defective Products Act, 1991 protects manufacturers and other producers from liability where the state of scientific knowledge at the time of production made it impossible to be aware of the defect in the product. It has to be said that concerns

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[16] *Fletcher v. Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 36 of the unreported judgment.

[17] *Fletcher v. Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 37 of the unreported judgment.

about product liability are very far removed from the situation of employees who become mentally ill because of their employer's negligence.

Keane C.J. went on to quote from another decision of the courts of the United States of America to support a third policy objection. The passage he quotes is also invoked by Geoghegan J. in his judgment. It is from Hecht J.'s judgment for the Court in the Supreme Court of Texas decision of *Temple-Inland Forest Products Corporation v. Carter*:[18]

> A person exposed to asbestos can certainly develop serious health problems, but he or she also may not. The difficulty in predicting whether exposure will cause any disease and if so, what disease and the long latency period characteristic of asbestos related diseases, make it very difficult for judges and juries to evaluate which exposure claims are serious and which are not. This difficulty in turn makes liability unpredictable, with some claims resulting in significant recovery while virtually indistinguishable claims are denied altogether. Some claimants would inevitably be over-compensated, when, in the course of time, it happens that they never develop the disease they feared, and others would be under compensated when it turns out that they developed a disease more serious even than they feared. Also, claims for exposure could proliferate because in our society, as the Supreme Court observed, 'contacts, even extensive contacts, with serious carcinogens are common'. Indeed, most Americans are daily subjected to toxic substances in the air they breathe and the food they eat. Suits for mental anguish damages caused by exposure that has not resulted in disease would compete with suits for manifest disease for the legal system's limited resources. If recovery were allowed in the absence of present disease, individuals might feel obliged to bring suit for such recovery prophylactically, against

[18] (1999) 993 S.W. 2d 88 (S.C.).

> the possibility of future consequences from what is now an inchoate risk. This would exacerbate not only the multiplicity of suits but the unpredictability of results.[19]

Again the strength of the policy argument may be doubted. There is, of course, an inherent difficulty with awarding damages for any tort on a once-off basis, since it involves a judicial guess as to what will happen in the future so far as the plaintiff's medical condition is concerned. Almost inevitably, it will result in overcompensation for some plaintiffs, under-compensation for others. But this is a generic problem associated with the once-off character of compensation in tort. Whilst it has graphic application in the context of cancerphobia, it is a feature of the litigation process every day in the Four Courts where judges have to grapple with percentage risks of future exacerbation of injury or, more mundanely, of the possible onset of arthritis in the future. Various ways of dealing with the negative aspects of the once-off award have been proposed or implemented in many jurisdictions. The Law Reform Commission devoted an entire Report to the subject. In short, failing to confront the generic problem while denying victims of negligence who suffer psychiatric injury compensation on the basis that in the future they may go on to suffer further injury in a painful and probably terminal disease, seems a somewhat incoherent, way of seeking to reform the law.

Keane C.J. went on to make plain the limits of the basis of rejecting the plaintiff's claim. These were the irrationality of the fear of contracting a disease where the risk is characterised by the medical advisers as very remote. If the risk of contracting the disease could be categorised as probable, however, the policy objections would not prevail and the claim would succeed. The Chief Justice did not address the interim case, where the risk is between "very remote" and "probable" — such as a 40% risk, for example. Nor did he throw light on when an irrational fear becomes rational. If I am told that I have a 30% chance of developing a fatal, painful disease, am I really irrational in becoming fearful simply because the chances are less than 50%? Russian roulette operates, for the first

[19] *Fletcher v. Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at pp. 39-40 of the unreported judgment.

shot at least, on a risk of fatality of less that 17%. Geoghegan J. in his judgment provided a detailed analysis of the case-law throughout the common law would. As to the reasons for refusing to impose a duty of care, he placed emphasis, first, on the irrationality of the fear of injury:

> In my view it would be unreasonable to impose a duty of care on employers to take precautions not merely that their employees will not contract disease but that they will not contract so serious a fear of contracting a disease however irrational that they develop a psychiatric overlay. The court should not permit compensation for irrationality in that way. It is quite different from the case of a plaintiff who suffers from traumatic neurasthenia linked with physical illness directly resulting from an accident.[20]

Again one can discern a desire to blame people with psychiatric illness for their irrationality in becoming ill. This stance may be considered to lack insight into the aetiology of mental illness. The idea that one can make a meaningful distinction based on whether the mental illness derives from physical illness sustained in an accident or from predisposing mental condition seems mistaken.

Geoghegan J. gave a second policy reason for not imposing a duty of care in the circumstances of the instant case:

> [T]here would be an element of unfairness of the kind adverted to by Lord Hoffman [in *White v. Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455] as between employees exposed to such asbestos who may in fact suffer from great anxiety for the remainder of their lives but not such as could be characterised as psychiatric injury on the one hand and those who suffer from such anxiety which can be characterised as psychiatric injury on the other. Is it just that a worrier who has to take medication for his worry receives sums

[20] *Fletcher v. Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 59 of the unreported judgment.

> in the order of €50,000 or more whereas worriers who do not have to take such medication get nothing? I think not.[21]

With respect, the idea that justice would be advanced by denying the claim of those who suffer mental illness because others, whose worry does not cause mental illness have no claim seems less than obvious. The distinction between the two groups, based on the presence or absence of mental illness, seems to involve a defensible enough basis, whereas a distinction, within the group of mentally ill claimants, based on whether their illness was caused by worry (whether rational or not) or by some other source, is not intuitively justifiable.

It is worth noting that Geoghegan J., whilst identifying the irrationality of the fear as a policy reason for rejecting the claim, also used language consistent with rejecting claims where the fear is not irrational. We have just noted that his suggested policy objection based on the asserted injustice of distinguishing between worriers whose worry leads, or does not lead, to mental illness, does not identify the irrationality of the worry as a relevant factor. Moreover, he went on to state, in unqualified terms, the view that:

> … it would be unreasonable to impose a duty of care on employers to guard against mere fear of a disease even if such fear might lead to a psychiatric condition.[22]

Other aspects of the *Fletcher* decision may be noted briefly.

First, neither Keane C.J. nor Geoghegan J. specifically endorsed the division of claimants in 'nervous shock' cases into primary and secondary victims. Yet equally neither rejected it in clear terms. It is unfortunate that the opportunity was not taken to address and resolve this issue since it has an impact on other aspects of the law of negligence.

Secondly, and following on this precise point, neither judge took

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[21] *Fletcher v. Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at pp. 59-60 of the unreported judgment.

[22] *Fletcher v. Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003, at p. 61 of the unreported judgment.

a definitive position on the principles set out by the House of Lords in *Page v. Smith*[23] where a distinction was drawn between unforeseeable and psychiatric injury caused to primary victims, which was capable of being compensated, and unforeseeably psychiatric injury caused to others, which was not. An attempt was made in Fletcher to limit this holding into the narrow context of road traffic accidents, but nothing said in Page v. Smith would warrant this reading.

Thirdly, neither Keane C.J. nor Geoghegan J. clarified fully the position as to how the 'eggshell skull' principle applies in the context of mental injury. This principle is essentially concerned with remoteness of damage. *Fletcher* concentrated on the issue of the scope of the duty of care. Geoghegan J. offered a useful discussion of how the concept of reasonable foreseeability has different nuanced meanings in these separate contexts but this analysis did not go far enough in clarifying the present status of the eggshell skull principle.

C. Affirmative Duty

The impact of the Glencar restatement of the duty of care may be seen in *Breslin v. Corcoran and Motor Insurers Bureau of Ireland*.[24] The first defendant had left his car, unlocked with the keys in the ignition, outside a coffee shop in Talbot Street Dublin as he dropped into the shop to buy a sandwich. As he was coming out, an unknown person jumped into the car and drove off at high speed. It turned into Talbot Lane, where the plaintiff was crossing the road, and struck him. Undoubtedly the first defendant had been guilty of carelessness (and breach of statutory duty: Road Traffic Construction, Use and Equipment of Vehicle Regulations of 1963 (S.I. No. 190 of 1963), regulation 87)), but was the causal connection between his wrong and the plaintiffs injury severed by a *novus actus interveniens?*

In the High Court, Butler J. had no hesitation in finding that the chain of causation had been "clearly broken". The first defendant's negligence had been merely a causa sine qua non rather than a causa causans. The only type of circumstances in which Butler J. could envisage a successful claim against the owner of a stolen vehicle

[23] [1996] 1 A.C. 155 (H.L.).
[24] Supreme Court, unreported, 27 March 2003.

would be where there was "actual and clear evidence that the vehicle was left in an area where it should be known to the owner that people routinely stole cars for the purpose of driving them around in a reckless and dangerous fashion".[25]

The Supreme Court affirmed. Fennelly J. (Denham and Murray JJ. concurring) placed a strong emphasis on Glencar as the guiding light. Keane C.J.'s judgment in that case repudiating Anns in favour of Caparo and Sutherland Shire Council represented:

> … the most authoritative statement of the general approach to be adopted by our courts when ruling on the existence of a duty of care.[26]

It seemed to Fennelly J. that:

> … in addition to the elements of foreseeability and proximity, it is natural to have regard to considerations of fairness, justice and reasonableness. Almost anything may be foreseeable. What is reasonably foreseeable is closely linked to the concept of proximity as explained in the cases. The judge of fact will naturally also consider whether it is fair and just to impose liability. Put otherwise, it is necessary to have regard to all the relevant circumstances.[27]

Fennelly J. went on to provide an extensive analysis of the English Court of Appeal decision of *Topp v. London Country Bus (South West) Ltd.*[28] and the House of Lords decisions in *Dorset Yacht Co Ltd v. Home Office*[29] and *Smith v. Littlewoods Organisation Ltd.*[30] as well as the Supreme Court case of *Cunningham v. McGrath Bros.*[31] and the Circuit Court decision of *Dockery v. O'Brien*[32] and

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[25] *Breslin v. Corcoran and Motor Insurers Bureau of Ireland*, High Court, unreported, Butler J., 17 July 2001, at pp. 2-3 of the unreported judgment.
[26] Supreme Court, unreported, 27 March 2003, at p. 5 of the unreported judgment.
[27] Supreme Court, unreported, 27 March 2003, at pp. 5-6 of the unreported judgment.
[28] [1993] 3 All E.R. 448 (C.A.).
[29] [1970] A.C. 1004 (H.L.).
[30] [1987] A.C. 241 (H.L.).
[31] [1964] I.R. 209 (S.C.).
[32] (1975) 109 I.L.T.R. 127 (C.C.).

Cahill v. Kenneally.[33] From all these cases he drew the following conclusion:

> A person is not normally liable, if he has committed an act of carelessness, where the damage has been directly caused by the intervening independent act of another person, for whom he is not otherwise vicariously responsible. Such liability may exist, where the damage caused by that other person was the very kind of thing which he was bound to expect and guard against and the resulting damage was likely to happen, if he did not …[34]

He continued:

> The test then is not merely that of reasonable foreseeability. It is, in addition, necessary to ask whether it was probable that the unattended car, if taken, would be driven do carelessly as to cause damage to others. It seems to me beyond argument, and it is not really disputed, that it was reasonably foreseeable that the car would be stolen.
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> It cannot be seriously disputed, that it was reasonably foreseeable as well as likely that the unattended car, with its keys in the ignition, would be stolen. I think it is obvious that to do all these things in a busy city street, without any mitigating circumstances, is an act of gross carelessness.
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> In modern circumstances, it is obvious that failure to exercise proper control and supervision over motor cars involves a serious risk of damage and worse to innocent people. It is equally clear that it was reasonably foreseeable that any goods, which might have been left

[33] [1955-56] Ir. Jur. Rep. 127 (C.C.).
[34] *Breslin v. Corcoran and Motor Insurers Bureau of Ireland*, Supreme Court, unreported, 27 March 2003, at p. 13 of the unreported judgment.

in the car, would be stolen. Thus, if the motor car owner had been carrying goods commercially and, perhaps even looking after them gratuitously, for others, he would probably have been liable to the owners for their loss; similarly, if he had borrowed or rented the car, in respect of any damage to the vehicle. In each of these cases, it seems to me that the test of proximity would have been satisfied. Theft of the car or its contents could be regarded as "the very thing" against [which] the custodian of the car should guard. They are directly related to the act of theft.

The nub of the case is, of course, the possible liability of the first named defendant for injuries caused by the negligent driving of the thief. Even if the owner of the car, or the driver, if not the owner, should be held liable to the owner of contents or of the car itself for damage to either of these items of property, it is not easy to articulate the basis for his automatic liability to the victim of negligent driving of the car.

It is the negligent driving, not the taking of the car, which has caused the damage. It would have to be shown that the owner should have foreseen not merely the taking but also the negligent driving. There would have to be some basis in the evidence, such as that suggested by the learned trial judge, for a finding that the car, if stolen, was likely to be driven in such a way as to endanger others. Cars may be stolen for reasons which do not carry such implications. Some of these, though criminal, do not necessarily imply dangerous driving. The line would, on any view, have to be drawn somewhere. If a car were stolen for resale, the owner could scarcely be responsible for the driving of the purchaser, whether that person were honest or not.

In my view, there is nothing in the present case to suggest

> that the first-named defendant should have anticipated as a reasonable probability that the car, if stolen, would be driven so carelessly as to cause injury to another user of the road such as the plaintiff.[35]

The outcome of the decision is clear. Fennelly J. favours a rule whereby a defendant whose carelessness results in the reasonably foreseeable causing of damage by an intervening independent act of another person should not merely on that account be liable for that damage: only where it is *probable* should liability be imposed. This is a somewhat unfortunate development. The concept of negligence, so far as the standard of care is concerned, does not depend on isolating the issue of the degree of likelihood of the occurrence of damage as the sole determinant of liability: other factors — the gravity of the threatened injury, the social utility of the defendant's conduct and the cost of preventing the damage — must also be weighed in the formula. Those who engage in conduct involving low social utility with a serious risk of harm should scarcely be protected from liability by reason merely that the third party intervention, although foreseeable, was not actually probable. If, for example, a person illegally imports phials of sarin poison and hides them in his cellar, the prospects of their being stolen and used to injure or kill innocent victims may in the particular circumstances fall short of being characterised as probable, but that should surely not foreclose the issue of that person's being held to have breached a duty of care to the victim. Changing from the language of the *standard* of care to that of the *duty of care* should not have such transformative consequences. Let us take anther hypothetical case. A teacher leaves a class of fifteen year olds unsupervised without good reason. A fight develops and a student loses his eye. Should liability depend crucially on whether the fight was probable rather than reasonably foreseeable?

It is not very easy to identify a clear principled basis for Fennelly J.'s distinction between damage to the stolen vehicle and injury to a victim of the thief's negligent driving. Fennelly J. appears to treat the theft of the vehicle as "the very thing against [which] the custodian

[35] *Breslin v. Corcoran and Motor Insurers Bureau of Ireland*, Supreme Court, unreported, 27 March 2003, at pp. 14-16 of the unreported judgment.

of the car should guard" and damage to the vehicle as being "directly related to the act of theft".[36] The difficulty with limiting the duty of care in this way is that it mixes up the duty of care issue with that of remoteness of damage. It will be recalled that the "directness" test, favoured in *Re Polemis*[37] was repudiated by the Privy Counsel in *The Wagon Mound (No. 1)*.[38] As glossed by the House of Lords in *Hughes v. Lord Advocate*[39] a defendant is liable in negligence only for injuries or damage of a kind that was reasonably foreseeable (even if the precise manner in which the injury occurred was not foreseeable). Fennelly J.'s approach involves a revival of the directness test, used to limit liability since the injury must in any event have been reasonably foreseeable. Superadded to this limitation is the requirement that the injury be "the very thing" which the defendant ought to have anticipated. The liberalising effects of *Hughes v. Lord Advocate* can have no application as the remoteness issue will not be reached, the plaintiff's case foundering on judicial consideration of the duty of care.

The question whether liability should be imposed on car drivers who leave keys in the ignition cannot be resolved by a totally abstract analysis: inevitably values as to the proper remit of negligence law will affect the answer. If emphasis is placed on the deterrent function of tort law and on communitarian norms, the Supreme Court's approach may appear too narrow. If, however, one is concerned to prevent negligence law from being transformed into a system of strict liability to compensate victims of misfortunes, including those resulting from the ill will of other human beings, one may perhaps sympathise with that approach.

It should not be ignored that the battle in Breslin was essentially between the Motor Insurers Bureau of Ireland and the car-owner's insurance company. Could it be argued that it would have been preferable for the careless car owner to have felt the pinch through an increased premium rather than have all car owners, albeit indirectly, subsidise that act of carelessness?

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[36] *Breslin v. Corcoran and Motor Insurers Bureau of Ireland*, Supreme Court, unreported, 27 March 2003, at p. 15 of the unreported judgment. Damage may of course, occur some time after the theft.
[37] [1921] 3 K.B. 560 (C.A.).
[38] [1961] A.C. 388 (H.L.).
[39] [1963] A.C. 837 (H.L.).

D. Judicial Immunity From Suit

In *Flynn v. Connellan*[40] the plaintiff sought damages against a District Court Judge for "malice, misprision, misfeasance [and] perversion of the course of justice". Ó Caoimh J. dismissed the proceedings on a motion brought pursuant to O. 19 r. 17 of the Rules of the Superior Courts and pursuant to the inherent jurisdiction of the court. *McCauley & Co. Ltd. v. Wyse-Power*[41] and *Tughan v. Craig*[42] had held that an action might not be maintained against a judge of a court to record for anything done by the judge as a judge in a judicial proceeding. Ó Caoimh J. was:

> … satisfied that as the District Court is and has been since 1971 a court of record, that on the authorities cited to me, the first defendant enjoys privilege form suit in respect of words and actions in the course of acting in his judicial capacity and that this privilege must extend to any allegation of malice. Were it not to so extend, a judge would be open to suit merely on the basis of an allegation of malice. Accordingly, I am satisfied that I must allow the defendant's motion in respect of the first defendant.[43]

It may be recalled that, in *Desmond and MCD Management Services Ltd. v. Riordan*[44] Morris P. emphasised that:

> … because the granting of an immunity to the judiciary of necessity imposes a limitation upon the constitution[al] … rights of the citizen to vindicate his good name[,] ... the limitation must be strictly limited ... to achieve its objective [of] enable[ing] the judge to administer the law freed of the concern that he will be made answerable for his actions.[45]

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[40] High Court, unreported, Ó Caoimh J., 30 April 2003.
[41] (1943) 77 I.L.T.R. 61 (H.C.)
[42] [1918] 1 I.R. 245 (Ch.D.).
[43] High Court, unreported, Ó Caoimh J., 30 April 2003, at p. 7 of the unreported judgment.
[44] High Court, unreported, Morris P., 14 July 1999.
[45] High Court, unreported, Morris P., 14 July 1999, at pp. 5-6 of the unreported judgment.

Knowingly acting in excess of his or her jurisdiction would render a judge no longer immune from suit. It seems that *Flynn v. Connellan*[46] has not disturbed this holding since it was concerned with the narrower threshold question of whether any immunity extended to District Court Judges.[47]

E. Public Law/Negligence Nexus

The boundaries between public law and claims for negligence have never been easy to draw. It seems clear, however, that the mere fact that a person succeeds in judicial review proceedings is not, of itself, a reason for holding that the respondent has breached a duty of care in negligence to that person. In *McGrath v. Minister for Justice*[48] the Supreme Court overturned an award of damages in negligence against the defendant where the plaintiff, a member of the Garda Síochána, had successfully challenged, in judicial review proceedings, certain disciplinary proceedings against him. Murray J. (McGuinness and Hardiman JJ. concurring) observed that the High Court judge had:

> … proceeded on the basis that because the three errors of the appellants in the conduct of the disciplinary proceedings ... caused delay ... this in itself constituted negligence. Mere causation is not enough. The onus was on the respondent to establish a failure to exercise reasonable care by reference to a recognized duty. The appellants were at all times exercising their functions under statutory regulation, and assuming again there was a duty of care, the rational test is whether the decision taken was one which no reasonable authority would have taken. (See Fennelly J. in *Glencar Exploration v. Mayo County Council* (No. 2) [2002] 1 I.R. 84 at 155).
>
> In this context no case was made by the respondents in

[46] High Court, unreported, Ó Caoimh J., 30 April 2003.
[47] For further consideration of this somewhat cloudy area of the law, see Brazier, M. and Murphy, J., *Street on Torts* (10th ed., Butterworths, London, 1999), pp. 102-103.
[48] Supreme Court, unreported, 2 May 2003.

> the High Court or in this court as to any act or default on the part of the appellants other than the fact of all three failures referred to by the learned High Court judge in his judgment. All of those matters were the subject of judicial review proceedings. By succeeding in the judicial review proceedings the respondent obtained his remedy. There was no other material before the court on which a finding of negligence could have been made. The appellants' three failures in the judicial review proceedings do not in themselves establish negligence.[49]

McGrath may be contrasted with *Beatty v. Rent Tribunal*.[50] There the Rent Tribunal had carried out an inspection of the applicant's premises, in discharge of its statutory functions under the Housing (Private Rented Dwellings) (Amendment) Act, 1983, in breach of the principles of natural and constitutional justice. O'Donovan J. awarded damages for negligence. The Irish Times Law Report (on which I am relying) notes that O'Donovan J. applied McCarthy J.'s test in *Ward v. McMaster*.[51] Although he referred, in other related contexts, to *Glencar*, he did not add the third step which *Glencar* prescribes. He found that the statutory power under which the respondent made its determination was "designed to protect particular interests", echoing the language of *Glencar*, and that the respondent ought to have had owners and tenants of property in contemplation. He could identify no compelling exception based on public policy. It must be said that if the *Glencar* three-step test had been applied, it is quite possible that the outcome would have been different.

III. PUBLICANS AND HOTELIERS

Callery v. Sinnan Inns Ltd. t/a Clifton Court Hotel[52] raised, but did not have to resolve, an important question relating to the direct

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[49] Supreme Court, unreported, 2 May 2003, at pp. 23-24 of the unreported judgment.
[50] High Court, unreported, O'Donovan J., 16 May 2003, reported in the *Irish Times Law Report*, 2nd June 2003.
[51] [1988] I.R. 337 (S.C.).
[52] High Court, unreported, Peart J., 28 November 2002 (Circuit Appeal).

or vicarious liability of publicans and hoteliers for the tortious acts of security staff working for an employer who was engaged as an independent contractor to provide security services for the licensed premises or hotel. The plaintiff had received a serious injury to his finger in an altercation outside the defendant's premises. He claimed that it had been bitten off by a member of the defendant's security staff when he was being wrongfully prevented from re-entering the premises. His Honour Judge Hogan found in favour of the plaintiff against the defendant and a second defendant in the Circuit Court proceedings, Security Extra Services Ltd. He awarded the plaintiff over €25,000. The second defendant did not appeal.

Peart J. rejected the plaintiff's evidence and accepted that of the defendant's witnesses. He specifically declined to hold that the plaintiff's finger had been bitten by one of the bouncers. The bouncers had merely repelled an attack; it had been "inevitable that some force had to be used to restrain the plaintiff and to put him on the ground".[53]

Since he had reached this conclusion, Peart J. found it unnecessary to address the question whether the defendant was "responsible in negligence for the acts of the employees of the security firm".[54] He noted the anomaly resulting from the fact that the Circuit Court judgment against the security firm continued to apply, in spite of his holding which was inconsistent with it.

It may be worth reflecting briefly on the question of possible liability of service providers, such as pubs, hotels or shops, or even employers relative to their employees, for the torts of employees of security firms that have been engaged as independent contractors. Does this contract necessarily immunise the party engaging the contractor from the liability for the torts of the contractor's employees? The answer surely has to be in the negative. There will of course be very many cases where that party has no liability, whether direct or vicarious, but there will be some instances where liability can arise.

Let us attempt to distinguish between vicarious and direct liability

[53] High Court, unreported, Peart J., 28 November 2002 (Circuit Appeal), at p. 6 of the unreported judgment.
[54] High Court, unreported, Peart J., 28 November 2002 (Circuit Appeal), at p. 6 of the unreported judgment.

in this context. In situations where vicarious liability arises, the party on whom that liability is imposed is liable, not because he or she has done anything negligent or otherwise worthy of criticism but simply by reason of the relationship that generates vicarious liability. In Irish law today there is some uncertainty as to the basis for imposing liability. The tidy compartmentalism of distinguishing between employers (on whom vicarious liability may be imposed) and parties engaging independent contractors (on whom vicarious liability may not be imposed) has to some degree been overtaken by a more generic test based on the reality of control being exercised by one party over another's conduct, regardless of the formalities. This was what the Supreme Court favoured in the controversial case of *Moynihan v. Moynihan*.[55] Laffoy J. evinced an understandable distaste for the application of the control criterion in the domestic context, in *Duffy v. Rooney and Dunne's Stores (Dundalk) Ltd*.[56] Outside that context it appears to hold continuing force.

The effect of *Moynihan* is that a court is free to penetrate the formality of a contractual relationship and to hold that, in spite of it, one party had *de facto* control over the other's actions. Thus, if a service-provider engages a security firm as an independent contractor but nonetheless manages the day-to-day activities of the staff of that security firm, there is no guarantee that the *Moynihan* principle will not override the contractual formalities. It is interesting to note the intertwining of functions that characterised the relationship between the hotel and the security firm in *Callery*. Peart J. noted in his judgment that:

> Mr. Joe McKevitt ... was the manager at the premises for about five years and he was the only manager. He says that every half hour or so it is his habit to go out to the door and check that everything is alright. On this occasion he was doing just this when suddenly the plaintiff rushed past him and out onto the street. A girl followed. He said that a row between [sic] started up the street, with scuffling and shouting. The girl seemed upset about something. He says that when he went back inside

[55] [1975] I.R. 192 (S.C.).
[56] High Court, unreported, Laffoy J., 23 June 1997.

> he said to the two doormen that if the two should try to get back into the premises they should be refused. He went back up to his office, but that a short time later he was told there was some trouble outside and he went back down. The plaintiff was outside shouting and pointing to his finger and saying that 'this is thousands'.
>
> Mr. McKevitt also gave evidence that the premises get their security men from Security Extra Services ltd and they have been doing so for some time. It appears that Mr. McKevitt recommended these doormen to that company because he had known them or at least one of them ... from the past. The company then took him on and he in turn brought in ... the other bouncer in question. Mr. McKevitt apparently lays down guidelines to Security Extra Services Ltd as to how the bouncers are to conduct themselves, and indeed he accepted that if for any reason a particular bouncer was not doing the job in the way he wanted it to be done, he would ring up the company and arrange for a different doorman to be provided. He would be in the habit of recommending certain people to that company and they would be taken on in order to provide security on the door of the appellant's premises. His policy is that minimum force should at all times be used in restraining unwanted persons.[57]

Another avenue for the possible imposition of vicarious liability on service-providers should also be noted. This is the concept of a non-delegable duty of care. Our courts have been flirting with the concept in the context of employers' liability, where they cannot make up their mind finally whether to accept or reject it. The concept has also appeared in the context of occupiers' liability, in *Crowe v. Merrion Shopping Centre Ltd*.[58] Its precise relationship with section 7 and section 8 of the Occupiers' Liability Act, 1995 has

[57] High Court, unreported, Peart J., 28 November 2002 (Circuit Appeal), at p. 4 of the unreported judgment.
[58] (1995) 15 I.L.T. (ns) 302 (C.C., His Honour Judge Spain).

yet to be clarified. It is well established in respect of the torts of strict liability.

If an employer cannot shuffle off his or her responsibility to act with due care to an employee by engaging an independent contractor, it is possible — though I suspect, unlikely — that a court would be disposed to impose a similar burden on service providers such as publicans.

We should also consider the service provider's direct liability in negligence. Public houses are potentially dangerous places. Publicans are under a duty to use reasonable care in protecting patrons from the risk of injury. They do not automatically discharge that duty of care by engaging an independent security firm. If, for example, a publican has reason to believe that the employees of the security firm are incompetent or unduly belligerent, the publican cannot stand idly by, sheltering behind the contract with the security firm. Moreover, if the employees of the security firm are integrated into the publican's management system, the publican may in some instances be considered to have responsibility for the security system, if not as controller under the *Moynihan* criterion, at least as one in a proximate relationship with patrons so far as the law of negligence is concerned.

Let us turn to another decision dealing with publicans, this time in the context of the extent to which they fall under an affirmative duty of care to protection patrons from being attacked by other patrons. In *Wallace v. Flynn*[59] the plaintiff, when having a meal in the defendant's snooker hail and café, was subjected to what Kelly J. described as 'a savage assault' by a person who had just entered the premises. The assailant used a steel baseball bat, which had been partially concealed under his coat. A female member of staff immediately went to the money booth and pressed the panic alarm and called the police. Another member of staff, a male whose duties included some element of security work, ran straight from the storeroom, where he was working, to the café and tried unsuccessfully to grab the assailant who at this time was leaving the premises. He stood back when the assailant tried to strike him with the bat. Kelly J. referred to *Hall v. Kennedy*[60] where Morris J. had

[59] High Court, unreported, Kelly J., 1 May 2002.
[60] High Court, unreported, Morris J., 20 December 1993.

stated:

> The obligation of the [publican] at law is to take all reasonable care for the safety of a customer while on the premises. This would include in this case ensuring that another customer in the premises did not assault him. The necessary steps would include, in an appropriate case, removing such a customer from the premises, refusing to serve him drink and staffing the bar with sufficient barmen or security staff so as to ensure the safety of the Plaintiff.[61]

Kelly J. was of the opinion that these principles were applicable to the proprietor of the premises in the instant case, subject to whatever modifications were necessary having regard to the different character of the latter premises. Kelly J. distinguished *Hall v. Kennedy*[62] and dismissed the plaintiffs claim. The evidence had disclosed that neither the plaintiff nor his girlfriend had ever met the assailant before. There had been no basis on which the defendant could have had the slightest suspicion that the assailant might be ill-disposed to the plaintiff. There had never been any trouble when the plaintiff, his girlfriend or the assailant had previously been on the premises. Neither the defendant nor any member of his staff ought to have had any inkling of the assailant's violent disposition or criminal record. The incident had taken place without warning and very quickly. The premises had been 'a relatively peaceful one' prior to the incident. It had formerly been open until 1 a.m., with a buzzer on the door to control entry. Before the incident it had moved the closure to 10 p.m., which made it reasonable to abandon the buzzer system of entry. During the earlier period of four years, no serious incident had occurred.

Kelly J. did not consider it unreasonable for the defendant not to have employed a person for full-time security duties. Even if a full-time security person had been employed, he would not have been able to prevent the assault unless he had been sufficiently close to

[61] High Court, unreported, Morris J., 20 December 1993, at p. 5 of the unreported judgment.
[62] High Court, unreported, Morris J., 20 December 1993.

intervene. Kelly J. observed that, "[i]n any event, he would have been the brave security man who would have sought to tackle a person armed as [the assailant] was".[63]

IV. ROAD TRAFFIC

A. Rear-end Collisions

In *New Ireland Assurance Public Ltd. Co. v. Donnellan*[64] His Honour Judge McMahon addressed important issues of liability relating to road traffic accidents. Three central personae were involved in the incident. Mrs. Donnellan was driving her car towards a road junction. The sun was in her eyes. The traffic lights on the pole in front of her carried, at the same level and beside each other, two lights, one of which was showing a green arrow, the other, governing the filter lane to her right, showing red. Because of the sunny conditions the green light "show[ed] weaker and was not as prominent as the red light (because of the nature of the filter)".[65] She braked. Mr. Jordan, driving behind her, found himself in a dilemma. Behind him was Mr. Fogarty, driving a jeep too close to the rear of his vehicle. Mr. Jordan decided that, if he braked in his own lane, he would be sandwiched between the two vehicles. Accordingly he veered to his right. The jeep partially clipped his vehicle, which in turn struck the pole carrying the traffic lights. His Honour Judge McMahon acquitted Mrs. Donnellan of negligence. He stated:

> … stopping as she did Mrs. Donnellan was not creating a problem for the vehicle immediately behind her: finally, all three cars involved in the primary collision were travelling in the same lane and at the same speed i.e. approximately 40 m.p.h., which was not an inordinate speed given the conditions.
>
> If Mrs. Donnellan in these circumstances was

[63] *Wallace v. Flynn*, High Court, unreported, Kelly J., 1 May 2002, at p. 14 of the unreported judgment. The assailant had been sentenced to three years' imprisonment for the attack on the plaintiff.
[64] Circuit Court, unreported, His Honour Judge McMahon, 27 January 2003.
[65] Circuit Court, unreported, His Honour Judge McMahon, 27 January 2003.

> momentary blinded and mistakenly concluded that the light controlling her passage was red, she was not acting unreasonably to bring her car to a halt when she knew she was not creating an unavoidable situation for the driver immediately behind her. In fact, it would be unthinkable for her to drive on in such circumstances.[66]

Nor was Mr. Jordan guilty of any carelessness. All responsibility rested on Mr. Fogarty. His Honour Judge McMahon stated:

> There would have been no accident if Mr. Fogarty had been keeping a sufficient distance behind the BMW, as Mr. Jordan was doing in respect of Mrs. Donnellan's Scorpio in front of him. Mr. Jordan, took his evasive action not because of what Mrs. Donnellan had done, but because of what Mr. Fogarty was doing, that is, driving too close and in a dangerous manner. Mr. Fogarty admitted in his evidence that he knew he was driving too close to Mr. Jordan at the speed he was travelling. If Mr. Jordan, for example, had not seen Mr. Fogarty in his rear mirror he would have braked and halted safely behind Mrs. Donnellan. He would then, on the evidence, have been hit by Mr. Fogarty and in all probability would have been shunted forward into Mrs. Donnellan's car by the heavier jeep which Mr. Fogarty was driving. In such a case the sole responsibility for damage to both cars would rest with Mr. Fogarty. Should it be any different because Mr. Jordan took reasonable evasive action in the agony of the moment to escape the danger he was in and to provide Mr. Fogarty with a greater opportunity to bring his vehicle to a safe stop? Unfortunately, because of Mr. Fogarty's proximity to Mr. Jordan and his speed Mr. Fogarty was unable to avail of the opportunity which Mr. Jordan provided for him. It is important to remember that in his case, the only danger to Mr. Jordan at the critical time was that

[66] Circuit Court, unreported, His Honour Judge McMahon, 27 January 2003.

which was created by Mr. Fogarty. The obligation on Mr. Fogarty was to drive so as to be able to stop if the vehicle in front was caused to pull up suddenly. What happened in front of Mr. Fogarty was the very thing against which he was under a duty to take precautions.

The truth here is that the first, the only and the dominant act of negligence was that of Mr. Fogarty. Mr. Fogarty was on Mr. Jordan's back for some time and was in no position to avoid a collision if Mr. Jordan was caused to stop. Mrs. Donnellan's action, which I have held did not constitute negligence, could not be said to relieve Mr. Fogarty of his responsibility. The reason why the law requires drivers to keep a safe distance from the car in front is to avoid the very risk which arises when the car in front has to stop. (See *Stansbie v. Troman* [1948] 2 K.B. 48; *Cunningham v. McGrath Bros* [1964] I.R. 209). The question in such cases according to Prosser and Keeton "is essentially one of the scope of the defendant's obligation, and far removed from causation". (*The Law of Torts,* 5th ed., p. 305, 1984)

In summary therefore I find that Mrs. Donnellan's conduct was not negligent. Furthermore, her action although a factual cause was not the legal cause of this accident. Mr. Fogarty's continuing act of negligence in driving too close to Mr. Jordan was the sole legal cause of the collisions that occurred on this occasion. Mr. Jordan's evasive action, taken in the agony of the moment, was reasonable in the circumstances and was not such as to attract any element of contributory negligence. Confronted as he was in the heat of the moment, within an invidious choice, his decision, although it turned out badly for him in the end cannot be criticised. Furthermore, there is no guarantee that had he stopped behind Mrs. Donnellan's Scorpio, he would have fared any better.[67]

[67] Circuit Court, unreported, His Honour Judge McMahon, 27 January 2003.

In *Kirwan v. Doherty*[68] the Supreme Court affirmed a finding by Carney J. in favour of the plaintiff where there had been a complete conflict of evidence as to how the accident had occurred. The plaintiff alleged that the defendant's car had struck his car when the plaintiff had been obliged to stop because a car had come out of side road in his path. The defendant claimed that the plaintiff, having passed him out, had reversed into him. The plaintiff and two witnesses on his behalf had earlier made statements to the Gardaí in which they had misrepresented where the journey had begun. This was because the party had been coming from a Garda station arising from 'a difficulty of some sort' which the plaintiff's son had. Carney J. had acknowledged that there were 'a multiplicity of issues in the case' which he was not obliged to resolve since the essential issue concerned what had occurred at the time of the accident. He found the evidence of the plaintiff and a witness on his behalf 'more convincing' and accordingly held in the plaintiff's favour.

The defendant appealed unsuccessfully to the Supreme Court. Keane C.J. (Hardiman and Fennelly JJ. concurring) observed that it was:

> … always, of course, more helpful viewed from the perspective of an appellate court if the trial judge particularises the reasons for his arriving at his conclusion and makes findings of a specific nature in relation to the credibility of the witnesses that he has heard and obviously, in the present case, it would be right to say that the reasons given by the trial judge are somewhat laconic, and he certainly does not go into any great detail as to why he has found the plaintiff and his witnesses more convincing. But in my view one can infer from what the trial judge says, that while, because he had made it clear that he was unhappy with the manner in which the plaintiffs and his witnesses made their statements to the Gardaí and subsequently altered them ... that has not affected his view as to who is to be believed in relation to what was the central matter —

[68] Supreme Court (*ex tempore*), unreported, 7 March 2002.

> how did this accident happen. In relation to that matter he was satisfied, it is quite clear, that the plaintiff and his witnesses gave what was the true version of events. If he had believed the defendant's version of events then quite obviously he could not have found for the plaintiff because the two accounts, it has to be said, were utterly irreconcilable. If it happened in the way the defendants said, well then the plaintiff could, under no circumstances, have succeeded in this case.[69]

B. Contributory Negligence

In *Shelley-Morris v. Bus Átha Cliath-Dublin Bus*[70] a swingeing and controversial reduction of 50% was decreed by the Supreme Court, varying O'Higgins J.'s reduction in the High Court of 25%, where a passenger on a bus was injured when the bus was driven in a negligent fashion. The passenger was at the time going up the stairs of the bus, holding her two-year-old daughter on her right hip and holding the rail with her left hand. She was approximately one step from the top when the bus jerked forward. The plaintiff was thrown backwards, her left hand being dislodged from the railing. O'Higgins J. dealt with the issue as follows:

> While I feel that the plaintiff herself must take a share of the responsibility for the accident, it is true that there is no embargo on people going up to the top of the bus and they are entitled to go up. The evidence is indeed of the driver is that people would in ordinarily journeys be going up the bus while the bus was moving and there are handrails provided, but to do so with a small child on one's hip when it is not necessary to do so seems to me to be not what a prudent person would do.
>
> To do so with a small child on the hip in circumstances where one had already noticed the jerky nature of the

[69] Supreme Court (*ex tempore*), unreported, 7 March 2002, at pp. 6-7 of the unreported judgment.
[70] Supreme Court, unreported, 11 December 2002.

> bus when moving off seems to me to amount to a considerable degree of contributory negligence. I penalise the plaintiff in contributory negligence to 25%.

On appeal to the Supreme Court, Denham J. stated:

> Accepting the evidence that the bus was being driven in a fast and jerky fashion it is in those circumstances that, at a red light, the plaintiff decides to pick up a two year old child, and, wearing high heels, climb the stairs to the upstairs of the bus ...
>
> Given that the bus was being driven in a fast jerky fashion the negligence of the plaintiff is clear. Given the factors, the proven way in which the bus was proceeding, the age and consequent weight of the child, the decision to move while the bus was making a journey, the footwear of the plaintiff, I am satisfied that the learned trial judged erred in apportioning the negligence to the plaintiff at 25%. Both the plaintiff and the defendant were equally negligent. I would apportion the negligence as against the plaintiff at 50%.[71]

Hardiman J. was also:

> … of the view that the plaintiff's action in needlessly ascending the stairs of the bus carrying a two year child in her right arm was a significant contributory factor to the accident. The only reason given for ascending the stairs was that the child wanted to do so: it was plainly the responsibility of a parent to refrain from gratifying an impulse of the child that exposed both of them to danger. This danger was still more obvious if, as alleged, the manner of driving had deteriorated on the second leg of the journey. Having regard to the fact that there was

[71] *Shelley-Morris v. Bus Átha Cliath-Dublin Bus*, Supreme Court, unreported, 11 December 2002, at p. 14 of the unreported judgment.

> ample accommodation downstairs and that all passengers were going to the same destination, the driver had no positive reason to consider the possibility that a woman with a two year old child in her arms would ascend the stairs. I would divide the responsibility for this accident in equal measure between the plaintiff and the defendant.[72]

One may wonder whether this reduction can be justified. Two-storey buses are offered to the public on the basis that both storeys are accessible. There is an inevitable danger that any passenger who decides to accept the offer to go upstairs may fall. The courts have not held that drivers must wait until all upstairs passengers have reached their seats before putting the bus in motion. If a driver drives in a negligent manner causing the bus to jerk, it would seem quite unjust that a passenger without disability or burden, such as carrying a young child, should have any reduction in the compensation awarded for injury resulting from that negligence. It is not (yet) negligent to be a parent in charge of a young child on a bus, but apparently it may be negligent for the parent to seek to take the child onto the upper floor. Is a parent with a two-year-old child to be characterised as negligent in getting onto a bus with seats available only upstairs? Is it really fair that the availability of seats downstairs should result in the denial of half the quantum of compensation for injuries resulting from the driver's negligence?

C. Practical Issues Relating to Documentary Evidence on Appeal

In *Furey v. Suckau*[73] Hardiman J. (Murphy and Geoghegan JJ. concurring) stressed how essential it is that all documents, including photographs and sketches, which were before the trial court should also be available on the hearing of the appeal. In the instant case not all the photographs were produced. Certain maps were missing, including three that had been marked by witnesses during the hearing. The Supreme Court ordered a retrial, not on this account, but because the trial judge, Ó Caoimh J., had failed to address an

[72] *Shelley-Morris v. Bus Átha Cliath-Dublin Bus*, Supreme Court, unreported, 11 December 2002, at pp. 35-36 of the unreported judgment.
[73] Supreme Court, unreported, 26 April 2002.

evidential dispute between engineers who were witnesses at trial as to the point of impact or to refer to evidence by members of the Garda Síochána as to scrape or gouge marks at a certain position on the road.

V. OCCUPIERS' LIABILITY

As you know, the Occupiers' Liability Act, 1995 has replaced the common law rules on the subject. It divides entrants into three categories: visitors, recreational users and trespassers. Broadly speaking visitors are all of those who go onto another's property either with that other's consent or by authority of the law (the Gardaí or fire-fighters, for example). However, entrants on premises who pay no charge and whose purpose is a "recreational activity", as defined in the Act, are categorized as recreational users even where the occupier permits the entry. 'Recreational activity' is defined as one conducted in the open air (including any sporting activity), scientific research and nature study conducted in the open air, exploring caves and visiting sites and buildings of historical, architectural, traditional, artistic, archaeological or scientific importance.

The duty that the occupier owes a visitor is that of the 'common duty of care' — in essence the same as the common law concept of negligence. Recreational users and trespassers are not owed any duty of care. All that they can ask is that the occupier not intentionally injure them (or damage their property) and not act recklessly towards them. The criminal trespasser is stigmatized even more stringently: the occupier is free to act recklessly in his or her regard (unless the court determines that this immunity should not apply "in the interests of justice"). Moreover, the occupier is entitled to intentionally injure an entrant where this is required for self-defence, defence of others or defence of the property. The Act has not changed the scope of these defences. So far as defence of property is concerned, therefore, one may expect that litigants will invoke the late Judge Carroll's enlightened judgment, in *MacKnight v. Xtravision*[74] emphasising the need for commercial occupiers to exercise restraint in the face of trespass.

[74] Circuit Court, unreported, His Honour Judge Carroll, 5 July 1991.

As to the scope of the duty owed to visitors, His Honour Judge McMahon's judgment in *Heaves v. Westmeath County Council*[75] gave important guidance on aspects of the Occupier's Liability Act, 1995. The plaintiff was injured when he slipped on rustic steps when walking on the grounds of Belvedere House with his two children. Belvedere House had been opened to the public earlier that summer. It was in the occupation of the defendant. Although the house itself was closed to the public on the day of the accident — a Sunday — the gardens and surrounding grounds were open to visitors. Behind the House, a terrace overlooked the lawn. As one moved towards the water, formal steps led down to another lower terrace.

The accident occurred when the plaintiff's two children had strayed from his sight and the plaintiff was looking for them. As he was going down the steps, he slipped on an uneven indentation on the second step which was partly covered in lichen and moss.
The plaintiff sued the defendant as occupier, arguing that it had breached its 'common duty of care to him' as a visitor. The circumstances of the plaintiff's arrival onto the premises proved important. He had driven to the car park where he paid a one pound entry fee for himself and 50 pence for each of his children. Two attendants in a wooden hut in the car park had taken the money. His Honour Judge McMahon held that the plaintiff should be characterised as a visitor for the purposes of the Act. He stated:

> In so far as the term 'visitor' includes an entrant who was present on premises by virtue of a contract, it would seem clear that the plaintiff in the present case should be classified as a visitor. After all, he paid an entry fee in respect of himself and his children. At common law he would have been classified as a contractual invitee. At common law he would be entitled to reasonable care. The history of the legislation in question indicates that there was no intention to downgrade the legal status of such an entrant. The Act was primarily introduced to reverse *McNamara v. E.S.B.* [1975] I.R. 1 in respect of trespassers, and to create a new category for recreational

[75] Circuit Court, unreported, His Honour Judge McMahon, 17 October 2001.

> users who were causing some concern to the agricultural community who feared that the common law might treat them too leniently by according to them the duty of reasonable care.
>
> 'Recreational users', on the other hand, was intended to cover people who entered premises with or without permission, *without a charge*, to engage in a recreational activity conducted in the open air (including any sporting activity), or to engage in scientific research and nature study or to explore caves, visit sites and buildings of historical, architectural, traditional, artistic and archaeological or scientific importance. (Section 1(1) of the 1995 Act).
>
> From a careful reading of these definitions it is clear that, by entering under a contract the plaintiff is squarely in the category of 'visitor', and by paying a charge he is outside the category of 'recreational user' …[76]

Counsel for the defendant suggested that, since the money from the plaintiff had been paid in the car park, it constituted a charge in respect of parking the car only and, since it did not amount to an entry fee, it accordingly brought the plaintiff out of the visitor category and into the category of recreational user. His Honour Judge McMahon did not agree. He considered that there could be:

> … little doubt, from the definition of recreational user, that a parking charge, if that is all it is, will not take the entrant out of that category. The weakness of this argument in the present case, however, was fully exposed when, in answer to the question whether the plaintiff and his children would have been charged if they arrived on foot, the defendant's counsel had to concede that they would have to pay in such an event also. In these

[76] Circuit Court, unreported, His Honour Judge McMahon, 17 October 2001, at pp. 3-4 of the unreported judgment.

> circumstances, it is clear that the fees were not paid for the privilege of parking the car. They were clearly entry fees. And this made the plaintiff and his children 'visitors' under the Act.
>
> That the plaintiff also wandered at his leisure enjoying the garden and the grounds, is not in doubt. But engaging in a recreational activity does not necessarily and invariably make him a recreational user. The Act is clear in declaring that if an entrant comes to the premises under contract and pays a charge he is a visitor, and only a visitor. In this legislative classification it is important to remember that there are three, and only three categories; these categories are exhaustive; there are no more categories. Furthermore, it is equally important to realise that an entrant cannot be in two categories at the same time. A careful study of the legislation compels one to this conclusion and in this, it in no way departs from the common law ... To accept the defendant's argument that, because the plaintiff was enjoying the scenery, he must therefore be a recreational user, would ignore these principles, would distort the statute and would lead to unwarranted and unreasonable conclusions. For these reasons I have little hesitation in rejecting it.[77]

The question thus reduced itself to whether the defendant had discharged its duty under section 3(1):

> … to take such care as is reasonable in all circumstances (having regard to the care which the visitor may reasonably be expected to take for his own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to exercise over the visitor's activities) to ensure that a visitor to the premises does not suffer injury or damage by reason of

[77] Circuit Court, unreported, His Honour Judge McMahon, 17 October 2001, at pp. 4-5 of the unreported judgment.

any dangerous existing thereon.[78]

An engineer who gave evidence on behalf of the plaintiff pointed out that the step on which the plaintiff had slipped had a rough indentation. He considered that, when covered with moss, it might constitute a trap. He suggested that the steps might have been cordoned off, that a warning notice might have been placed at the head of the steps to alert visitors or that a handrail might have been constructed.

Emphasising that the duty imposed by section 3(1) was one of 'reasonable care and no more', His Honour Judge McMahon concluded that the precautions which the defendant had taken in all the circumstances were reasonable. It had appointed personnel to address the risk; the head gardener had a satisfactory cleaning system in place, and it had worked for several years without a problem. Moreover, in those matters where the gardener lacked competence he recognised his own limitations and engaged an outside expert to advise him. He had also duly implemented the advice he received.

The holding in this case should be welcomed by those in charge of open spaces whose concerns about their potential liability as occupiers led to the enactment of the 1995 legislation. Those fears, if not completely groundless, were exaggerated, since there is in this context a very real difference between reasonable care and strict liability.

Let us now consider a few areas of uncertainty regarding the 1995 Act. The first concerns the scope of liability under the Act. Section 1(1) indicates that it relates only to dangers due to the state of the premises. This would suggest that other dangers, due to some other cause, such as the activity of the occupier, do not come within its scope. The point is of considerable practical significance because, if this is so, a trespasser or recreational user would still be able to sue for negligence in appropriate cases (subject to the new *Glencar* three-step test) where the injury is attributable to some activity rather than a danger due to the state of the premises.

In *McGovern v. Dunnes Stores*[79] where a customer slipped on a

[78] Circuit Court, unreported, His Honour Judge McMahon, 17 October 2001, at p. 5 of the unreported judgment.
[79] Circuit Court, unreported, His Honour Judge McMahon, 6 March 2003.

plastic clothes hanger lying on the floor in the defendant's store, His Honour Judge McMahon applied common law negligence principles rather than the 1995 Act as there had been "no complaint about a structural defect in this case". Had the Act applied, it seems clear that the outcome would not have been difficult, since the duty to a visitor under the Act — which the plaintiff customer clearly was — is identical to that of negligence under common law. We await a case involving a trespasser or recreational user. If the courts do attempt to make the distinction between dangers due to the state of the premises and dangers resulting from activities on the premises, they will inevitably have formidably difficult judgment calls awaiting them. If the clothes hanger in *McGovern v. Dunnes Stores* had been left on the floor overnight, would it have been transformed by the passage of time into a danger due to the state of the premises?

A second question — yet to be resolved by the courts — concerns the extent to which an occupier may modify downwards his or her duty of care to a visitor under section 5 of the Act. This section permits the occupier to limit the duty to that of not acting recklessly or causing intentional injury to the visitor but only where this limitation is reasonable in the circumstances. Is it reasonable for a hospital, a public house, a school or a supermarket to limit its duty in this way? The answer depends on a value judgment, on which we have so far no judicial guidance.

VI. MEDICAL NEGLIGENCE

Medical negligence litigation is on the increase. Most of it appears to take place in the High Court, perhaps because of the potentially high damages that may be involved as well as the economics of pursuing litigation of this character with its heavy emphasis on expert evidence. At all events, the principles are clear enough: adherence to a customary practice will normally suffice to acquit the medical practitioner of negligence unless the court concludes that the particular practice was one involving inherent defects which ought to have been obvious to anyone giving the matter due consideration. The Supreme Court so held in *Dunne v. National Maternity Hospital*[80] and has reiterated this in many cases since then.

[80] [1989] I.R. 91 (S.C.).

The standard is contextualized to the particular discipline that the doctor practises. General practitioners much reach the standard of reasonable, not the very best, general practitioner. The Supreme Court in *Collins v. Mid-Western Health Board*[81] was surprisingly demanding in the standard it prescribed, requiring a general practitioner to engage in a degree of proactive enquiry close to that of cross examination of the patient where the general practitioner has been informed (by the patient's spouse) that the patient has a symptom — in this instance a severe headache — which the patient is not emphasizing when giving an account of his symptoms.

In *Cleary v. Cowley*[82] a senior house officer was acquitted of negligence in failing to diagnose a pulmonary embolism in a 17 year old patient who came back to the hospital a day after he had been discharged with resolving pneumonia. Carroll J. considered that the house officer's diagnosis — that the pneumonia was still present — was reasonable in the circumstances. It was the obvious contender: as one expert witness observed, "if you hear hoof beats, do not think zebra."[83]

In *Quinn v. South Eastern Health Board*[84] Ó Caoimh J. applied the *res ipsa loquitur* doctrine where the plaintiff sustained *meralgia parasthetica* following an appendectomy. The surgeon did not give evidence; in the absence of an explanation, Ó Caoimh J. considered that the plaintiff should succeed in her claim.

An interesting puzzle as to the basis on which a claim should be analysed arose in *Sheehan v. Mid-Western Health Board*.[85] The plaintiff, who accompanied his wife to the accident and emergency department of a hospital, fainted when her cut lip was being sutured. He fractured his skull. He claimed that the hospital was negligent in not providing him with a seat. Not surprisingly, his action failed. Murphy J. characterized the claim as falling within the principles of occupiers' liability rather than professional negligence. Perhaps a more straightforward characterisation would be that of the liability of hospitals as managers of the provision of health services.

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[81] [2000] 2 I.R. 154 (S.C.).
[82] High Court, unreported, Carroll J., 20 December 2002.
[83] *Cleary v. Cleary*, High Court, unreported, Carroll J., 20 December 2002, at p. 13 of the reported judgment.
[84] High Court, unreported, Ó Caoimh J., 22 March 2002.
[85] High Court, unreported, Murphy J., 1 August 2002.

VII. PRODUCT LIABILITY

There have been several cases over the past fifteen years involving claims that inflammable clothes manufactured for children ought to have had an adequate warning attached to them. Some have failed, either because there was no need to attach any warning in the circumstances (*Browne v. Primark t/a Pennys*)[86] or because the warning was adequate (*Cassells v. Marks & Spencers*).[87] Another failed on the ground of lack of causation (*Duffy v. Rooney and Dunnes Stores*).[88] The absence of a warning led to the imposition of liability in *O'Byrne v. Gloucester*.[89]

In *Rodgers v. Adams Childrens Wear Ltd*.[90] a six year old girl was burnt when wearing a dress manufactured by the defendant. There was a warning on the label sewn into the side seam. Her claim for negligence failed. Carroll J. held that there had been no obligation to test the dress for inflammability. The relevant regulations extended only to children's nightdresses and dressing gowns. Nor had the manufacturer been negligent in failing to place the warning at the neck or on a hanging tag. No regulation addressed the question of location of warnings. Moreover, Carroll J. found it 'incredible" that the child's mother should have presumed the dress to be safe because she did not see a warning at the neck or on a tag. Following *Duffy* and *Cassells*, Carroll J. did not consider it essential to have treated the dress with fire retardant.

Finally, Carroll J. held that there had been no breach of the European Communities (General Product Safety) Regulations, 1997. Regulation 8 deemed a product safe if it conformed with specific rules of law of the state drawn up in conformity with the Treaty of Rome. Where no such rules existed, the conformity of a product to the general safety requirements should be assessed taking into account standards drawn up in the State, codes of good practice in respect of health and safety in the product sector concerned or the state of the art and technology and the safety which consumers

[86] High Court, unreported, 10 December 1990.
[87] High Court, unreported, Barr J., 25 March 1999.
[88] Supreme Court, unreported, 23 April 1998, affirming High Court unreported, Laffoy J., 23 June 1997.
[89] Supreme Court, unreported, 3 November 1988.
[90] High Court, unreported, Carroll J., 11 February 2003.

might reasonably expect. Carroll J. considered that the Supreme Court and High Court had prescribed standards with which the manufacturer in *Rodgers* complied. There were no regulations for daywear in any EU state. No credible evidence had been adduced which would require that the label be placed at the neck. Accordingly, Carroll J. concluded that the dress was a safe product.

One suspects that in future years, when consumerist values strengthen, the judgments in *Cassells* and *Rodgers* (and even aspects of *Duffy*) will be regarded as inappropriately deferential to commercial norms and insufficiently demanding of efficacious warnings. The purpose of an inflammability warning is to affect behaviour, not merely convey information.

In *Clabby v. Global Windows Ltd.*[91] a postal worker who hurt his back when delivering letters to letterboxes placed at the bottom of doors failed in his action for negligence against the manufacturer, supplier and installer of these letterboxes. He invoked an industrial standard (I.S. 195 of 1976) regarding *inter alia* the positioning of letterboxes, but Finnegan P. concluded that this standard was concerned, not with the health and safety of postal workers, but with the danger of sharp edges on letter plates and the inconvenience to postal workers of letter plates that were too low or too high.

VIII. CAUSATION, PROOF AND REMOTENESS OF DAMAGE

A. Factual Causation

Factual causation is a crucial constituent of a claim for damages for negligence. It is not sufficient for the plaintiff to prove that the defendant was negligent: a causal connection between that negligence and the plaintiff's injury has to be established. Proof of the causation is, in theory, a matter of evidence but one suspects that the courts have a tendency to be willing to find that causation has been established in cases where, for more intuitive reasons, they consider that the defendant's misconduct warrants an award of compensation.

In *Corkery v. Bus Éireann/Irish Bus*[92] the plaintiff bus driver was

[91] High Court, unreported, Finnegan P., 21 January 2003.
[92] High Court, unreported, Budd J., 29 January 2002 affirmed by the Supreme Court, unreported, 6 May 2003.

attacked by a robber in his bus. He contended, successfully, that his employer had been guilty of negligence and breach of statutory duty in failing to install a protective screen door in the bus. Accepting that the defendant had been negligent, could the plaintiff prove a causal connection between that negligence and the plaintiff's injury? Budd J. held that he could. Budd J. accepted the argument made by counsel for the plaintiff that, if the screen door had been in the bus, the plaintiff could have used it against the robber. There was also "the factor that the presence of such an assault protection door would reduce the risk to a driver by making the driver less exposed, at times of his discretion, to an attacker".

The Supreme Court affirmed this on 6 May 2003. In an *ex tempore* judgment (with which Fennelly and McCracken JJ. concurred), Keane C.J. observed that Budd J. had been:

> … entitled to hold that it was a sufficiently widespread practice in the passenger bus industry in this country and indeed in the adjoining jurisdiction, sufficiently widely adopted and for very good reason and at relatively small expense in the case of the Cork operation, that it should have been adopted by the defendant.[93]

The causation issue did not feature in the appeal.

In *Fanning-McCormack v. Gowing t/a Anglesea Lodge Veterinaty Hospital*[94] His Honour Judge McMahon dismissed proceedings for negligence and breach of contract against a veterinary surgeon where a colt foal died after a lotion prepared by the defendant had been administered to the foal. The court found that there had been no negligence in the preparation of the lotion, which was appropriate to the foal's condition; nor had there been a breach of contract. On the issue of causation, His Honour Judge McMahon concluded that the plaintiff had failed to establish that the administration of the lotion had caused the death of the foal. Evidence had been given that the condition suffered by the foal could occur 'for reasons for which veterinary medicine has yet no clear answers'. There was also a

[93] Supreme Court, unreported, 6 May 2003, at pp. 11-12 of the unreported judgment, *per* Keane C.J.
[94] Circuit Court, unreported, His Honour Judge McMahon, 11 June 2002.

possibility that the colt might have received a bang to the hock in the period between initial diagnosis and administration of the lotion.

An issue of causation raising important questions of social policy arose in *O'Carroll v. Diamond*.[95] It is concerned with how a solicitor should best discharge his or her duty of care to spouses whose interests are not necessarily coincident. The plaintiff's husband had received in excess of £100,000 for investment from neighbours. They had sued him in 1988 for its return, alleging fraud. In these court proceedings the plaintiff's husband was required to swear an affidavit setting out the disposition of these funds which 'would have left him in jeopardy in regard to the criminal law'. To avoid this, the plaintiff's husband came to a settlement with the neighbours involving a consent to judgment for the charging of his assets pending their sale to realise the amount due. The defendant was acting as solicitor for the plaintiff's husband. The plaintiff was joint owner of the family home. She had not been aware of the litigation and its outcome. When she learned the true position she and her husband had a telephone conversation with the defendant in which the defendant told the plaintiff that she should take independent legal advice in connection with protecting her share of the home if she had any doubt in the matter. He said that a good job had been done protecting her husband so far and that a week previously her husband had been getting ready to go to gaol for contempt of court as he had not been in a position to file the necessary affidavits. After the plaintiff had indicated that she was anxious that the neighbours should get their money back and that she wanted to do everything possible to achieve that, the defendant had said that, if the plaintiff was in any doubt, she should get independent legal advice and that he could not advise her in the matter.

The plaintiff and her husband went to the defendant's office the following day. He explained all of the documents she was signing, but repeated that he could not advise her and that it was totally up to her. She indicated that she was willing to go along with the situation. In due course the family home was sold. Some time later the plaintiff sued the defendant for negligence and breach of contract.

[95] High Court, unreported, O'Neill J., 31 July 2002.

The defendant gave evidence that, having regard to the fact that the plaintiff's husband was already his client when the plaintiff got in touch with him, he could not take her on as a client unless there was 'a uniformity or commonality of interest' between her and her husband and that he could not at all advise her of her options because to do so would conflict with his obligation to her husband.

O'Neill J. held that the defendant had been negligent and in breach of contract in taking this course. In his view:

> … unless the defendant had been instructed by [the plaintiff's husband] not to discuss or to advise the plaintiff of her options, there would have been no good reason why he should not have done so. At the very least he should have enquired from [the plaintiff's husband] if he had any objection to that course and perhaps even invited him to discuss collectively with his wife all of the options available to both of them. It is quite clear from the evidence that nothing of this kind ever arose and in the context of a husband and wife who were then united as a couple, it should have arisen.
>
> While I entirely accept that the position adopted by the defendant was arrived at conscientiously and carefully having regard to the interests of [the plaintiff's husband], it had the result of leaving entirely unserved the interests of the plaintiff and indeed also the interests of both [the plaintiff's husband] and the plaintiff jointly as a couple because it deprived them as a united married couple of the opportunity to jointly make choices which would have been in the best interest to them and their family.
>
> I am compelled to conclude that the defendant was wrong in withholding advice from [the plaintiff] either separately or jointly with her husband and that his omission in this regard is of such an obvious or even glaring nature as to lead inexorably to a finding that his conduct of this aspect of the transaction was not of a

> standard which one would have expected form a member of the solicitor profession of his standing and thus was negligent.[96]

The next crucial question was one of causation. If the plaintiff had been advised appropriately by the defendant, what would she have done? Would she have asserted her own interest in half of the home or would she have supported her husband by agreeing to the sale of the home and the use of her share to discharge her husband's liability to the bank and the Haydens? O'Neill J. concluded that she would have followed the latter course:

> No doubt the plaintiff was extremely angry with [her husband] for getting them into an awful predicament. However, it would seem to me that it was very unlikely that she would have left him exposed to the risk of criminal prosecution and a custodial sentence, with all the attendant consequences of that for [her husband], but more particularly for the plaintiff herself and her children. It would seem to me that the salvaging of her half share from the sale of the family home would not in all probability have outweighed the terrible consequences for the family as a whole, of criminal proceedings against [her husband].[97]

This holding seems consistent with the realities of life where spouses come under financial pressure. It is worth contrasting the role of tort law in this context with other legal strategies to protect economically dependent spouses from losing possession of the family home. The doctrine of undue influence, for example, will not be defeated by proof that, even if that influence had not been exercised, the plaintiff would still have consented to the disposition involving the loss of the home. A similar outcome will generally follow in respect of a restitutionary claim.

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[96] *O'Carroll v. Diamond*, High Court, unreported, O'Neill J., 31 July 2002, at p. 25 of the unreported judgment.

[97] *O'Carroll v. Diamond*, High Court, unreported, O'Neill J., 31 July 2002, at p. 27 of the unreported judgment.

Another professional negligence claim in which the issue of causation arose in *Cleary v. Crowley*.[98] Carroll J. held that a senior house officer had not been guilty of negligence in failing to diagnose a pulmonary embolism in a 17 year old patient who had pneumonia.

The general thrust of the expert evidence adduced on behalf of the defendants was that pulmonary embolism was a very rare condition for a person of the age of the deceased and that the blood could most easily be explained by reference to the pneumonia rather than by searching for a statistically rare condition. One witness observed: "you hear hoof beats do not think zebra".[99]

The senior house officer had not had access to the patient's records. Carroll J. did not consider that this constituted evidence of negligence on the part of the hospital. The events had taken place in 1994 before the advances in record-keeping associated with computer technology. It was "reasonable in 1994 that the records would not be immediately traceable at midnight on the day after [the deceased] was discharged from hospital".[100] In any event, Carroll J. was satisfied that no causal connection had been established: "if the records had been available it would not have affected the diagnosis".[101]

In *Millington v. Taylor (t/a The Big Tree Public House)*[102] questions of causation and remoteness fell for consideration. The plaintiff was an employee of the first defendant, working in a public house. The back door to the premises did not have an outside lock. Employees going out the door would either ring a bell or call to a colleague to alert the colleague of the need to close and lock the door from the inside. One day the door was left unlocked. A thief came in and stole some drink as well as the keys of the plaintiff's car. He proceeded to load the drink into the plaintiff's car. When the plaintiff came upon the scene, she challenged the thief, who jumped into her car, locked the doors from the inside and began to reverse the car. The plaintiff lay across the bonnet, clinging to it. The thief then

[98] High Court, unreported, Carroll J., 20 December 2002.
[99] *Cleary v. Crowley*, High Court, unreported, Carroll J., 20 December 2002, at p. 13 of the unreported judgment.
[100] *Cleary v. Crowley*, High Court, unreported, Carroll J., 20 December 2002, at p. 16 of the unreported judgment.
[101] *Cleary v. Crowley*, High Court, unreported, Carroll J., 20 December 2002, at p. 16 of the unreported judgment.
[102] Circuit Court, unreported, His Honour Judge McMahon, 17 July 2002.

accelerated forward towards the road, causing the plaintiff to fall off and injure herself. The thief escaped and was never apprehended.

His Honour Judge McMahon held that the 'bell or call' system for keeping the back door locked was inadequate and that the employer was negligent in this regard. He went on to address the issue of remoteness of damage:

> The risk which was recognised was the risk which materialised. The door was left open, the system failed to alert the plaintiff and an unauthorised intruder gained access. The risk also contemplated that the intruder might not be an honest person - if only honest persons were expected there would be no need for any locks - and that he might take whatever advantage offered itself to him. In the present case he was offered a handbag, a mobile phone and the plaintiff's car keys. There were also crates of beer available. The thief proceeded to maximise his opportunity. No, more than any 'respectable' thief would do. He took what he wanted from the hand bag and then began to unload some beer into the car which was now at his disposal. Once the thief was in, was not this what we would expect him to do? If the cat gets in, should we be surprised that he will drink the milk? Up to this point, in my view, what he did was not only foreseeable, it was predictable.[103]

As to what happened thereafter, His Honour Judge McMahon was satisfied that it also was foreseeable. When the plaintiff intervened, the thief "knew that the game was up and, again predictably ... decided to make his getaway in the car he was planning to take anyway".[104] There was nothing "very unpredictable" about the thief's reversing and accelerating when the plaintiff was lying across the bonnet of the car:

> It may be true that the exact sequence of events could

[103] Circuit Court, unreported, His Honour Judge McMahon, 17 July 2002, at pp. 4-5 of the unreported judgment.
[104] Circuit Court, unreported, His Honour Judge McMahon, 17 July 2002, at p. 5 of the unreported judgment.

> not have been predicted, but once the risk of entry materialised it was the very "kind of thing" that might reasonably be expected to happen.
>
> In my view, it does not lie in the employer's mouth to say that the events that followed were not reasonably foreseeable and that the employer had its duty of care in respect of the damage that occurred to the plaintiff. Put another way, it is my view that the damage caused to the plaintiff by the employer's breach of duty was too remote.[105]

His Honour Judge McMahon went on to reject the argument that either the plaintiff's conduct or that of the thief after her intervention constituted a *novus actus interveniens*. As to the plaintiff, what she had done might have been imprudent in hindsight but was a genuine effort to stop the thief making off with her car and the employee's property:

> She acted in the agony of the moment, but at the time it was not an unreasonable attempt to prevent a crime and apprehend a criminal. It was not, in my view, conduct which relieves the employer from his failure to secure the premises and protect the plaintiff from the risk. If a bank clerk, in any effort to spoil a bank robbery, goes for the alarm button and invites a blow from the robber, is he or she to be penalised, by holding that the clerk was the author to his or her own misfortune? To be so characterised, or to amount to contributory negligence, the conduct would have to be foolhardy indeed. In the circumstances that arose here, I am not prepared to find any fault with the conduct of the plaintiff.[106]

The thief's conduct presented somewhat different considerations so far as the *novus actus interveniens* doctrine was concerned. His

[105] Circuit Court, unreported, His Honour Judge McMahon, 17 July 2002, at p. 5 of the unreported judgment.
[106] Circuit Court, unreported, His Honour Judge McMahon, 17 July 2002, at p. 6 of the unreported judgment.

Honour Judge McMahon referred to Butler J.'s decision in *Breslin v. Corcoran*[107] declining to impose liability on a car owner whose reference in leaving keys in the ignition resulted in the theft of the vehicle, after which the plaintiff was injured by the thief when driving the individual. Butler J. had held that the thief's act amounted to a *novus actus interveniens*. It would have been different if the vehicle had been left in an area where people routinely stole cars and drove them recklessly. We have already noted that the Supreme Court affirmed Butler J. on 27 March 2003, placing emphasis on the lack of probability of negligent driving by the thief as a reason for not holding the negligent car owner liable. His Honour Judge McMahon observed that, in the instant case:

> … the employer knew that there was a risk of intruders. In addressing this risk he installed a system which proved to be inadequate, and patently so, if a moment's thought was given to the locking mechanism at the rear door. He had a duty to prevent the risk arising in the first place. Our case is about the extent and content of the employer's duty of care, and it is not properly analysed in terms of causation at all.[108]

His Honour Judge McMahon referred, among other sources, to the English case of *Stansbie v. Troman*[109] where the failure of a house painter to discharge his promise to close the door after he left the house led to the entry of a thief and the theft of the householder's jewellery. The theft was, in the circumstances, the very thing against which the painter had been under a duty to take precautions.

It we accept that, in the instant case, the employer had undoubtedly been negligent in facilitating the theft of the plaintiff's car, does this mean that he should have to compensate the plaintiff for the injury she sustained when, on the basis of *Breslin v. Corcoran*, the employer would not have to compensate a road-user injured by the thief after he had made his escape? It may be suggested

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[107] High Court, unreported, Butler J., 17 July 2001.
[108] *Millington v. Taylor (t/a The Big Tree Public House)*, Circuit Court, unreported, His Honour Judge McMahon, 17 July 2002, at p. 6 of the unreported judgment.
[109] [1948] 2 K.B. 48 (C.A.).

that the two cases can be distinguished on the basis that the plaintiff's injury in the instant case was inexorably connected with the actual theft of the car and her understandable attempt to prevent the thief from achieving this goal. If the thief, having stolen the car without the plaintiff's knowledge, were to have run over her in accident entirely unconnected with making his escape, *Breslin v. Corcoran* would appear to represent a barrier to her claim.

B. Causation and Percentages of Risk

In *Carroll v. Lynch*[110] Johnson J. held that a surgeon had been guilty of negligence which resulted in the conversion of the operation to an open thoracotomy. Had the operation been conducted without negligence, the risk of having to convert to open thoracotomy would have been 15%. Johnson J. awarded only 85% of the damages, adopting a surely mistaken approach, since the plaintiff's injury resulted entirely from the act of negligence (as found by Johnson J.) rather than from some inherent risk. I should stress that the Supreme Court overturned Johnson J.'s decision and ordered a retrial so the observations as to the defendants' negligence are entirely moot.

C. Burden of Proof

In *Cosgrove v. Ryan and Electricity Supply Board*[111] Murphy J. addressed the question of the burden of proof in the context of negligence actions. The facts were simple enough. When the plaintiff, an agricultural contractor, was harvesting silage on the first defendant's lands, his harvester came into contact with a low voltage electricity line which the second defendant had installed. He claimed damages for personal injury and property damage. The claim against the second defendant was framed in negligence in erecting and maintaining the cables at a height too low for certain farm machinery to pass under. The second defendant operated a standard for minimum clearance in respect of low voltage lines over fields of 18 feet at erection and 15 feet at worst conditions. It appears that the harvester's maximum height while on level ground was 13 feet but

[110] High Court, unreported, Johnson J., 16 May 2002, reversed on grounds not of present relevance by the Supreme Court, 15 May 2003.
[111] High Court, unreported, Murphy J., 18 December 2002.

that on sloping ground this could change:

> The level on which the silage harvester stood at the point of impact is critical. If the wheel closest to the funnel or chute were to have risen 1 foot above the level of the further wheel, the funnel, extending to the same distance as the harvester itself, would rise by double that amount. This is an elementary triangular relationship. The furthest wheel would act as the fulcrum. It follows that if the nearest wheel is lifted 1 foot over the 8 foot 6 inch span, a gradient of 2 over 17, the funnel would rise by 2 feet to 15 feet. This would be the same height as the prescribed line clearance at worst conditions.[112]

The plaintiff's case failed for lack of proof. Neither party adduced precise evidence of the gradient of any part of the 12 acre field. Murphy J. was of the view that "a simple measurement would ... have resolved the issue in this case".[113] Moreover, the plaintiff on his own admission had not had any regard to the overhead lines when carrying out the work.

Murphy J. rejected the argument that the burden of proof should rest on the defendant as undertaker acting under statutory authority. While it was true that putative liability under the rule in *Rylands v. Fletcher*[114] might be resisted by a defendant acting under statutory authority where he or she could establish the absence of negligence on his or her part, in the instant case *Rylands v. Fletcher*[115] liability had not been pleaded. In negligence proceedings, res ipsa loquitur was the only instance of a shift in the burden of proof and even in such circumstances, said Murphy J., "the burden of causally linking the damage caused by the conduct of the defendant remains with the plaintiff, quite irrespective of the question of negligence".[116]

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[112] *Cosgrove v. Ryan and Electricity Supply Board*, High Court, unreported, Murphy J., 18 December 2002, at pp. 15-16 of the unreported judgment.
[113] *Cosgrove v. Ryan and Electricity Supply Board*, High Court, unreported, Murphy J., 18 December 2002, at p. 16 of the unreported judgment.
[114] (1868) L.R. 3 H.L. 330 (H.L.).
[115] (1868) L.R. 3 H.L. 330 (H.L.).
[116] *Cosgrove v. Ryan and Electricity Supply Board*, High Court, unreported, Murphy J., 18 December 2002, at p. 12 of the unreported judgment.

D. Res Ipsa Loquitur

Rothwell v. Motor Insurers Bureau of Ireland[117] is an important decision in that it represents a second acknowledgment by the Court of the novelty of the rationale for the *res ipsa loquitur* doctrine presented in *Hanrahan v. Merck Sharp & Dohme (Ireland) Ltd*.[118] Traditionally, res ipsa loquitur was a rule relating to inferences warranted by circumstantial evidence. In *Scott v. London & St. Katherine Docks Co*.[119] Erle C.J. observed, of the thing causing the injury to the plaintiff that:

> … where [it] is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary circumstances does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

In *Hanrahan*, the Supreme Court restated the doctrine, placing emphasis on a rationale that it would be palpably unfair to require a plaintiff to prove something which is beyond his reach and which is peculiarly within the range of the defendant's capacity of proof. On this approach, *res ipsa loquitur* is concerned with the equities as between plaintiff and defendant regarding burden of proof rather than with the value-free process of inferential reasoning based on circumstantial evidence.[120]

In *O'Shea v. Tilman Anhold and Horse Holiday Farm Ltd*.[121] Keane J. (as he then was) noted that the *Hanrahan* restatement had been criticised and that it might "need to be reconsidered at some stage".[122]

In *Rothwell*, Hardiman J. (Murray and Geoghegan JJ.

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[117] Supreme Court, unreported, 24 February 2003.
[118] [1988] I.L.R.M. 629 (S.C.).
[119] (1865) 3 H. & C. 596 at 601; 159 E.R. 665 at 667 (Ex.Ch.).
[120] For further criticism, see McMahon, B. and Binchy, W., *Irish Law of Torts* (3rd ed., Butterworths, Dublin, 2000), paras. 9.51-9.52.
[121] Supreme Court, unreported, 23 October 1996.
[122] Supreme Court, unreported, 23 October 1996, at p. 5 of the unreported judgment.

concurring) noted that the *Hanrahan* rationale had been subject to academic criticism but observed that it appeared to him to be "authoritative unless and until specifically considered in a case where its reversal is sought".[123] He emphasised that the *Hanrahan* rationale applied, not where the matter in question was merely within the exclusive knowledge of the defendant but where furthermore it was also peculiarly within the range of the defendants' capacity of proof. This meant that, on the facts of *Rothwell*, the *res ipsa loquitur* doctrine had no application. The plaintiff's vehicle had crashed having come in contact with an oil spillage on the road. He sought to hold the Motor Insurers Bureau of Ireland liable on the basis that the slippage had been caused by a leak or spill from an unknown vehicle. Assuming that this was indeed the cause, the plaintiff faced a further evidential problem since the diesel cap on the vehicle might have been left off not by the driver, but by a member of the fuel depot staff. Since the plaintiff could not adduce evidence one way or the other on this point and since *res ipsa loquitur* could not be invoked because the matter was not within the exclusive knowledge of the MIBI, the plaintiff's claim failed.

In *Jordan v. Torsney*[124] the plaintiff gave evidence that the first defendant's car, as it approached her vehicle, moved over to the plaintiff's side of the roadway and crashed into her. The first defendant sustained injuries in the accident which prevented her from being able to enlighten the court as to what caused her vehicle to veer in this way. Evidence was given that there had been an oily patch on the road at the time; where precisely that patch was relative to the place where the accident occurred was not clarified in Keane C.J.'s *ex tempore* judgment, with which McGuinness and Geoghegan JJ. concurred. Kinlen J. held in favour of the plaintiff and the Supreme Court affirmed.

Keane C.J. did not mention *expressis verbis*, the *res ipsa loquitur* principle but it seems clear enough that this is what was applied. He stated:

> Quite obviously in a situation like this where a car, for

[123] Supreme Court, unreported, 24 February 2003, at p. 14 of the unreported judgment.
[124] Supreme Court (ex tempore), unreported, 13 March 2002.

no apparent reason comes on to the wrong side of the road and crashes into a plaintiff, who is admittedly driving in a perfectly proper fashion, with due care and consideration for the other users of the road, that is *prima facie* evidence of negligence which immediately shifts the onus to the defendant. In this case it appears that the driver of the defendant's car, because of the impact of the accident on her, was unable to give any explanation as to how the accident happened. It consequently must remain entirely a matter of surmise or speculation as to how the car performed what was obviously such a dangerous manoeuvre, namely driving entirely onto its wrong side of the road. It may have been a skid, it may have been because the defendant was endeavouring to overtake at a time that was manifestly unsafe to do it. It may have been for other reasons, which, would again take one further into the realm of speculation. It is sufficient to say that that evidence having been given, in my view, the onus shifted squarely and emphatically onto the defendant to explain how the accident happened. No doubt if she had given evidence that she had encountered this oil patch and that it had caused her to lose control of the car, then that might have brought about the somewhat unusual situation in which a plaintiff driving on a highway in perfectly proper and normal fashion is struck by another car, without any fault on her part, would be unable to recover any damages because there could not have been any question of her recovering damages against the Motor Insurers Bureau of Ireland ...

The fact was that the car, the defendant's car, performed a manoeuvre which if it was being safely driven at the time, it could not possibly have performed and, that immediately imposed an obligation on the defendant to explain how it came to perform the manoeuvre. If the explanation was that it hit a patch of oil and that the

> defendant driver was quite unable to control it, than that would have been a matter for the trial judge to resolve as to whether in that situation he should conclude that the plaintiff was simply the victim of an inevitable accident. There had been no such evidence before the learned High Court judge for perfectly understandable reasons, and if the defendant driver was wholly unable to recall the circumstances in which she came to be on the wrong side of the road, there could only be one conclusion to the case.[125]

IX. DAMAGES

A. Exaggeration

What is a court to do in a case where the plaintiff is admittedly the victim of a tort but seeks to exaggerate the injuries that he or she has sustained? In *Vesey v. Bus Éireann*[126] the Supreme Court rejected the argument that there should be a radical reduction of the compensation awarded below the quantum actually sustained to punish the plaintiff for his or her misconduct, by way of analogy with punitive damages, which enhance quantum in order to punish a defendant for misconduct. Hardiman J. (Denham and McGuinness JJ. concurring) did, however, note with interest the established jurisprudence in the United States of America under which a court has power to dismiss an action for flagrant bad faith.[127] This power is exercised in such cases as where a litigant engages in dishonest conduct, obstructs the discovery process or otherwise seeks to perpetrate a fraud on the court. Hardiman J. observed that:

> The American context is of course rather different from that prevailing here. In particular the American courts usually lack the power to penalise conduct of the relevant sort by an appropriate order as to costs. But there is plainly a point where dishonesty in the

[125] Supreme Court (*ex tempore*), unreported, 13 March 2002, at pp. 3-5 of the unreported judgment.
[126] [2001] 4 I.R. 192 (S.C.).
[127] Cf. Papachristos, J., "Comment, Inherent Power Found, Rule 11 Lost: Taking a Shortcut to Impose Sanctions in *Chambers v. Nasco*" (1993) 59 *Brooklyn Law Review,* 1225.

> prosecution of a claim can amount to an abuse of the judicial process as well as an attempt to impose upon the other party.[128]

The theme was revisited in *Shelley-Morris v. Bus Átha Cliath-Dublin Bus*.[129] The plaintiff had been injured when she was a passenger in the defendants' bus. She claimed that the damage done to her knee would prevent her from obtaining gainful employment in the future. Video evidence taken of her by agents of the defendant cast doubt on the accuracy of her evidence. O'Higgins J. made some allowances for this fact when assessing damages. The Supreme Court went further, overruling the awards for loss of future earnings and of pension (amount to €62,500) and reducing the award for future pain and suffering from €40,000 to €20,000. Hardiman J.'s observations are worth recording:

> I wish to reiterate what was said by the Court in *Vesey*: that the onus of proof in these cases lies on the Plaintiff who is, of course, obliged to discharge it in a truthful and straightforward manner. Where this has not been done "a court is not obliged, or entitled, to speculate in the absence of credible evidence". To do so would be unfair to the defendant. Moreover, a Plaintiff who engages in falsehoods may expose himself or herself to adverse orders on costs. Furthermore, as was observed in *Vesey* ".... there is plainly a point where dishonesty in the prosecution of a claim can amount to an abuse of the judicial process as well as an attempt to impose on the other party"
>
> This last proposition is well established but has been little considered in the content of personal injuries claims. It is, perhaps, appropriate to comment on the Courts power to prevent, or remedy, abuse of process at

[128] [2001] 4 I.R. 192 at 202 (S.C.).
[129] Supreme Court, unreported, 11 December 2002.

> greater length than was done in Vesey.[130]

Hardiman J. referred to *Goldsmith v. Sperrings*[131] where Lord Denning M.R. had stated:

> In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a Tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.[132]

In *Arrow Nominees v. Blackledge*[133] the English Court of Appeal had said:

> It is no part of the Court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the Court is to do justice between the parties; not to allow its process to be used as the means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.[134]

Hardiman J. had:

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[130] *Shelley-Morris v. Bus Átha Cliath-Dublin Bus*, Supreme Court, unreported, 11 December 2002, at p. 27 of the unreported judgment.
[131] [1977] 2 All E.R. 566 (C.A.).
[132] [1977] 2 All E.R. 566 at 574 (C.A.).
[133] [2000] 2 B.C.L.C. 167 (C.A.).
[134] [2000] 2 B.C.L.C. 167 at 194 (C.A.) *per* Chadwick L.J.

> … no doubt that these principles are equally applicable in this jurisdiction. It must not be thought that a falsehood in respect of one aspect of a claim will, at worst, lead to that particular part of the claim being reduced or disallowed. The Courts have a power and duty to protect their own processes from being made the vehicle of unjustified recovery. In a proper case this will be done by staying or striking out the Plaintiffs proceedings.
>
> Quite properly in the circumstance of the present case, the Defendant has not sought this drastic relief. That is not to say that this relief would be inappropriate in a similar case in the future. But it appears to me that a Plaintiff who is found to have engage in deliberate falsehood must face the fact that a number of corollaries arise from such finding:-
>
> (a) The Plaintiff's credibility in general, and not simply on a particular issue, is undermined to a greater or lesser degree.
>
> (b) In a case, or an aspect of a case, heavily dependent on the Plaintiff's own account the combined effects of the falsehoods and the consequent diminution in credibility mean that the Plaintiff may have failed to discharge the onus on him or her either generally or in relation to a particular aspect of the case.
>
> (c) If this occurs, it is not appropriate for a court to engage in speculation or benevolent guess work in an attempt to rescue the claim, or a particular aspect of it, from the unsatisfactory state in which the Plaintiff's falsehoods have left it.[135]

[135] *Shelley-Morris v. Bus Átha Cliath-Dublin Bus*, Supreme Court, unreported, 11 December 2002, at pp. 28-29 of the unreported judgment.

B. Loss of Earnings

In *O'Neill v. Electricity Supply Board*[136] Finnegan P. made no reduction under the rule in *Reddy v. Bates*[137] where the plaintiff, aged 52 at the time of the accident in 1999, had been an employee of the defendant since 1965. At the time of the accident he was working as a network technician. In view of the plaintiff's security of employment, Finnegan P. said that he thought that a reduction would be inappropriate. Perhaps the relatively short period of future employment facing the plaintiff before retirement was also a factor.

C. General Damages

In *McGauran v. Smith*[138] Peart J. awarded €45,000 general damages plus a further sum of €8,000 for future pain and suffering to the plaintiff who, at the time of the accident "was a young and energetic 19 year old about to commence his second year at college". The plaintiff had sustained injury to his neck, lower back, face and jaw. The latter persisted, causing him anxiety and depression. The plaintiff failed his 2nd year examinations and was obliged to take a year out of college. On his return he had a successful result. Peart J. was satisfied that the absences from college had, "in the main", been attributable to his post-accident medical condition. He did not consider, however, that the evidence had sufficiently demonstrated that the plaintiff had lost a year's earning capacity as a result. Peart J. observed:

> Other factors could come into play, but I will nevertheless make some allowance in this regard in my assessment of general damages, but not to the extent of a full year's anticipated earnings which the plaintiff estimated to be in the region of €25,000.[139]

The award of €45,000 appears to include compensation for this economic loss, as well as for pain and suffering to the time of judgment (a period of four years) and for the destruction of the

[136] High Court, unreported, Finnegan P., 31 July 2002.
[137] [1984] I.L.R.M. 197 (S.C.).
[138] High Court, unreported, Peart J., 8 October 2002.
[139] *McGauran v. Smith*, High Court, unreported, Peart J., 8 October 2002, at p. 5 of the unreported judgment.

plaintiff's ambition to play for the senior football team of his County (Cavan).

In *Riley v. Bus Éireann*[140] Barr J. awarded the plaintiff £50,000 damages for 'pain, and disablement' suffering to the time of judgment and a further £150,000 damages for future pain, suffering and disablement where the plaintiff was injured in an accident in 1997, resulting in severe pain and numbness in his upper body. At one stage his doctor had been obliged to resort to morphine treatment of a kind primarily used for terminally ill patients suffering from cancer.

In *O'Neill v. Electricity Supply Board*[141] Finnegan P. awarded a 55 year old plaintiff, who had been seriously injured in an accident in 1999, €82,500 damages for pain and suffering to the time of judgment and a further €82,500 for future pain and suffering. The plaintiff had sustained multiple fractures of his ribs and an infusion at the base of his left lung. He was in intensive care for a week and in hospital for one month. Throughout this time, Finnegan P. was satisfied, the plaintiff was in 'excruciating pain'. He developed back pain and suffered a range of other conditions, including shortness of breath and depression.

If the trial judge fails to resolve a conflict on the medical evidence, "[t]his creates a dilemma for the [Supreme] Court" Denham J. so observed in *Meehan v. Clerkin*[142] in an *ex tempore* judgment with which Murray and McGuinness JJ. concurred. The only way of resolving the dilemma was to return the matter to the High Court.

D. Punitive (Exemplary) Damages

Four decades after the decision of the House of Lords in *Rookes v. Barnard*[143] the Irish law on punitive or exemplary damages — the terms are interchangeable — is still shamefully uncertain. One might have imagined that it would have been a fairly straightforward question whether the Irish courts followed, or rejected, in whole or part, the limitations placed on the award of punitive damages in *Rookes v. Barnard*.[144] It will be recalled that the House of Lords held that in future punitive damages might be awarded in only three

[140] High Court, unreported, Barr J., 13 February 2002.
[141] High Court, unreported, Finnegan P., 31 July 2002.
[142] Supreme Court (*ex tempore*), unreported, 1 February 2002.
[143] [1964] A.C. 1129 (H.L.).
[144] [1964] A.C. 1129 (H.L.).

categories of case: first, where servants of the state had engaged in unconstitutional action; second where the defendant had invested in the commission of the tort, hoping to still be in profit having paid the compensatory damages; and third where statute authorised the award of punitive damages. Moreover, Lord Devlin had gone on to articulate three considerations which should be borne in mind when awarding punitive damages:

> 1. The plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.
>
> 2. The power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, can also be used against liberty. The judge was pointing to the need for restraint in the amount of damages that should be awarded.
>
> 3. The means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant.[145]

Over the decades, the Irish courts were very slow to take an unambiguous position on the status of the *Rookes v. Barnard* limitations (and "considerations") in Irish law. Often a court would point out that the case in question fell within one of the prescribed categories but it was not clear from this that the intent in saying so was to give an express endorsement to the limits specified in *Rookes v. Barnard*.

[145] [1964] A.C. 1129 at 1227-1228 (H.L.).

Eventually, the Supreme Court engaged in a clear analysis of the question, in *McIntyre v. Lewis*[146] but unfortunately this did not result in greater clarity: McCarthy J. rejected *Rookes v. Barnard*;[147] Hederman J. gave a hint, but no more, of a willingness to accept its principles; and O'Flaherty J. endorsed *Rookes v. Barnard*[148] in both its limitations and its three considerations. He went so far as to add a further limitation of his own:

> If the compensatory amount awarded includes aggravated damages then I believe that if any award is made by way of exemplary damages, it should properly be a fraction rather than a multiple of the amount awarded by way of compensatory damages (including aggravated damages).[149]

A further complicating factor is that, under the principle articulated in *Meskell v. Coras Iompair Éireann*[150] an infringement of a person's constitutional right may give rise to an action for damages. The question naturally arose whether punitive damages might ever be awarded for such infringement. The answer given by the Supreme Court in *Conway v. Irish National Teachers Organisation*[151] was in the affirmative. Finlay C.J. referred to such matters as the importance of the right in question. He did not suggest for a moment that the *Rookes v. Barnard* limitations should apply.

You will recall that the Supreme Court held in *Hanrahan v. Merck Sharp & Dohme (Ireland) Ltd.*[152] that tort law is the vehicle for protecting constitutional rights in the normal case and it is only in exceptional instances, where the particular tort is "basically ineffective" in providing that protection, that a sui generis claim for damages for infringement should be countenanced.

If *Rookes v. Barnard*[153] principles were to be held to apply to a claim sounding in tort but not (after *Conway*) to a *sui generis* claim

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[146] [1991] 1 I.R. 121 (S.C.).
[147] [1964] A.C. 1129 (H.L.).
[148] [1964] A.C. 1129 (H.L.).
[149] [1991] 1 I.R. 121 at 141 (S.C.).
[150] [1973] I.R. 121 (S.C.).
[151] [1991] I.L.R.M. 497 (S.C.).
[152] [1988] I.L.R.M. 629 (S.C.).
[153] [1964] A.C. 1129 (H.L.).

for damages for infringement of a constitutional right, then a plaintiff whose claim happens to fall outside the remit of a conventional tort would be entitled to punitive damages where another plaintiff whose claim sounded in tort would not. Since there is no principled basis for the dividing line between tort claims and *sui generis* claims, this would constitute an unfortunate anomaly.

In *Crofter Properties Ltd. v. Genport Ltd.*[154] McCracken J. revisited the issue. An employee to the defendant company had made very serious false allegations to the British police as to alleged criminal behaviour with the intention of damaging the plaintiff company and the further objective of regaining possession for the defendant company of a hotel leased to the plaintiff company by the defendant company for vicariously liable for this wrong. McCracken J. awarded £50,000 general damages. So far as punitive damages were concerned, he expressed a preference for McCarthy J.'s approach agreeing with,

> … the view of McCarthy J. [in *McIntyre v. Lewis*] that if the conduct of the guilty party is such as requires them to be punished or made an example of, then the damages should be awarded on that basis and without regard to the possibility of a windfall to the innocent party.[155]

This might on first reading appear to amount to a rejection of the first of Lord Devlin's 'considerations' in *Rookes v. Barnard*;[156] perhaps a better interpretation is that it constitutes a robust rejection of the limitations prescribed in *Rookes v. Barnard*.[157]

McCracken J. went on to emphasise the fact that the employee of the defendant who had made the false allegations had gone on, in his view, to commit perjury. This had been made even more reprehensible because she had chosen, when giving false evidence, to paint herself as a person to strong religious beliefs. McCracken J. went on to state:

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[154] High Court, unreported, McCracken J., 10 September 2002.
[155] High Court, unreported, McCracken J., 10 September 2002, at pp. 5-6 of the unreported judgment.
[156] [1964] A.C. 1129 (H.L.).
[157] [1964] A.C. 1129 (H.L.).

> It has been urged on me by counsel for the [plaintiff] that in effect I should assess exemplary damages at a figure which means there is no further liability on the [plaintiff] in respect of arrears of rent. I do not think this is a proper basis on which to assess exemplary damages, although I do accept that I am entitled to have some regard to the financial position of the parties. I think I also must have some regard to the guidelines laid down by the Supreme Court in regard to general damages for defamation, as I think it would be wrong that the court would award a higher figure in exemplary damages than it could ever award for general damages. However, this is an extremely bad case and is one in which there must be some very substantial penalty imposed on the [defendant]. I will propose to assess exemplary damages of £250,000.[158]

Two points emerge from this passage. First, McCracken J. appears to be applying the third 'consideration' mentioned by Lord Devlin. Taking account of the means of the parties is controversial since it can lead to anomalies unless closely analysed. Of course evidence as to their respective means may be relevant to assessing the gravity of the wrong; so far as the defendant is concerned, his or her means will have some relevance to whether the award has a truly punitive character. McCracken J. was surely right in not going further and in declining to take the radical step to relieving the plaintiff company of its liability in respect of arrears of rent.

The second point relates to McCracken J.'s view that it would be wrong for the court to "award a higher figure in exemplary damages than it could ever award for general damages".[159] One may question whether this is so. If we assume that a very serious personal injury case is worth £250,000 general damages for pain and suffering under the *Sinnott v. Quinnsworth Ltd*.[160] principles and if we further assume the (controversial) propriety of taking account of that tariff

[158] High Court, unreported, McCracken J., 10 September 2002, at p. 6 of the unreported judgment.
[159] High Court, unreported, McCracken J., 10 September 2002, at p. 6 of the unreported judgment.
[160] [1984] I.L.R.M. 523 (S.C.).

when awarding damages in defamation cases, it does not follow that, in the quite separate context of punitive damages, there has to be any connection between the quantum of the award and what *Sinnott* (in 2003 monetary values) prescribes for pain and suffering. Punitive damages seek to punish, not compensate. A compensatory scale has no direct relevance.

Let us consider a hypothetical case where the defendant sadistically engages in truly grotesque wrongdoing, as, for example, where he or she seriously violates the bodily integrity of a group of defenceless, non-autonomous people, with such significant mental disability that they have no clear awareness of what has occurred. While courts should always act with restraint and proportionality, even when they are awarding punitive damages, respect for those values does not require the introduction of a measure derived from an entirely different context.

E. Aggravated Damages

In *Swaine v. Commissioners of Public Works in Ireland*[161] the Supreme Court threw some light on the scope of awards for aggravated damages. It will be recalled that, in *Conway v. Irish National Teachers Organisation*[163] Finlay C.J. had identified three headings of damages for tort or for breach of a constitutional right: ordinary compensatory damages, aggravated damages and punitive (or exemplary) damages. Finlay C.J. defined aggravated damages as:

> … compensatory damages increased by reason of:
> (a) the manner in which the wrong was committed involving such elements of oppressiveness, arrogance or outrage, or
>
> (b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or

[161] [2003] 1 I.R. 521 (S.C.).
[162] [1991] 2 I.R. 305 (S.C.).

> (c) conduct of the wrongdoer and/or his representative in the defence of the claim of wronged plaintiff, up to and including the trial of the action.[163]

Finlay C.J. made it clear that this list of circumstances was:

> … not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must, in many instances, be in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant.[164]

In *Swaine*, the facts were similar to those in *Fletcher*, involving the exposure by the defendant of the plaintiff to the risk of fatal injury form breaking asbestos. In the High court, O'Neill J. held that the defendant had been guilty of "negligence of the grossest kind". He awarded the plaintiff £45,000 plus £15,000 as aggravated damages. The defendant in *Swaine* (in contrast to *Fletcher*) did not contest liability on appeal, which was limited to the issue of quantum of damages.

The Supreme Court overturned the award. Keane C.J. (Denham, Murray, Hardiman and Geoghegan JJ. concurring) referred to Finlay C.J.'s judgment in *Conway*. He did not think it was possible to dissent from O'Neill J.'s description of the character of the defendant's negligence.

Keane C.J. observed that the circumstances identified by Finlay C.J. in *Conway* in which aggravated damages might be awarded did "not typically arise in cases of negligence" and, if they did, were "not a ground for increasing the amount of compensatory damages".[165] He gave the example of a defendant driving in a reckless manner or under the influence of drink or drugs. While the person's conduct

[163] [1991] 2 I.R. 305 at 317 (S.C.).
[164] [1991] 2 I.R. 305 at 317 (S.C.).
[165] [2003] 1 I.R. 521 at 525 (S.C.).

could well be stigmatized as arrogant, outrageous or oppressive, it had never been suggested that the moral culpability involved should be reflected by an award of aggravated damages. The cases where one would expect to find awards of aggravated damages were those, such as defamation and malicious prosecution, in which it could be said that the intention of the defendant to commit the wrong was frequently a precondition of liability. Keane C.J. did not, however, close the door completely to the possibility of aggravated damages being awarded in an action for negligence: that question could be left for a case in which it was fully argued.

One may question whether *Swaine* was not just the case warranting an award of aggravated damages. The negligence was of the grossest character. In contrast to a single instance of drunken or reckless driving, the default of the defendant had continued over a long period of time. O'Neill J. had declined to award punitive damages. The defendant might have considered itself fortunate in having the modest tariff of aggravated damages applied.

It is illegitimate to speculate about judicial motivations. One can therefore limit oneself to noting the fact that the outcome of the *Swaine* appeal is that the potential normative dissonance between an award of aggravated damages and the non- imposition of a duty of care for the same grossly negligent conduct was averted.

X. TRESPASS TO LAND

In *AGS (ROI) Pension Nominees Ltd. v. Madison Estates Ltd.*[166] Lavan J. dismissed a claim for damages for trespass and an interlocutory injunction where the central question was whether planning permission had envisaged the provision of parking spaces for residents of apartments. Lavan J. used strong language as to the plaintiff's claims it was 'patently a weak case' and Lavan J.'s 'view overall' was 'of a plaintiff institution intent on overpowering the residents who would find it difficult to find a defence to this unmeritorious claim.'

Lavan J. was satisfied on the balance of probability that planning permission for the entire development would not have been granted

[166] High Court, unreported, Lavan J., 25 July 2001.

by the planning authority without parking places being provided for the residents of the apartments.

XI. NUISANCE

In *Sheeran v. Meehan*[167] Herbert J. had to deal with a long-running dispute between neighbours relating to the manner in which the defendants used their hi-fi radio stereo system. At an early stage in the breakdown of relationships, the first named plaintiff, one Saturday morning at 7.45 am, had gone to his neighbour's front door in his pyjamas in response to the level of noise from their radio and said "Kathleen, I am trying to get some sleep", to which the second named defendant responded "Maybe you should get up", before closing the door.

Herbert J. recounted in detail the saga that unfolded. He applied the definition of nuisance approved by the Supreme Court in *Hanrahan v. Merck Sharp & Dohme (Ireland) Ltd.*[168] where Henchy J., delivering the judgment of the Court, relied in part on Gannon J.'s approach in *Halpin v. Tara Mines Ltd.*[169] stated that nuisance must constitute:

> … an interference with the plaintiff's comfort in the enjoyment of his property. The test is whether the interference is beyond what an objectively reasonable person should have to put up with in the circumstances of the case. The plaintiff is not entitled to insist that his personal nicety of taste or fastidiousness of requirements should be treated as inviolable. The case for damages in nuisance — we are not concerned here with the question of an injunction — is made out of the interference is so pronounced and prolonged or repeated that a person of normal or average sensibilities should not be expected to put up with it.[170]

Herbert J. was fully satisfied from the evidence that in a period

[167] High Court, unreported, Herbert J., 6 February 2003 (Circuit Appeal).
[168] [1988] I.L.R.M. 629 (S.C.).
[169] [1976-1977] I.L.R.M. 28 (H.C.).
[170] [1988] I.L.R.M. 629 at 640 (S.C.)

from June to December, 2000 the interference by the defendants with the plaintiffs' comfort in the enjoyment of their home had been so pronounced and so repeated that objectively reasonable persons should not have to put up with it.

The noise levels abated after December 2000. Herbert J. accepted the evidence adduced on behalf of the defendants that in March 2001 a block had been fixed to the radio control panel which prevented the radio from being played at a sound setting in excess of 2.5 and that this block had not been removed. He also accepted expert evidence that this prevented a noise nuisance resulting in the plaintiffs' home even with the graphic equalizer and the saturation control in full use. One witness calculated that, with the noise level in the defendants' home of between 70 and 75 decibels when the radio was played at the sound setting of 2.5, the equivalent level of noise in the plaintiffs' kitchen was 38-38.17 decibels, admittedly in excess of the recommended criterion of 35 decibels. Another expert made measurements of 72 decibels to take account of the differentiated decibel output between tuning the radio stereo system to ordinary radio broadcast programmes and using an acoustic engineer's compact disc, the measured noise level 'would be less, but just less, than the recommended level of 30 decibels for bedrooms'.

Herbert J. concluded that the defendants had not been guilty of a nuisance after December 2000 and varied the Circuit Court order accordingly.

XII. DEFAMATION

A. Slander

The need to prove special damage in actions for slander, save in four somewhat eccentrically defined cases, proved the rock on which the plaintiff's claim for slander perished in *Dinnegan v. Ryan*.[171] The plaintiffs had booked a small post-wedding reception at the defendants' public house. When they arrived with their guests they were asked to leave the premises. The reason for the defendants' breach of contract never emerged: Murray J. was satisfied that he had "not been told the full story behind this matter".[172] The

[171] High Court, unreported, Murray J., 13 May 2002.
[172] *Dinnegan v. Ryan*, High Court, unreported, Murray J., 13 May 2002, at p. 12 of the unreported judgment.

plaintiffs' action for breach of contract was successful. Murray J. awarded each spouse €6,000 damages. Their claim for slander failed, however, as the case did not fit within any of the four exceptional grounds for an award without special damages. Murray J. noted that:

> … [a]part from the fact that Mr. Dinnegan was unemployed at the time of the alleged slander, it was not ... and could not have been contended that it was spoken of him concerning his trade or profession".[173]

Although counsel for the plaintiffs had suggested that the publicity of the ejection from the premises might lead to economic problems, such as difficulty cashing a cheque or obtaining employment, Murray J. pointed out, on the basis of *Michael v. Spiers and Pond Ltd*.[174] that the threat of future temporal problems would not suffice. It was not therefore, necessary to consider whether the words allegedly used by the first named defendant — "I do not want you here, I want you to leave" — were defamatory.

The decision represents a clear reminder of the need for the Equal Status Act, 2000 to ensure that victims of discriminatory refusals of service have an avenue for compensation.

B. Costs

In *Mangan v. Independent Newspapers (Ireland) Ltd*.[175] the plaintiff had sued the defendant for libel. Barr J. on application of plaintiff's counsel, had discharged the jury after the opening of the defence. The Supreme Court, on 25 July 2001, had held that Barr J. was incorrect in doing so. It ordered a retrial. The plaintiff succeeded in his claim on the retrial but was awarded only €25,000 damages, below the High Court threshold. Carroll J. held that he was entitled to costs on the Circuit Court scale for both the aborted trial and the retrial. The defendants appealed, unsuccessfully, to the Supreme Court.

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[173] *Dinnegan v. Ryan*, High Court, unreported, Murray J., 13 May 2002, at p. 15 of the unreported judgment.
[174] (1909) 101 L.T. 352.
[175] Supreme Court, unreported, 31 January 2003.

So far as the costs for the aborted trial were concerned, McCracken J. (Geoghegan and Fennelly JJ. concurring) observed:

> … the plaintiff had to bear his own costs of the abortive trial, and certainly if he had to bear both sets of costs, then the entire award of damages to him would be eaten up in paying those costs. In this case the plaintiff was seriously libelled and the jury considered the proper compensation to him was €25,000. They would have been totally unaware that that money would not go to the benefit of the plaintiff, but would be used to pay costs. This would certainly seem to me to tip the balance of any discretion in the learned trial Judge in favour of the plaintiff. I think it is also very relevant that, while it was held that the learned trial Judge erred in discharging the jury the Court did not find that the objection was unjustified, but rather considered it unnecessary to rule on the point.[176]

Regarding the costs of the retrial, the defendant sought to invoke section 17(5) of the Courts Act, 1981 as amended, which provides as follows:

> Where an order is made by a court in favour of the plaintiff or applicant in any proceedings (not being an appeal) and the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the judge concerned may, if in all the circumstances he thinks it appropriate to do so, make an order for the payment to the defendant or respondent in the proceedings by the plaintiff or applicant of an amount not exceeding whichever the following the judge considers appropriate …[177]

McCracken J. noted that Carroll J. had adverted to a number of

[176] Supreme Court, unreported, 31 January 2003, at pp. 6-7 of the unreported judgment.
[177] Supreme Court, unreported, 31 January 2003, at p. 8 of the unreported judgment.

matters which she had clearly taken into account in the exercise of her discretion. He went on to note that it was also:

> … relevant to consider that this is a libel action in which damages are determined by a jury. It is not an action for a liquidated sum, nor is it an action for general damages in a negligence action which would be determined by a judge alone. In those cases, the plaintiff's legal advisors in deciding in which Court to initiate the claim should be able to estimate within reasonable parameters the probable level of damages should the plaintiff succeed. The situation is very different in a libel action where the views of juries can differ enormously on the question of damages. In the present case, the plaintiffs advisors obviously considered that the plaintiff would obtain reasonably substantial damages if he succeeded. As it transpired, the plaintiff in fact recovered damages within the Circuit Court jurisdiction, but they were still reasonably substantial damages and it could not be said that the plaintiff was in any way unreasonable or irresponsible in bringing the proceedings in the High Court. Indeed, had the plaintiff been awarded only a slightly higher amount the learned trial Judge would have had the discretion to allow the plaintiff full High Court costs under s. 17(2). In all these circumstances I consider it was proper to refuse to make an order under s. 17(5).[178]

[178] Supreme Court, unreported, 31 January 2003, at p. 9 of the unreported judgment.