DUTY OF CARE - THE FULL CIRCLE?

1. INTRODUCTION.

In most negligence actions, where there are established precedents, the duty of care is not generally considered; it is assumed. The challenge arises when the Court is presented with novel circumstances. Over the past two centuries a struggle has been ongoing between the goals of justice for the injured; and the avoidance of over burdening the wrongdoer, with potentially significant cost consequences for society as a whole. Cardozo CJ warned in Ultramares Corporation v Touche (1931) against the imposition of “a liability in an indeterminate amount for an indeterminate time to an indeterminate class”. If society cannot pay for the consequences of injury occasioned by wrongdoing, whether through insurance, taxation (or other loss spreading mechanism), social unrest may arise. Further, there must be reasonable clarity of people’s responsibilities in law, to enable them to organise their affairs through the purchase of first or third party insurance. In established categories of liability, generally speaking such order is capable of being achieved.

Where the case is novel and having precedential value beyond its facts, however, the law faces a challenge to ensure that an appropriate and just balance is achieved between the righting of perceived wrongs and the overburdening of perceived wrongdoers who may be required to pay compensation.

The two tier approach to the determination of the existence of a duty of care in novel cases, which emerged in the late 1970's in Anns v London Borough of Merton, has been described recently as a test which gave rise to concern that the law of negligence was in danger of becoming the dominant vehicle for recovery in any civil action. It was suggested that such development might threaten, if not obliterate, other torts or even recovery in contract and quasi contract. Thus, given its far ranging and uncertain boundaries, in certain cases, dicta in more recent jurisprudence, has implied, if not expressly stated, that the law of negligence, as developed in Anns, ought be reined in.

Of course the difficulty for any court when considering the imposition of liability in novel circumstances is that it is being invited to analyse and pronounce upon the requirements of the pre-wrongdoing relationship, which gives rise to the duty of care: the problem is that such analysis invariably and inevitably only occurs after damage has been occasioned. Thus, a retrospective analysis of what society and the law of negligence expects, arises for consideration after the injury has been suffered and the alleged tortfeasor has been accused of wrongdoing. The damage requirement of the law of negligence dictates this.

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1 Per O'Donnell J in Whelan v AIB Jan 2014.
Recent jurisprudence suggests that the formulation of foreseeability of injury, giving rise to a *prima facie* liability, negatived only by considerations of policy, loads the balance in favour of a finding of liability. On the application of such two stage test...

“The question is almost imperceptibly whether a plaintiff who has now been found to have been injured by the carelessness of a person whose acts could foreseeably cause damage to the plaintiff, should nevertheless be deprived of damage?”

In an attempt to counteract this, the safety net concepts of *just and reasonableness* were introduced into the equation to assist in guarding against the unrestrained development of the law of negligence, based only upon a concept of proximity (borne of foreseeability of injury) and tempered only with judicial interpretation of matters of policy.

Perhaps, when one considers how the law of negligence was formulated, an argument may be made that the common law world is in the process of coming full circle in its approach to the imposition of liability for injuries or damage, of whatever nature, caused by carelessness, however caused, and to whomsoever caused. In the absence of precedent or analogy, recent pronouncements suggest that Courts should be wary and reluctant to impose a duty of care in novel circumstances. Recent dicta indicates a more abstract approach to the determination of the existence of the duty of care, with emphasis being placed on the guidance provided by already established categories and incidents of negligence.

In the recent case of *Ennis v HSE*, Hogan J summarised the modern approach thus:

“It follows, therefore, from an assessment of both *Glencar* and *Whelan* that while proximity and foreseeability remain the touchstones of the existence of a common law duty of care in negligence, these ingredients, while essential, are not in themselves sufficient. It must also be fair and reasonable to impose such a duty of care, which test also embraces broader policy considerations. In this context, the law is likely to be guided by precedent and established doctrine. Insofar as there are gaps in the common law duty of care, then absent special and unusual circumstances, the courts will generally fill in the interstices of any such gaps only where such developments represent essentially modest incremental changes which can be justified by reasoning by analogy with established case-law.”

Similar sentiments were expressed by the UK Supreme Court last month in *Michaels v Chief Constable for South Wales* [2015] UKSC 2 - per Lord Toulson:

2 Per O Donnell J in *Whelan*
"The development of the law of negligence has been by an incremental process rather than giant steps. The established method of the court involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable. In doing so it pays regard to the need for overall coherence. Often there will be a mixture of policy considerations to take into account. From time to time the courts have looked for some universal formula or yardstick, but the quest has been elusive. And from time to time a court has used an expression in explaining its reasons for reaching a particular decision which has then been squashed and squeezed in other cases where it does not fit so aptly."

Is the thinking behind judicial pronouncements over the last twenty years similar to the judicial thought behind its early origins? Is the law of negligence heading full circle?

In the light of recent judicial dicta on the approach to determining the existence of a duty of care in modern negligence, it is instructive to recall the emergence of the law of negligence in the nineteenth century.


2.1 The “Writ” System.

Early Common Law was dominated by the writ system where prospect of success in litigation was largely dependent on the existence of a precedent form, or writ, to cover the facts of the case. It used to be said that unless there was a writ there could be no right. Opportunity for judicial innovation was limited. In that body of law which might rightly be regarded as the progenitor of the modern law of tort, there were basically two forms of action, the action of trespass and the action upon the case. In its original form trespass was primarily concerned with violent invasions of tangible property rights; with the question of culpability seemingly regarded as irrelevant. By the fifteenth century this position had modified somewhat and it was felt that liability attached for all harm occasioned by trespass, however involuntary, if it was in anyway avoidable. Academic writings suggest that it was in defence to such actions that the concept of negligence emerged.

2.2 The “Action Upon the Case”.

The action on the case, so-called because all the facts of the case were specifically pleaded, encapsulated the residue of the early tort actions. It became settled that indirect interferences with persons or property had to be pleaded on the case, whereas direct interferences constituted trespass.

2.3 Negligence Founding a Cause of Action – Early Absence of an Underlying Principle.
The law of negligence did not appear in the records as founding a cause of action, in itself, until the late 18th century. Where such cases were reported, there was no underlying principle governing recovery; merely a series of particular instances in which an action on the case for negligence was permitted. Initially, these cases were confined to the common callings cases—e.g. common carrier, surgeons, attorneys, and innkeepers.

2.4 The Emergence of an Underlying Principle.

While there were many cases, there was scant evidence of a common trend regarding the principle underlying the entitlement to recover damages in negligence until the decision in Donoghue v Stevenson. During the course of the 19th century “the categories of negligence are never closed” was the cry of Heaven v Pender (1883) 11 QBD 503. In the latter part of the nineteenth century, the law of negligence took shape as an independent tort, with the emergence of the constituent concepts of its modern defined form, being duty of care, breach of that duty and damage. In 1893, Lord Esher, stating the law of the time, asserted that “a man is entitled to be as negligent as he likes to the whole world if he owes no duty to them”. However, the simplicity of this assertion was in marked contrast to the difficulty encountered in examining the origin of the duty requirement. Certain historical commentators, such as Professor Winfield, suggested that it originated in the early 19th century when tort and contract were disentangled; and in the process of separating tort from contract, the development of the law of negligence was born from a confused notion of assumpsit, effectively meaning undertaking. This, it was thought, was the germ of the duty concept. This observation is not without contemporary significance, bearing in mind the emphasis placed in recent times on the fact or concept of undertaking, when analysing the special relationship required, in certain circumstances, to found the duty of care.

2.5 The “Neighbour” Principle.

The importance of Donoghue v Stevenson is that Lord Atkin defined the circumstances in which a duty of care would be held to exist on what might be considered to be broad comprehensive lines divorced from what had been closed category thinking which pervaded judicial decisions in the nineteenth and early twentieth century. Thus, negligence would not exist as a cause of action unless the duty requirement was satisfied; and the duty requirement would not generally be satisfied unless Lord Atkin’s test was complied with. Hence the neighbourhood principle dictated that:

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”

Professor Heuston wrote that the decision in **Hedley Byrne v Heller** was the most striking decision in the field of negligence since **Donoghue v Stevenson**. It was a decision which marked a watershed in the development of law of negligent misrepresentation and economic loss. Insofar as negligent misrepresentations were concerned, a duty of care existed where there was a special relationship between the parties. Quite irrespective of contract, if someone possessed of the special skill undertook to apply that skill for the assistance or benefit of others, who might reasonably be expected to rely on the exercise of such skill, a duty of care would arise. The special relationship was thought to be premised upon the voluntary assumption of responsibility, the exercise of skill by a person professed of such skill; and reliance. In **Dorset Yacht Club v Home Office**, Lord Diplock refined this in the circumstances of that case, summarised by Lord Toulson in **Michaels** as follows: **"the development of the law of negligence proceeds by first identifying the relevant characteristics of the conduct and relationship between the parties involved in the particular case and the kinds of conduct and relationships which have been held in previous decisions to give rise to a duty of care".**

2.7  Post Hedley Byrne – What Requirements?

Each of these requirements has been refined over the years. Thus, in **Ministry of Housing and Local Government v Sharp** the Court of Appeal in England stated that the duty to use care in statement arose not from the voluntary assumption of responsibility but from the fact that the person making it knew, or ought to have known, that others, being his *neighbours* in that regard, would have faith in the statement being accurate. Further, the requirement of reliance has also been the subject of much refinement particularly through cases, such as the disappointed beneficiaries (or negligently drawn wills) cases - e.g. **Ross v Caunters, Wall v Hegarty** and in relation to financial transactions, more recently, in this jurisdiction in **Wildgust**.

2.8  A Two Tier Approach.

The modern refined approach to the assessment of the duty of care may however, be traced back to the more recent decision of **Anns v London Borough of Merton**. There, the House of Lords, having considered the combined effect of what it

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3 However, see more recently the decision of the English Court of Appeal in **Hunt v Optima (Cambridge) Ltd and Ors** [2014] EWCA Civ 714. It was held that an architect’s certificate provided *after purchase* of property could not be the foundation for negligent mis-statement claims. While the architects had been retained by the developer to inspect and certify flats, most of the certificates were not actually signed off until after exchange of contracts and, for most purchasers, not until after completion. Clarke LJ observed that “reliance must follow representation.” Loss must be in consequence of reliance. The purchasers could not have relied on the certificates when they exchanged contracts, because the certificates had not by then been completed. See also **Whelan v AIB**, where the absence of real reliance by the family on solicitor’s advices negatived, not the duty of care rather liability for the ensuing damage.
described as the trilogy of cases (Donoghue v Stevenson, Hedley Byrne v Heller and Dorset Yacht Club v Home Office) adopted a two tier test. The first limb of this test was to invite a consideration of whether there was sufficient proximity to give rise to a prima facie duty of care. If this question was answered in the affirmative, the second question had to be addressed was whether there were any circumstances which might negative the existence of the duty of care. Thus, Lord Wilberforce observed that….

“In order to establish that the duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask 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 question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class a person to whom it was owed or the damages to which a breach of it may give rise.”


In the Australian case, Sutherland Shire Council v Heyman (1985) Brennan J. thought it preferable that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by what he described as an massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of the person to whom it is owed”. McCarthy J., commenting in Ward v McMaster, pithily observed that the proposition of incremental growth, which he described as verbally attractive, suffered from a temporal defect, being that rights should be determined by the accident of birth.

2.10 Just and Reasonableness.

The next development of note was in England in Caparo Industries v Dickman 1990 where Lord Bridge posited that, in addition to foreseeability of damage,

“…necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of proximity or neighbourhood and that the situation should be one in which the court consider it fair, just and reasonable that the law should impose a duty of a given scope upon the one-party for the benefit of the other.”

2.11. Two Plus One.
In Ireland, the Supreme Court in *Glencar Exploration plc v. Mayo County Council (No.2)* [2002] 1 I.R. 84 accepted and adopted a test which effectively involves a three stage assessment-proximity, negativing considerations and just and reasonableness. As stated by Keane C.J. ([2002] 1 I.R. 84, 139):

“There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of “proximity” or neighbourhood” can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J. at first instance in Ward v. McMaster [1985] IR 29, by Brennan J. in Sutherland Shire Council v. Heyman (1985) 157 C.L.R. 424 and by the House of Lords in Caparo plc. v. *Dickman* [1990] 2 A.C. 605. As Brennan J. pointed out, there is a significant risk that any other approach will result in what he called a ‘massive extension of a prima facie duty of care restrained only by undefinable considerations.”

Keane CJ also referred to observations which had been made in England in *Stovin v Wise*. It was there stated that the difference in approach between *Anns* and *Caparo* may ultimately be of no great significance. The considerations which, in that particular case, negatived the existence of a duty of care under the *Anns* formulation, were consistent with an assessment as to whether it was just, fair and reasonable to impose such a duty in the particular circumstances.

3. “Summing Up”.

In *Whelan v Allied Irish Banks and Ors* [2014] IESC 3 O’Donnell J referred, in mathematical terms, to a perceived difference in approach:

“To the casual observer it might appear that there is little difference between an approach which imposes liability where there is prima facie a duty of care unless considerations of policy negative the existence of such a duty, and one which imposes a duty of care only when there is sufficient proximity and considerations of policy make it just and reasonable that such a duty should exist. One approach might seem to be merely the negative image of another and to the mathematically minded, five minus two is exactly the same as one plus two. However, there is and has been in practice a very significant difference between the two which might be illustrated by this case. The formulation in *Anns* v. Merton London Borough Council and *Ward v. McMaster* of prima facie liability only negatived by considerations of policy loads the balance heavily in favour of finding liability. Furthermore, it tends to ensure that the general issue as to the existence of a duty of care in such
circumstances will be addressed in the particular circumstances of the case and the question becomes, almost imperceptibly, whether a plaintiff who has now been found to have been injured by the carelessness of a person whose acts could foreseeably cause damage to the plaintiff, should nevertheless be deprived of damage?"

**Whelan** concerned, inter alia, an action for negligence against a firm of solicitors. In the High Court, the trial Judge had found that notwithstanding proximity and the absence of negativing policy considerations, nevertheless it was neither just nor reasonable that a duty of care should be imposed, given that the defendant solicitors were introduced very late in the day to advise on one small and specific aspect of a more complex transaction. The transaction involved the purchase of development land in Waterford (with the aim of selling it on for a large profit) and the overall structure also concerned the construction of a tax efficient mechanism for the distribution of proceeds and anticipated profits among family members. Essentially, a late amendment to a document made the loan a recourse one. The particular question arose on the eve of closing in circumstances where, in the view of the trial Judge, the client’s instructions gave little possible hint that the answer was critical to the decision of the client on a significant financial transaction.

O’Donnell J described as challenging, the trial judge’s conclusion that as a matter of law a solicitor acting for a client in relation to a transaction owed no duty of care in giving advice about the legal nature of a document, prepared in draft form and intended to be used as part of an overall transaction. O’Donnell J felt that the trial judge was quite right to conclude that *even though the relevant advice had been given on occasion, and in relation to a matter outside the original retainer, there was sufficient proximity between the plaintiffs and the solicitors to give rise to a duty of care, if all other requirements are satisfied*. Further, it could not be doubted that, if the duty of care arose, the firm was in breach of its duty and negligent in advising/not advising that the alterations to the draft document meant that the loan was now a recourse loan. The claim against the solicitors failed because the trial judge considered that it was necessary to take at least one further step and establish, in addition to proximity and a lack of care, that it would also be fair and reasonable to impose liability on the defendant. The trial Judge may have been influenced in his decision by the limited involvement of the solicitor in the context of such a significant transaction of a value (and loss claimed) in excess of €20m. He believed that it was unreasonable to expect that the solicitor ought to have known that the advice which he gave was critical to the family’s decision to proceed (or not proceed) with the entire transaction, and that such decision might have hinged on the fact that the loan was recourse or non recourse. The trial Judge held that it was not reasonably foreseeable that, by acting on his advice, the Plaintiffs would sign up to a facility, the nature of which they claimed they were unwilling to accept, given that the solicitor was kept in ignorance in that regard.
O’Donnell J could not agree with the judge’s approach to the determination of the existence of a duty of care. He referred to Ward, Glencar, Donoghue v Stevenson, Hedley Byrne v Heller, Home Office v Dorset Yacht Club, Anns and Sutherland.

“…Lord Atkin’s elegant and memorable speech in Donoghue v. Stevenson had the effect of suggesting that there was a single unifying principle which explained why liability arose not just in that famous case, but in other individual cases in which liability had been established in negligence. Thereafter, the question increasingly became whether those areas, where it had hitherto been thought no liability and no duty of care arose or which had not yet been the subject of any decided case, would also succumb to Lord Atkin’s unifying principle. Those were areas such as liability for statements rather than actions (Hedley Byrne), liability for public law actions of public authorities (East Suffolk Rivers Catchment Board v. Kent [1941] A.C. 74 and Anns v. Merton London Borough Council), liability for auditors of companies to third party investors (Caparo), pure economic loss cases (Caparo and Glencar), liability for nervous shock, and liability of builders and/or subcontractors to subsequent purchasers of buildings with whom they had no contractual relationship (Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 A.C. 520), together with other favourite classroom examples such as the potential liability of rescuers.”

Having referred to the two tier approach in Anns v. Merton London Borough Council, in the United Kingdom, and Ward v. McMaster in this jurisdiction, he observed that the position appeared to have been reached where it was said that liability in negligence in such novel areas could be determined by the application of a two stage test. First, whether, if there was foreseeability of damage there was sufficient proximity between the parties to establish a duty of care, and second, whether there were any possible policy considerations which should limit or negative the existence of the duty of care, albeit, as McCarthy J. observed in Ward v. McMaster, it would require powerful considerations of policy to deprive a plaintiff, who had suffered foreseeable damage as a result of the careless act of a sufficiently proximate wrongdoer, of the damages to which he or she would otherwise be entitled.

A concern about this approach was that it would give rise to a considerable extension of liability, and consequently cost, and make the tort of negligence the dominant vehicle for recovery in any civil action, which would threaten, if not obliterate, the other torts and even recovery in contract and quasi contract. Hence the formulation in Anns v. Merton London Borough Council and Ward v. McMaster of prima facie liability only negativated by considerations of policy loads the balance heavily in favour of finding liability and tended to ensure that the general issue as to the existence of a duty of care in such circumstances would be addressed in the
particular circumstances of the case. Thus, as stated, almost imperceptibly, the question became whether a plaintiff who has been found to have been injured by the carelessness of a person whose acts could foreseeably cause damage to the plaintiff, should nevertheless be deprived of damages. Viewed in this way it was apparent that the trial judge’s conclusion that the solicitors owed no duty of care when advising as to the nature of the facility agreement because to impose a duty of care in such circumstances would not be just and reasonable, could not be maintained. First, this was not a novel area where liability was being asserted for the first time. It was well established that a solicitor may owe a duty of care independent of contract. Second, the just and reasonable test in Glencar was essentially a policy consideration and it has been long since determined that it is just and reasonable that the solicitor should owe a duty of care in such circumstances.

4. Abstract analysis - Public Policy and Reasonableness to be decided as Questions of Law – The “Wilderness of Single Instances”.

The analysis of the existence and imposition of the duty of care had to be approached at, what O'Donnell J described as, a certain level of abstraction. It had been stated by Lord Browne-Wilkinson in Barrett v. Enfield London Borough Council [2001] 2 A.C. 550 (pp. 559-560) that the decision as to whether it is fair, just and reasonable to impose liability in negligence on a particular class of would-be defendants “depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered”. In Michaels, Lord Kerr referring to this passage observed.

"This ... clearly contemplates that, in deciding what is "fair, just and reasonable", courts are called on to make judgments that are informed by what they consider to be preponderant policy considerations. Some assessment has to be made of what a judge considers the public interest to be; what detriment would be caused to that interest if liability were held to exist; and what harm would be done to claimants if they are denied a remedy for the loss that they have suffered. These calculations are not conducted according to fixed principle. They will frequently, if not indeed usually, be made without empirical evidence. For the most part, they will be instinctual reactions to any given set of circumstances."

Lord Browne Wilkinson stated in Barrett, that issues of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law.

“Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company ... that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case.”
In what some might describe as the removal of quasi-equitable type principles from the individual merits of each negligence action, O’Donnell J observed:

“The test does not mandate or permit a consideration of each individual case and whether the imposition of a duty of care, and therefore liability, meets some undefined concept of fairness in the particular case. If that were so, then the law would be no more than the application of individual discretion in different facts or circumstances which might well be decided differently from court to court. In such circumstances, the law of negligence would be little more than the wilderness of single instances criticised by Tennyson”.

5. Liability for the Intentional Acts of a Third Party in a non vicarious/Employment Law setting

One such area which has been particularly fraught with difficulty is the circumstance in which independent liability in negligence will be imposed on one for the deliberate actions of third parties. It requires the existence of a special relationship. Generally speaking, this special relationship must exist between the defendant and the person who has committed the deliberate acts.

This was considered recently in Ennis v. Health Service Executive and Jarlath Egan [2014] IEHC 440. The Plaintiff was the owner of a cottage in Athlone. It was extensively damaged by fire that spread from the adjoining premises, these premises being owned by Mr. Jarlath Egan, the second named Defendant. The property had been leased by Mr. Egan to a troubled teenager, described in the proceedings as Ms. A. She had been placed there some weeks earlier with the assistance and support of the Health Service Executive exercising its powers under the Child Care Act, 1991. Difficulty was experienced with Ms. A’s conduct, and also the persons who frequented the property with her. In fact in the hours before the fire took place the lease had been terminated. The fire was started deliberately by two companions of Ms. A following an all-night party. Ms. A and her companions had, unlawfully re-entered the property probably as a result of breaking a window to the rear of the premises. The Plaintiff’s neighbouring premises was all but destroyed and significant damage was done to seven other properties. Ms. Ennis sued the HSE and the owner of the house, Mr. Egan. The case against Mr. Egan was dismissed. Whatever the scope of the immunity conferred by the Accident Fires Act, 1943, the Act was held to have no application to this case. The fire was started deliberately. Mr. Egan and Ms. Ennis were described as innocent parties. Mr. Egan had simply leased the property to Ms. A. He terminated the lease once it became clear that she was either unable or unwilling to look after the property. The fire took place after Ms. A had unlawfully re-entered the property.

The background to the tenancy was that Mr. Egan had purchased the house, (at the time he was a university student) renovated it and advertised it for renting. At that time the HSE ran a residential centre for troubled teenagers in its care in a cottage nearby. One of the residents was Ms. A., who had come from what was described as, a dysfunctional family background and had been in care since the age of two.
Ms. A attained her 18th birthday in August, 2005. She wished to live independently. A social worker working with the HSE saw Mr. Egan’s advertisement, viewed the house and considered it suitable. She then arranged with Mr. Egan that Ms. A would take a letting of the premises. The lease commenced on the 25th of July, 2006. Monthly rent was €550 which was paid by the HSE for the first two months; and thereafter the costs were divided between the HSE and Ms. A in the form of rent allowance.

The claim against the HSE succeeded. The learned trial judge considered copious documentation including care records relating to Ms. A. In December, 2004, a guardian ad litem had expressed concern for plans of independent living once Ms. A reached 18. The guardian ad litem had described this plan as contraindicated by her past history and independent living would likely lead to personal crisis. It was thought it would be more than likely that Ms. A would quickly revert to volatile substance abuse and any attempt to fast track independent living without her receiving sustained therapeutic intervention would set her back. A subsequent guardian ad litem report from May, 2005, however, did not repeat the same concerns.

On Saturday the 24th of September, following reports of a break in to the leased house (i.e. No. 10), staff of the HSE found the property in a complete mess. The HSE’s social workers spoke to Ms. A about her behaviour and attitude, her choice of friends and her approach to alcohol and drug misuse. The mess created by her was cleared up and it was arranged for Ms. A and her sister to help in this process. Later that night, staff received a call from Ms. A to say that she wanted to leave No. 10 and obtain a flat elsewhere. Ms. A stated that she feared that the youth who was responsible for the break-in would return. On the 29th of September, a social worker attached to the HSE went to the house, brought Ms A. for lunch and later returned to No. 10 in order to tidy up the premises. There they met with Mr. Egan who had received complaints from other neighbours about noise. Mr. Egan thought it best that Ms A would leave. Ms. A was brought by staff to visit her younger sister at a Retreat Lodge. Ms. A expressed the view to the social workers that she was glad to be back in care, as she felt that she was not ready or able to live alone. Nevertheless, she expressed her intention to go out that evening with an individual, who was described as undesirable. The staff tried to warn her not to do so. She did not seem “to take anything in that was said to her and she stated that she thought she was OK”. On Friday the 30th of September, Ms. A, the HSE social work staff and Mr. Egan met at No. 10 to assess the damage to the property. It was at that point that the tenancy was terminated and keys returned. This occurred at around 6.45 p.m.

Later that evening Ms A left Retreat Lodge without permission and did not return at curfew time. In fact the Garda, at the request of the HSE, went looking for her
sometime after 1.00 a.m. Even later, a social worker travelled by taxi to collect Ms. A, having made contact with her, but she refused to get into the taxi. A phone call was received at 5.00 a.m. by the fire service from the garda to say that No. 10 was on fire. Thus, at the time of the fire, Ms. A did not have the keys to the house; and the lease had been terminated.

A Forensic Psychologist who was called to give evidence described Ms. A as an acutely vulnerable young person whose placements had broken down, she had failed to cooperate with various therapies, engaged in substance misuse and had frequently absconded from secure environments. His evidence was that had he been called upon to advise on the steps to be taken, in order to manage Ms. A, he would have devised a Behavioural Care Programme and would not have let Ms. A out of sight. HSE staff advised that they were working towards the goal of independent living for Ms. A for over one year. In truth, there were few other options available, according to HSE staff.

Hogan J. observed that the attitude of Ms. A, who was a highly vulnerable person, showed indifference to any damage which may have been done to the property immediately prior to her departure. She had expected that items which had been damaged or broken or stolen would simply be replaced by the HSE. He accepted the evidence of the Psychologist that Ms. A was simply unsuitable for independent living. Her unsuitability as a tenant had become crystal clear and the few short weeks she had resided in No. 10. He also noted that the HSE had agreed to reimburse Mr. Egan for the damage done to the property (i.e. when the tenancy was terminated and before the fire took place).

Mr. Justice Hogan therefore was required to consider what duty of care, if any, was owed by the HSE to Ms. Ennis. This involved a critical analysis of the circumstances in which a third party could be found liable for the actions of another. Acknowledging the general principle that one party is not liable for the actions of a third party, save where a duty of care has been found to exist by reason of special circumstances, Hogan J. referred at length to the decision in *Dorset Yacht Company Limited v. Home Office* [1964] AC 1004. He observed that it had been judicially recognised that the actions of troublesome children and delinquent juveniles often present such special case.

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4 Young offenders were working under the supervision of three prison officers on an island in Dorset. In breach of their instructions the officers had gone to bed leaving the trainees to their own devices. Seven offenders escaped and went on board a yacht which they found nearby. They launched the yacht, collided with the Plaintiff’s yacht which was moored in the vicinity and having done so, caused further damage to the Plaintiff’s yacht when they entered upon it. The owners of the yacht sued the home office in negligence. They succeeded. Lord Reid noted that if staff had obeyed their instructions, they could and would have prevented the trainees from escaping. It was a likely consequence of the neglect of the officers that the yacht would suffer damages.
Hogan J. referred to the argument which had been made before the Court of Appeal that no person could be responsible for the acts of another when he is not a servant or acting on his behalf. Lord Reid, in *Dorset Yacht* stated as follows [1970] AC 1004 1027:

“But here the ground of liability is not responsibility for the acts of the escaping trainees: it is liability for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind. So the question is really one of remoteness of damage. And I must consider to what extent the law regards the acts of another person as breaking the chain of causation between the defendants’ carelessness and the damage to the plaintiff.”

Lord Reid observed that if the intervening action was likely to happen, then it did not matter whether the action was innocent, tortious or criminal. Tortious or criminal actions by third parties were very often the very kind of thing which were likely to happen as a result of wrongful or careless acts. The taking of the boat was the very kind of thing that the Borstal Offices ought to have seen as being likely. Lord Reid noted, regarding causation, that no doubt it was easier to infer *novus actus interveniens* in the case of an adult but that seemed to him to be only a distinction. The *novus actus interveniens* argument was rejected.

Hogan J. also referred to the *Vicar of Writtle v. Essex County Council* [1979]. A twelve year old troubled child who had a propensity for fire raising set fire to a local church. When the child had appeared earlier before the Juvenile Court, local police asked that he be remanded into social worker care because of his known propensity for starting fires. He was placed in a home. However, the social workers did not inform the house parent in charge of the home where the child was to stay of the child’s propensities. Forbes J. concluded that there was negligence on the part of the Defendant in failing to convey to the management of the care home the information in their possession regarding the child’s propensity.

Hogan J. contrasted the *Vicar of Writtle* decision with the *P. Perl (Exporters) Ltd. v. Camden LBC* [1984] QB 342. There, the Plaintiff had leased the basement of premises and used them for the storage of garments. The Defendants were the owner of adjoining premises. Unauthorised persons were often seen on the premises and burglaries took place from time to time. On one weekend the intruders broke into the adjoining premises, knocked a hole through the common wall in the basement and stole garments which were the property of the Plaintiff. Liability was held not to exist as there was no duty of care. The degree of foreseeability required to impose a liability for acts of some independent third parties, was described by Waller L.J. as “high”. Robert Goff L.J. knew of no case where, in the absence of a special relationship, the Defendant was liable in
negligence for having failed to prevent a third party from wrongfully causing damage to the Plaintiff.

**Smith v. Littlewoods Organisation Limited** [1987] 1 A.C. 241. The House of Lords rejected a claim in negligence against the Defendants who had purchased an old cinema with a view to demolishing and replacing it with a supermarket. Previous owners had engaged with contractors to remove furniture and equipment which might have been of value but the building remained unused for a six week period. During that period, the security surrounds had been breached by children and young people. Acts of vandalism, including an attempted fire, had occurred. A fire was deliberately started in the cinema by teenagers. The cinema burned down and adjacent buildings were also damaged. There was nothing inherently dangerous in the abandoned building. The Defendants had no knowledge of the potential fire. There were no exceptional circumstances which required extra security, according to the House of Lords. There was no special relationship between the perpetrators of the fire and the owners of the property, the Defendant.

Reference was also made to **Breslin v. Corcoran** [2003] 2 IR 303 the first Defendant parked his car outside a café. He went in to the café but left the keys in the ignition. The car was taken by a thief, driven away at high speed and it then crashed into the Plaintiff as he crossed the road. The Supreme Court held that it was not foreseeable that the car would be driven in a negligent manner by the thief, although the theft of the vehicle in such circumstances was foreseeable. Fennelly J. repeated the proposition that:

“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.”

Hogan J. thought that this case was an illustration of a break in the chain of causation between the wrongful conduct of a third party thief and the Plaintiff, with whom no special relationship existed. He stated that the principle that a person could not be liable for the wrongful acts of a third party who was not acting an employee or agent for that person, was tempered where there was a special relationship which falls short of agency or employment. This is especially so where one has assumed responsibility for the other, *whether in fact or in law*, and where the negligence of the person who has assumed such responsibility may lead to a state of affairs whereby “it may be foreseen that damage could be caused to a third party by reason of the actions”. He relied upon the prison authority cases such as **Casey v. Governor of Midland Prison** and **Creighton v. Ireland**. While the HSE was not generally responsible for the conduct of those young adults under its care, yet, he felt that there may well be circumstances where there is a special relationship between the parties giving rise to a duty.

The HSE’s assistance to Ms. A was not gratuitously given. It was provided pursuant to express statutory power under Section 45 (1) of **The Childcare Act**,
1991.5 Given the provisions of that Act, Hogan J. felt that there was a special relationship between the HSE and Ms. A, such as gave rise to a duty of care. The HSE had concluded that Ms. A was suitable for independent living. It was HSE staff who had identified the premises as suitable. It was the HSE which endeavoured to monitor Ms. A during the period that she was in the premises. While all HSE staff and social workers had used their very best endeavours which “went well beyond the call of duty to assist Ms. A” the case could be distinguished from the Perl case. Objectively, there was negligence on the part of the HSE, being its conclusion that Ms. A was suitable for independent living. She was patently not fit for independent living. Failing to tell Mr. Egan of her background and her propensities prior to entering into the tenancy agreement, amounted to negligence on the part of the HSE. Her comment in the days leading up to the fire was such as might well have placed professionals dealing with her on guard as she had shown no insight into vandalism to the property in which she was at least complicit. It was entirely foreseeable that the property was likely to be damaged by both Ms. A and her circle of friends once she went into possession of the premises. It was the very kind of thing which was likely to happen once she was placed in a property of her own. The chain of causation was not broken once the tenancy was terminated and the keys returned. The very reason why Ms. A and her friends went back to the cottage was because they knew the property was vacant and available. Even though she no longer had the key to the premises, those who returned to the premises with her could easily gain access through a back window.

Hogan J. continued:

“I likewise consider that it is just and reasonable in the Glencar sense that a duty of care be imposed in such circumstances. One cannot but commend the entirely laudable actions of the HSE in endeavouring to care for such a troubled individual as Ms. A. But the State must also act in a fair and even-handed way towards all its citizens. If no such duty of care were to be imposed in these particular type of circumstances, it would expose innocent and absolutely blameless citizens such as Ms. Ennis and Mr. Egan to the risk of serious damage to their property in respect of which they had no right of recourse.”

Further, adopting the analysis of the just and reasonableness test in Whelan it could not be said that the imposition of the duty of care was novel. It found expression in English case law particularly Dorset Yacht Club and the Vicar of Writtle. Clear analogies were also to be found in the prison cases. Insofar as policy considerations were concerned, as O’Donnell J. had pointed out in Whelan, the just and reasonable test itself encompasses policy considerations:

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5 That provides; “Where a child leaves the care of ………it may, in accordance with subsection (2), assist him for so long as the [HSE] is satisfied as to his need for assistance and…he has not attained the age of 21 years.” Section 45(2) provides that the HSE: “…may assist a person under this section in one or more of the following ways - … by causing him to be visited or assisted…. , by arranging hostel or other forms of accommodation for him; and/or by co-operating with housing authorities in planning accommodation for children leaving care on reaching the age of 18 years.”
“It is sufficient to say in this context that if a duty of care can be imposed on the State in supervising and caring for prisoners, the same can be applied by analogy in respect of HSE staff charged with the equally demanding and difficult task of supervising troubled teenagers.”


Does the decision in Ennis accord with the decision in such cases as X (minors) v. Bedfordshire County Council, where the House of Lords declined on policy grounds to impose a duty on a local authority who either used or failed to use their statutory power to take children into care?

The reasoning behind the decision in X was due to the invariably fraught nature of such cases and that there was a risk that local authorities would be dissuaded by external factors from giving proper consideration to the exercise of their statutory powers. These were considered to be sufficiently powerful public policy factors in their own right which dissuaded the House of Lords from imposing the duty. Hogan J did not believe that such considerations obtained in Ennis. The just and reasonable test itself encompasses policy considerations. It was sufficient to say that if a duty of care could be imposed on the State when supervising and caring for prisoners, the same could be applied by analogy in respect of HSE staff charged with the equally demanding and difficult task of supervising troubled teenagers.

The Ennis decision is important in a number of respects. It restates that a breaking of the chain of causation on the novus actus interveniens principles will not apply where the type of injury which ultimately was occasioned was the very type of injury which was envisaged or foreseeable as a consequence of the original act of negligence.

The decision in JD v East Berkshire Community Health NHS Trust (2005) however, was not considered. Nevertheless, it is arguable that the decision in JD is not inconsistent with the reasoning of Mr. Justice Hogan. In JD, it was held that there was no duty owed in the investigation of claims of sexual abuse, to the parent or guardian of the allegedly abused child. That is because the primary duty was owed to the child and this may not necessarily be consistent with the duties alleged to be owed to a parent. On analysis, it could not be said that given the nature of the damage which occurred in this case, the duty owed to Ms. Ennis was in any way in conflict with the duty owed to Ms. A. The implication in the judgement is that the fulfilment of the duty to Ms. A would in itself have been in equal fulfilment of the duty to Ms. Ennis. Simply put, if that duty had been complied with, Ms. A would not have been regarded as being suitable for independent living, would not have been placed in independent living, alternatively Mr. Egan would have been so advised and have been able to make a considered decision on whether Ms. A should be permitted to take a lease of his premises – and should all of those duties have been complied with, the damage would probably not have been occasioned to Ms. Ennis’ premises. Therefore, in short, there was no inconsistencies of duty.

7 Policy and Operational Matters.
Of course, there is quite a thin dividing line between policy considerations which may come into play in exercising a power (or not, as the case may be), such as in *Glencar, JD* or *W*; and the practical implementation of such policy considerations. By and large the authorities appear to support the proposition that it is more difficult to impose a duty on a statutory body exercising powers at a policy level. At operational level, however, it would appear that different consideration apply. Nevertheless, it must be borne in mind that a statutory body is not omnipotential. Any duty of care which is imposed on a statutory authority at common law, must reflect and be reflected by the statutory powers which are being exercised by the authority when the negligence is said to have arisen. This is illustrated in *Siney v Dublin Corporation*.

8. Incremental Approach in the UK

The approach of the UK courts to the analysis of the duty of care was considered recently in *Michaels v Chief Constable of South Wales [2015]*. Here the court addressed the significant policy issues at play when holding that a duty of care was not owed to a victim of criminal activity by the police when they responded in an inadequate fashion to a 999 call. Lord Toulson observed...

"It is true that the categories of negligence are never closed (Heaven v Pender (1883) 11 QBD 503), and it would be open to the court to create a new exception to the general rule about omissions. The development of the law of negligence has been by an incremental process rather than giant steps. The established method of the court involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable. In doing so it pays regard to the need for overall coherence. Often there will be a mixture of policy considerations to take into account. From time to time the courts have looked for some universal formula or yardstick, but the quest has been elusive. And from time to time a court has used an expression in explaining its reasons for reaching a particular decision which has then been squashed and squeezed in other cases where it does not fit so aptly. Lord Wilberforce’s two-stage formula in Anns appeared at first to usher in a new era of development in the law of negligence, in which prima facie liability at the first stage was drawn very widely but could be negated or cut down by policy considerations at the second stage. The two-stage formula was stated in terms of general application, but it had particular implications for public authorities, because they have a wide range of duties and responsibilities which would be likely to bring them within the first stage of Lord Wilberforce’s formula. Doubts about the Anns formula were expressed by the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 and echoed in subsequent English decisions. In *Caparo Plc v Dickman [1990]* 2 AC 605 Lord Bridge (with whom Lords Roskill, Ackner and Oliver of Aylmerton agreed) emphasised the inability of any single general principle to provide a practical test which could be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope. He said, at pp 617-618, that there must be not only foreseeability of damage, but there must also exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or
“neighbourhood”, and the situation should be one in which the court considers it fair, just and reasonable that the court should impose a duty of a given scope on one party for the benefit of the other. He added that the concepts both of “proximity” and “fairness” were not susceptible of any definition which would make them useful as practical tests, but were little more than labels to attach to features of situations which the law recognised as giving rise to a duty of care. Paradoxically, this passage in Lord Bridge’s speech has sometimes come to be treated as a blueprint for deciding cases, despite the pains which the author took to make clear that it was not intended to be any such thing. The Anns formula was finally disapproved in Murphy v Brentwood District Council [1991] AC 398. The particular question in that case was whether the owner of a house built with defective foundations was owed a duty of care by the local authority which passed the plans. The House of Lords held that he was not. The property was the plaintiff’s home and it would have cost more than half of its value in good condition to repair the damage caused by the defective foundations. Lord Bridge observed that there might be cogent reasons of social policy for imposing liability on the authority, but that the shoulders of a public authority were only broad enough to bear the loss because they were financed by the public at large, and that it was pre-eminently a matter for the legislature whether these policy reasons should be accepted as sufficient for imposing on the public the burden of providing compensation for the plaintiff’s private loss. Similarly Lord Oliver said that it would not be right for the courts to create new principles in order to fulfil a social need in an area of consumer protection where there was legislation”.

Concerning those involved in administering "protective systems", he observed:

"It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law. The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public. Examples at the highest level include Yuen Kun Yeu v Attorney-General of Hong Kong [1988] AC 175 and Davis v Radcliffe [1990] 1 WLR 821 (no duty of care owed by financial regulators towards investors), Murphy v Brentwood District Council (no duty of care owed to the owner of a house with defective foundations by the local authority which passed the plans), Stovin v Wise and Gorringe v Calderdale Metropolitan Borough Council (no duty of care owed by a highway authority to take action to prevent accidents from known hazards). The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles which would cover the facts of the present case.”
Recognising the requirement of a special relationship (or assumption of responsibility) but rejecting the duty in this case, he observed

"I recognise fully that the statistics about the incidence of domestic violence and the facts of individual cases such as the present are shocking. I recognise also that the court has been presented with fresh material on the subject. However, I am not persuaded that they should cause the court to create a new category of duty of care for several reasons. If the foundation of a duty of care is the public law duty of the police for the preservation of the Queen's peace, it is hard to see why the duty should be confined to potential victims of a particular kind of breach of the peace. Would a duty of care be owed to a person who reported a credible threat to burn down his house? Would it be owed to a company which reported a credible threat by animal rights extremists to its premises? If not, why not? It is also hard to see why it should be limited to particular potential victims. If the police fail through lack of care to catch a criminal before he shoots and injures his intended victim and also a bystander (or if he misses his intended target and hits someone else), is it right that one should be entitled to compensation but not the other, when the duty of the police is a general duty for the preservation of the Queen's peace? Similarly if the intelligence service fails to respond appropriately to intelligence that a terrorist group is intending to bring down an airliner, is it right that the service should be liable to the dependants of the victims on the plane but not the victims on the ground? Such a distinction would be understandable if the duty is founded on a representation to, and reliance by, a particular individual but that is not the basis of the interveners' liability principle. These questions underline the fact that the duty of the police for the preservation of the peace is owed to members of the public at large, and does not involve the kind of close or special relationship ("proximity" or "neighbourhood") necessary for the imposition of a private law duty of care".

9 Conclusion.

Hogan J. Thought it was just and reasonable and in line with established precedent that a duty of care should be imposed. The decision may be considered a further illustration of the Court’s approach to the duty of care. In novel situations, the law dictates that the Court should exercise caution in any extension or perceived extension of the duty of care. Where there are established precedents, analogous cases or where the imposition is incremental, the law is more receptive to the imposition of a duty of care. The analysis should be abstract.

Is judicial thinking reflecting that which informed the action on the case –by requiring the existence of established precedent, precedent by analogy or incremental development? It is also of interest that the genesis of the duty, the confused notion of assumpsit or undertaking, is to the fore in the duty of care analysis as conducted in Michaels.

Nevertheless, it is noteworthy to observe that in these most recent Irish cases, where the duty of care has been closely scrutinised, a duty has been imposed.