THE HIGH COURT

[2013 No. 8223 P.]

BETWEEN

CIAN MCCARTHY

PLAINTIFF

AND

JAMES KAVANAGH TRADING AS TEKKEN SECURITY AND

HERLIHY SUPERMARKET GROUP LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Cross delivered on the 6th day of March, 2018

1. The plaintiff was born on 13th July, 1985. He is a psychiatric nurse by profession. After secondary school, he went to University College Cork where he completed a BSc in psychiatric nursing in 2008 and was employed thereafter by the HSE in North Lee Mental Health Services from 2008. After his employment, he decided for promotional purposes to get a higher diploma in acute and in enduring mental illness and in October 2011, he was in the course of studying for this diploma.

2. Briefly put, the plaintiff, who throughout the incident was the innocent party in all altercations, attended the second named defendant's supermarket premises in the early hours of 31st October, 2011, and after an incident was evicted by the first named defendant's security staff and was shortly thereafter assaulted by a third party. The plaintiff suffered serious injuries and claims that these injuries were caused by reason of the negligence of the defendants or either of them.

3. The defendants initially were separately represented and filed full defences including each blaming the other but both defendants are now represented by the same firm and no issue arises between them. The defendants deny liability, deny that they owed any duty of care to the plaintiff, plead a *novus actus interveniens* and further pleaded the provisions of s. 35(1)(i) of the Civil Liability Act 1961.

4. The facts in this case are not greatly in issue save for two matters which will be considered later and considerable evidence was furnished by the witnesses and also by CCTV footage and stills which will be discussed below. I find the essential facts are as follows:-

(i) On the evening on 30th October, 2011, Halloween weekend and also the weekend of the Cork Jazz Festival, a very busy weekend, the plaintiff and his then girlfriend (now his wife) went to a well known public house, Costigans in Washington Street, had a number of drinks there and went on with friends to the nearby licensed premises and indeed, nightclub, known as Reardans, opposite the Courthouse.

(ii) The plaintiff had a number of drinks in both premises and he says he would not have been fit to drive but there is no suggestion and no evidence exists that alcoholic drink or indeed any other act of Mr. McCarthy was in any way to blame for what happened. Mr. McCarthy was, at all stages, an innocent party. Though contributory negligence was pleaded against the plaintiff, this has not been maintained and no evidence exists of any contributory negligence. For the avoidance of doubt accordingly I hold that there is no contributory negligence against the plaintiff.

(iii) At some time after 2am, Mr. McCarthy and Ms. M decided to go to the first named defendant's Centra shop on the Grand Parade, Cork, to purchase some rolls to eat. The CCTV cameras show a very large number of people milling around in front of the Centra supermarket. It was Halloween weekend. There was clearly a fancy dress engagement going on nearby as people are to be seen in "*drag*" and other fancy dress outfits. It is common case that the gardaí had just left the front of the premises having to deal with an incident or disturbance in front of the shop moments before the plaintiff arrived. However, though the crowd outside the supermarket was very large, the CCTV films show, apart from the central actors in the affair that other citizens were milling around and took no part in what occurred.

(iv) There were a large number of patrons in the shop, along with the staff and two security guards who were on duty on behalf of the second named defendant. One of them, Mr. F was back near the counter and the other, Mr. P was near the front door. A queue formed up on the right hand lane as one looks at it from the front door which queue then turned slightly to its left in front of the deli counter.

(v) The plaintiff and Ms. M entered the shop and made their way up the queue with a number of people in front of them including two ladies, who turned out to be the O'M sisters who wore fancy or distinctive dresses.

(vi) A man, who turned out to be Mr. O'C, entered the shop with a cardboard box on his head by way of fancy dress presumably. He attempted to go to the deli counter direct without going through the queue but were redirected by the guard, Mr. F, back to the queue. Mr. O'C then is seen attempting to jump the queue, by moving upwards towards where the O'M sisters were placed in front of the plaintiff. The plaintiff and his fiancé, not unreasonably objected to this. It is possible that one of the O'M sisters who were in front of the plaintiff indicated that Mr. O'C was with them and that one of them would leave the queue to enable Mr. O'C to take his place.

(vii) In any event, Mr. O'C is seen, and is noticed by the guard, Mr. F, to be manhandling his way up to the front and this, apparently, caused some protest from the plaintiff and his girlfriend. One of the O'M girls went over to the security guard and the plaintiff is seen calling out probably to her or to the guard, something to the effect that people should mind their manners. Both Mr. O'C and in particular the O'M sister who was left in the queue objected to the plaintiff's conduct and words followed and the remaining sister in the queue is assaulted the plaintiff around his jaw and mouth.

(viii) The security guard, Mr. F, went over to the queue and because he apparently wanted to separate the plaintiff who was, as he saw it, one person in a row with three people, he escorted the plaintiff out of the shop. Mr. F was not it seems aware of Ms. M's connection to the plaintiff or that he was in fact separating the plaintiff from her. He handed the care of the plaintiff over to the second security guard, Mr. P, and omitted to tell Mr. P, as he now accepts to be the

case, that the plaintiff was the innocent party in the affair.

(ix) The plaintiff was followed almost immediately from the shop by the O'M sisters and by Mr. O'C. Mr. F apparently did request them not to follow but did not communicate to Mr. P that the three persons exiting the store immediately after the plaintiff were the perpetrators of the row against him.

(x) When the plaintiff exited the premises he was chased by the three pursuers who attempted to hit him about the head while at all times the plaintiff offered no resistance and backed away trying to cover his head to prevent these assaults.

(xi) The plaintiff then managed to break loose from his pursuers and made for the front door of the shop seeking safety. He was pursued by Mr. O'C.

(xii) Mr. P did not know that the plaintiff was the innocent party in the initial row and did not witness the plaintiff being beaten and pursued outside. Mr. P barred the plaintiff's re-entry and either pushed him away or puts his hands up so as to cause the plaintiff to bounce off him. Whether Mr. P merely barred the plaintiff with his two hands as he maintains or pushed the plaintiff back is one of the few factual matters of dispute.

(xiii) The plaintiff states that he was pushed backwards by Mr. P and fell over an unconnected person, Ms. H. In this, he is supported by Ms. L O'S an independent witness who was inside the store and also another independent witness, Mr. C O'S who was outside. Mr. P says that he blocked the plaintiff with his two hands and Ms. AG, a third independent witness heard Mr. P telling the plaintiff to stop and did not see him push the plaintiff. Examining the photographs, it is clear that whatever occurred and whether or not Mr. P's hands were moving towards the plaintiff in a push or were merely held up, the force of the impact of the plaintiff on Mr. P's hands caused him to stumble back towards Ms. H and towards the assaulting arms of Mr. O'C. I believe that all witnesses were attempting to tell the truth as they saw it but examining the CCTV and the still photographs especially from Camera 5, none of them show Mr. P with his two hands raised in a blocking position as he maintained. The photographs do show the plaintiff in collision with Mr. P and being pushed or falling backwards and in particular one photograph taken at 02:25:34:64 exhibited in Mr. Romeril's report shows Mr. P with not two hands but one hand raised and I conclude that what Mr. P did was, in fact, to push the plaintiff back towards the crowd and in particular, towards Mr. O'C. However, I am not persuaded that the resolution of this factual dispute causes any substantial difference to the outcome of the case.

(xiv) The only other issue of fact in dispute is whether the plaintiff then fell and knocked over Ms. H due to the direct impact of the push or whether he was assisted in that impact by being entangled with Mr. O'C. The defendants contend that it was the entanglement of the plaintiff with Mr. O'C after he had been pushed or blocked backwards which caused the plaintiff to knock down Ms. H. Again, while the film is not definitive on this, I hold that the best explanation for what occurred and what is shown in the photographs is that indeed, the plaintiff was pushed back in a falling motion and was grappled by Mr. O'C as he was falling. It was a combination of Mr. P's push and Mr. O'C that caused the impact with Ms. H. However, again I am not persuaded that the resolution of this factual dispute causes any significant change in the outcome of this case. It should, of course, be pointed out that Mr. C must have been of the view that the main cause of the impact with Ms. H, his girlfriend, was the plaintiff, hence Mr. C's response.

(xv) The plaintiff stumbled backwards from the push of Mr. P and with the assistance from Mr. O'C who had now caught up with the plaintiff and this caused the plaintiff to trip over and knock to the ground Ms. H who had nothing to do with the incident but was standing on the payment outside the shop.

(xvi) Unfortunately Ms. H's boyfriend, Mr. C who was behind or beside Ms. H intervened with a massive fist to the plaintiff's head causing him to fall to the ground crack his head and suffer a serious head and brain injury.

(xvii) Ms. M came out from the shop just as this was happening she herself remonstrated with and is then assailed by the OM sisters and then Mr. M saw the plaintiff on the ground bleeding profusely and went over to him.

(xviii) The gardaí came and Mr. C was subsequently charged and pleads guilty to Assault Occasioning Serious Harm and was appropriately sentenced and the O'M sisters and Mr. O'C were appropriately sentenced for public orders offences.

(xix) The plaintiff has no recollection of the incident or its aftermath until he awoke after being in a coma in hospital.

(xx) The entire incident is captured by a number of CCTV cameras. I have had the benefit of viewing these cameras and the stills extracted from the films on a number of occasions. The CCTV film, as is normal, is not a continuous movie but jumps from frame to frame as what is captured is not a continuous flow but rather millisecond after millisecond. I have also had the benefit of a frame by frame analysis by consulting engineers of what was to be seen and a discussion by Counsel of these matters.

(xxi) The entire incident occurred in real time not in fragmented milliseconds. This case can only be assessed by allowing for the fact that the incident happened in real time. The interval between the plaintiff being removed from the shop and being hit by Mr. C is less than ten seconds which period involved him being beaten by O'M sisters and by Mr. O'C, braking loose from them making for the door being pushed back and knocking over Ms. H as well as the punch. The interval between the plaintiff being pushed back by the security guard and the blow from Mr. C is just two seconds.

5. The issues of liability maybe summarised as follows:

(a) Did the defendants owe to the plaintiff a duty of care in the circumstances?

(b) If so were the defendants in breach of their duty of care.

(c) If so were the plaintiff's injuries caused by reason of the defendants' breach are the actions of Mr. C in assaulting the plaintiff to be regarded as a *novus actus interveniens*.

(d) If there is a duty of care and if the principle of *novus actus interveniens* does not apply, do the provisions of s. 35(1)(i) of the Civil Liability Act serve to defeat the claim.

Does the defendant owe the plaintiff a duty of care in the circumstances and were the defendants in breach of their duty of care?

6. I have had the benefit of extensive submissions on behalf of the plaintiff and the defendant of which I have read.

7. The defendants submit that insofar as they owe a duty of care to the plaintiff it does not extend to the conduct of third parties such as Mr. C and that Mr. C's assault and the injuries sustained by the plaintiff were not reasonably foreseeable and certainly not reasonable probable and in the absence of any *special relationship* between the defendants and Mr. C the imposition of responsibility on the defendants for the criminal actions of Mr. C cannot be justified.

8. The defendants admit that they owe the plaintiff a duty of care while in the Centra premises and this duty is owed not just to the plaintiff but to all customers and the defendants assert that their duty was "*to take reasonable care to ensure the safety of such customers by employing security staff, floor staff, operating systems of queuing as they did and expelling customers and refusing re-entry were that appeared recently necessary*". They submit that the duty did not extend to policing outside their premises on Washington Street and in particular they submit had they left their post to police any matter outside the ambit of their role they would have been guilty of dereliction of their duty to remaining customers. The defendants submit that the plaintiff was ejected from the premises in order to avoid a confrontation inside the premises which if it had escalated would have affected a large number of customers and that it was not reasonably foreseeable that Mr. O'C or the OM sisters would follow the plaintiff outside or that the security guard's decision to decline the plaintiff's permission to re-enter would result in Mr. C punching the plaintiff as he did. It is submitted that in order for the defendants to have a liability for the actions of third parties that they must be "*a special relationship*" as referred by Hogan J. in E*nnis v. Heath Service Executive and Jarlaith Egan* [2014] IEHC 440 and that no such *special relationship* existed between the defendants and Mr. C.

9. The plaintiff in their submissions rely upon the *ex tempore* ruling of this Court on the application of the defendants for a Direction on Day 7. That determination by the court does not satisfactorily deal with the issue of duty of care. The defendants' Direction application was on the principal of *novus actus interveniens* and, for that purpose, counsel on behalf of the defendant conceded that it was open to the court to find (a) that the defendants owe a duty of care to the plaintiff, (b) that that duty does not cease at the door of the supermarket, (c) that the defendants breached or may have breached that duty in allowing the three pursuers to follow the plaintiff without any ramifications and also possibly in the manner of their eviction of the plaintiff in the first place by not advising the security guard of the facts and by failing to allow the plaintiff back into the store and pushing the plaintiff out into the open air. In the aforementioned ruling the court stated that the defendants "*had a duty knowing the plaintiff who they had excluded from their premises and who they had allowed to be pursued by three pursuers would be offered safety by the security official and could easily have been re-admitted as though he was pursued by Mr. O'C he had escaped from his clutches and the security guard of which he could have admitted the plaintiff and stopped Mr. O'C and let (the plaintiff) back in. And also they had a duty not to push the plaintiff back towards his assailant …"* the plaintiff's rely upon that determination.

10. Given that the determination was limited to the issue of *novus actus interveniens*, in the circumstances when, for the purposes of the direction application, counsel for the defendant conceded that a duty of care existed beyond the door of the shop, my decision is not determinative of the issue now raised by the defendants, after all the evidence has been heard as to whether they owed a duty of care to the plaintiff.

11. Prior to the decision of *Glencar Exploration Plc. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 a plaintiff seeking to establish the existence of a duty of care had to satisfy two tests. That there was a sufficient proximity of relationship between the parties to warrant the imposition of a *prima facie* duty of care and that there were no policy reasons for not imposing such a duty. After *Donoghue v. Stevenson* [1932] A.C. 562 courts in England and in Ireland utilised the Biblical simplicity of the Neighbour Principle of Lord Atkins to establish whether a duty of care exists.

12. *Anns v. Merton London Borough Council* [1978] A.C. 728, referred to this test to be: is there a "*sufficient relationship or proximity or neighbourhood such that in a reasonable contemplation of the former carelessness on his part may be likely to cause damage to the later, in which case a prima facie duty of care arises…*" and as the learned authors in *McMahon & Binchy* (4th Ed.) at para. 6.13 state:-

> "*Proximity does not require closeness in either space or time. Liability in negligence may attach to conduct that results in injury or damage thousands of miles away in decades later to a plaintiff not born at the time when the conduct was contemplated…"*

13. The language of *Anns* was adopted by McCarthy J. in the Supreme Court in Ward v. McMaster [1988] I.R. 337. Though in *Glencar*, Keane C.J. was of the view that "*by no means clear"* that *Ward v. McMaster* had involved unqualified endorsement of the *Anns* two step test and Keane C.J. stated the test for the existence of a duty of care involves four rather than two steps as follows:-

> "*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…*" (Emphasis added)

14. The somewhat academic discussion as to whether the authorities after *Glencar* (above) introduced a three step rather than a four step analysis need not concern us here.

15. In the vast majority of cases, it is not, of course, necessary to analyse the principles in *Glencar* to establish a duty of care. Road users clearly owe duties of care to other road users, employers to employees, local authorities to persons injured to defective repairs or of the highway. But in this case, as the existence or nature of the duty of care is in issue, reference must be made to the duty of care as clarified by *Glencar* and subsequent cases.

16. The defendants submit that they owe no duty of care in respect of the actions of Mr. C. Whether Mr. C's actions represent a *novus actus interveniens* will be considered later but at this stage, the issue is whether the defendants owed a duty of care to the plaintiff in respect of their actions or inactions. It is important not to confuse or to overlap the issue of the existence of a duty of care and the issue of *novus actus interveniens*. The issue of *novus actus interveniens* only arises if a duty of care is found and there is breach of it.

17. The defendants did not punch the plaintiff or knock him on the ground that is clear and the defendants accept that they were

under a duty to take "*reasonable care to ensure the safety of their customers…or (by) operating systems of queuing…and (by) expelling customers and refusing re-entry where that appeared reasonably necessary".* It is the action of the defendants rather than of Mr. O'C or the OM sisters or Mr. C that are relevant in relation to the existence of the duty of care. Mr. O'C, the OM sisters and Mr. C are not agents of the defendants whether the defendants are liable for what Mr. C did will be considered under *novus actus interveniens*.

18. The plaintiff to whom the defendants owed a duty of care on the premises was ejected, reasonably peacefully, though with some protest, from their premises. The defendants were entitled to do this. The first security guard, Mr. F, says, and I accept this to be the case, that he advised Mr. O'C and the OM sisters that they should not follow the plaintiff and this, I accept, was part of the defendants' duty of care. Having done so, however, Mr. F did not advise Mr. P, that the plaintiff was the innocent party in the affray. Mr. P knowing that Mr. F was a highly trained security guard, naturally assumed that the plaintiff was the guilty party. Mr. F did not advise Mr. P that the three persons immediately following the plaintiff out of the premises were those who had been involved in an altercation and indeed, an assault on the plaintiff which was the reason that the parties were separated. Not knowing that the three pursing persons were those who had assaulted the plaintiff, Mr. P had no reason to notice what was apparent to independent persons that immediately he left the shop, the plaintiff was being assailed by the pursing threesome, was offering no resistance but shielding his head from their blows. Similarly, Mr. P had no reason to notice, and did not notice that the plaintiff had broke free from his assailants and was running to the shop door for safety. When he saw the plaintiff, attempting to re-enter the premises, Mr. P did not know that he had been assaulted both inside and outside the premises and was attempting reasonably to flee from his assailant.

19. As Mr. P very fairly said in his evidence had he known these things, he would not have prevented the plaintiff from being readmitted into the premises, would not have put his hands up or pushed the plaintiff away causing the plaintiff to move or fall backwards over Ms. H and would rather have let the plaintiff in and denied admission to Mr. O'C. It is clear that if the issue is confined to the neighbour principle then in the words of the good neighbour Mr. P, the plaintiff would have been readmitted and his injuries would not have occurred.

20. The issue here to be discussed is whether a duty of care in the light of *Glencar* was owed by the defendants after they had evicted him from their premises. I fully accept the submission by the defendants that they were not to know and indeed were completely ignorant of Mr. C's propensities or indeed of his presence. However, to introduce Mr. C into the discussion at the moment is again to fall into the trap of conflating the issues of *novus actus interveniens* with that of a duty of care.

21. In *Lyons v. Elm River Limited* (Unreported, High Court, Barr J., 16th February, 1996), the High Court on appeal from the Circuit Court imposed liability upon the operators of a disco in respect of assault from the plaintiff. I do not accept that this liability was on the basis of any "*special relationship*" as submitted by the defendants, rather the defendants were aware of the menace of the perpetrators towards the class of person like the plaintiff and they gave no warnings to the plaintiff before he left the premises though they were aware of other assaults.

22. However, insofar as a "*special relationship*" between a plaintiff and a defendant, rather than between the defendant and the perpetrator, is required, the plaintiff in this case was in a "*special relationship*" with the defendant. The plaintiff is not a stranger unconnected with the defendants' premises who was assaulted out on the Grand Parade. The plaintiff was a customer in the defendant's premises. The defendants admit that they owe a duty of care to him and to other customers. In this case, I find the defendants' duty of care did not stop at the door of their premises. The defendants were entitled to eject the plaintiff though he was entirely innocent in order to avoid confrontation with Mr. O'C and the O'M sisters. This is part of the duty of care they owed to their customers or visitors. Mr. F says that he advised the O'M sisters and Mr. O'C to remain in the store and I accept that that also was part of the defendants' duty of care. Being aware of the dangers posed by a continuation of the row, Mr. F ought to have noticed the three following the plaintiff and ought to have advised Mr. P of the situation. This, at the very least, would have led Mr. P, if he himself could not have persuaded the pursuers to remain in the store, to keep what was going on outside the store under observation and rather than pushing the plaintiff back as I find to be the case or blocking his re-admittance as he himself contends, he would have allowed the plaintiff back into the safety of the store. The neighbour question has been answered by Mr. P when he fairly said that had he known the circumstances he would, indeed, have not had denied the plaintiff access to the store. A property owner or its security staff, duly entitled, may lawfully evict a customer from their premises, but that eviction cannot involve the person, in effect, being thrown to the wolves, with the property owner having no concerns of legal liability for anything that occurred once the eviction had taken place.

23. Following the decision of *Glencar*, I hold that injury to the plaintiff, though not necessarily the indexed injury, was reasonably foreseeable as when the plaintiff was denied readmission, the defendants ought to have been aware that he was likely to have been assaulted and injured. The proximity test has been met. I also hold that in all the circumstances it is just and reasonable that the law should impose a duty of care upon the defendants and indeed that there are no public policy considerations to prevent it.

24. It is just and reasonable to impose a duty of care upon the defendant as otherwise security guards could eject customers involved in a minor row and thereby subjecting their former customers to risk of more serious injury outside their premises. If a defendant were entitled, in effect, to wash their hands under a supposed rule of law that no duty of care extends beyond their hall door, such a rule would not merely legitimise walking by on the other side of the road but also legitimise pushing a traveller out into the arms of brigands.

25. The duty of care is not to act as a policeman, it is not necessarily to intervene if persons unconnected and, therefore, without any "*special relationship*" with the defendants' premises are in danger (though I am not deciding that point) but rather where somebody who has been, in effect, placed in danger by the actions of the defendants is attempting to avoid that danger and such danger can readily be avoided by the readmission of the party into safety then it is not only just and reasonable that the law should impose a duty but public policy considerations cry out for such duty to be imposed.

26. Having decided to eject the plaintiff, Mr. F ought to have informed Mr. P that the plaintiff was, in fact, the innocent party. He did not do so. Having advised the three persons that they should not leave the premises Mr. F ought to have noticed that rather than accepting his advice, they were in hot pursuit of the plaintiff, he did not take any such notice. Furthermore, having seen the three in pursuit of the plaintiff, Mr. F should have notified Mr. P of this fact. He did not do this. Had Mr. P been aware of the facts, he would have kept the parties under observation and when he saw the plaintiff being assailed by his pursuers in attempting to return, he would have admitted him rather than forcibly excluding him. Unfortunately, this did not occur. The defendant accordingly did owe a duty of care to the plaintiff and were in breach thereof.

Novus Actus Interveniens

27. The determination made at the close of the plaintiff's case on the application for direction by the defendant in relation to *novus actus interveniens* is not necessarily determinative of the issues and I must revisit the issue *de novo* in the light of all the evidence

heard.

28. The defendants submit that the causal link between any actions of the defendant and the plaintiff's injury was broken by the actions of Mr. C, a unconnected third party severely and criminally striking the plaintiff and being the sole cause of his injuries. The defendants submit that any action or inaction on their part was a causa sine qua non but not the *causa causans*. The defendants rely upon the passage of Charlesworth and Percy on *Negligence* (13th Ed.) at para. 6-77:-

> *"Generally where a claimant's damage has resulted from the act of another person independent of the defendant, the mere fact that the defendant's breach of duty has given, as it were, the third party the opportunity to intervene does not suffice to make the defendant responsible for the consequence of the intervention. Rather these consequents must be within the scope of the risk created by the defendant's conduct."*

29. The defendants also cite the passage from the learned authors of McMahon and Binchy (4th Ed.) para. 2.49:-

> *"In examining the circumstances when the intervening act would have the effect of relieving the original perpetrator, two factors feature in the judge's approach: first, whether, and to what extent the intervening act was foreseeable by the original actor, and second, what was the mental attitude of the subsequent intervener – was he careless, negligent, grossly negligent, reckless or did he intend to do the damage?"*

30. The Supreme Court in *Breslin v. Corcoran* [2003] 2 I.R. 203; stated per Fennelly J., in relation to *novus actus interveniens*:-

> *"From all these cases, I draw 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."*

31. The defendants, in effect, submit that there is an unbridgeable chasm between their actions or inactions and the act of Mr. C. The defendants concede that the situation might be different if the injuries sustained was inflicted by the OM sisters or Mr. O'C. The defendants also conceded that had Ms. H, who the plaintiff knocked down, jumped up and injured the plaintiff by an assault that there might be a connection with their actions but contend that the action of Mr. C is independent of any act or inaction of the defendants.

32. The learned authors of McMahon and Binchy summarised the law in relation to *novus actus interveniens* at para. 2.79 as follows:-

> *"From the case law we may state the following propositions with some degree of confidence:-*
>
> *(i) If the third party's act is wholly unforeseeable then the original defendant will not be liable.*
>
> *(ii) If the third party's act is intended by the original wrongdoer, or is as good as programmed by him, or if it is an inevitable response to the defendant's act, or is very likely, then the original defendant is still considered the operative cause in law. The third party's intervention in these circumstances is not a novus actus which would break the chain of causation between the plaintiff's damages and the defendant's conduct. This is more obviously true when the intervening event is not a voluntary act at all: where A pushes B against C.*
>
> *(iii) If the third party's action is foreseeable (though not probable or likely) then the courts will look especially closely at the nature of the intervener's act in addressing this problem. If the intervener's act is criminal or reckless in the subjective sense, then it is likely to be considered as a novus actus. Similarly, if the third party's act is intentional in Lambe [Lambe v. Camdon LBC [1981] Q.B. 625] Watkins L.J. described the squatter's acts as 'unreasonable conduct of an outrageous kind' when he held that the defendant wrongdoer could not be responsible for it. In Perl [Perl (Exporters) Limited v. Camdon LBC (1983) 3 WLR 769], the act of thieves interposed between the defendant's conduct and the plaintiff's injury meant that the defendant was not liable. If the intervener's act, however, is merely careless, negligence or perhaps even grossly negligent it may not be considered sufficiently strong to break the chain of causation between the original defendant and the plaintiff's injury, although much will depend on the facts of the case in Crowley v. AIB [and O'Flynn & Ors [1988] ILRM 225]. We have seen that a negligent omission by the defendant bank was deemed sufficient to break the chain and relieve the third party architects.*
>
> *(iv) The defendant (i.e. the original wrongdoer) will not be relieved of responsible if the act or damage caused by a third party is 'the very kind of thing which the defendant was bound to expect and guard against the resulting damage was likely to happen if he did not'."*

33. I agree with the above summary which also was quoted with approval by Kearns J. in *Hayes v. Minister for Finance* [2007] 3 I.R. 190 at p. 206.

34. It is undoubtedly the case that the action of Mr. C was a criminal assault upon the plaintiff either deliberate or presumably in this case reckless. Had the plaintiff been injured by an assault from the O'M sisters or from Mr. O'C that would also have been a criminal and a reckless act. Had the plaintiff been assaulted by Ms. H whom he knocked down, that would also have been a criminal act. In order to establish whether the acts of Mr. C are, in effect, divided from the defendants' actions by a "*unbridgeable chasm*" which any actions of the O'M sisters, Mr. O'C or, indeed, Ms. H might not be, one has to look at the sequence of events.

35. In an image taken from camera 7 at 02:25:35, the plaintiff is to be seen with Mr. O'C behind him stooping and being pushed downwards with Ms. H invisible in front of him. Shielding Ms. H from view is the rear of Mr. C. In an image timed at the next second 02:25:36, the plaintiff's head has all but disappeared downwards, Mr. O'C is to be seen behind him and Mr. C is seen standing apparently unmoving. In the next image timed at the same second (02:25:36), Mr. C's right hand fist is seen swinging backwards in preparation for the blow. As I concluded at the application for direction, there is no unbridgeable chasm between the actions of Mr. C and what preceded it. It was an instant reckless response to seeing his girlfriend, Ms. H being knocked to the ground by the plaintiff that caused the blow. I hold that though criminal, Mr. C's action was reasonably foreseeable to anyone asking whether the boyfriend of an innocent person knocked to the ground would violently react against who he perceived to be her assailant. It is the action of an incident. Though the precise nature of the vicious assault was not foreseeable, I hold that under subpara. (2) of the summary of the law as contained in McMahon and Binchy (above) that a response to the plaintiff being pushed over and knocking down Ms. H was

"*very likely*". I also hold that the act or damage caused by Mr. C is, indeed as per Clause 4 (above) "*the very kind of thing which the defendant was bound to expect and guard against the resulting damage was likely to happen if he did not".*

36. Mr. C is not an agent of the defendant. The defendants are not vicariously liable for his actions but they are liable in Tort because in failing to readmit the plaintiff in the circumstances and in pushing him back towards the danger, they knew or ought to have known as a matter of virtual certainty that the plaintiff would suffer some assault and some harm. He had already been assaulted both inside their premises and outside by his pursuers. The act of Mr. C flows directly from the actions of the defendant. The defendants conceded that assuming they did have a duty of care to the plaintiff that they might be liable for any actions of Mr. O'C, the O'M sisters or possibly Ms. H, then it is entirely unrealistic and artificial to suggest that they are not liable for the actions of Mr. C.

37. In *Conole v. Red Bank Oyster Company & Anor* [1976] I.R. 191, the first named defendant's motor vessel capsized and a number of its passengers drowned. The vessel had been built by the third party and was unseaworthy when delivered to the defendants, a fact of which they were aware and it was held that "*direct and proximate cause of this accident was the decision of the defendants…to put to sea with passengers when they had a clear warning that the boat was unfit for the task. The defendants were the sole initiators of the cause of negligence…".* In that case and in other cases, there is a considerable time lapse between any negligence of the alleged *novus actus* and of the defendants in this case there is but a gap of two seconds. However, time is not the only factor to be considered though it is, in this case, very important.

38. In *Millington v. Traynor* (17th July, 2002) (Circuit Court Judge McMahon), the plaintiff who was an employee of the defendant challenged a thief who had entered the back of the house where she worked and stolen her handbag and the keys of her car, the thief jumped into the car, reversed it to make his getaway and in an effort to prevent his escape, the plaintiff threw herself on the bonnet and was injured. The employers were aware that the backdoor entrance from the car park to the public house represented a security risk and the method the employer devised to prevent unauthorised entry was inadequate. The anticipated risk of a thief entering the premises was a risk that actually materialised and, accordingly, a *novus actus* did not apply.

39. In this case, there is a far closer connection between the defendants' actions and that of Mr. C than between the defendants in *Millington* and the thief. The acts of burglary, car theft and reckless driving in *Millington* were all criminal. Though the consequences may not have been as severe as in this case, the acts were far more premeditated than any act of Mr. C. However, in *Millington*, as well as in this case, the key principle is as Fennelly J. stated in *Breslin v. Corcoran* [2003] 2 I.R. 203 that "*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*". This case is far removed from the defendants' breach of duty merely resulting in the third party having an "*opportunity to intervene*" as stated in the passage from Charlesworth cited at para. 27 above. This case is also entirely different from *Conole* (above at para. 36). In this case, there is a seamless rapid, almost instantaneous connection between the acts and inactions of the defendants which I have held to constitute a breach of duty and, what occurred to the plaintiff at the hands of Mr. C.

40. In order for liability to exist, the precise nature of the harm to the plaintiff does not have to be anticipated with particularity. What must, however, be clear is that when the plaintiff was denied re-entry to the premises and pushed back into the crowd, injury to him was "*the very kind of thing*" which the defendants were bound to expect and to guard against. In the circumstances, the defendants knew or ought to have known that the plaintiff was being exposed to, not alone a risk but the essential likelihood of, an assault which is precisely the type of harm that he actually suffered and that the defendant had a duty to prevent. There is nothing in the evidence adduced by the defendants that in the circumstances would lead me to change the finding on *novus actus interveniens*, I delivered *ex tempore* when the application for direction was made. In fact, the evidence, of the defendants especially that of Mr. P, if anything, strengthens the plaintiff's case.

41. The defendants' plea of *novus actus interveniens* must fail in this case.

Section 35(1)(i) of the Civil Liability Act 1961

42. The defendants contend that as the plaintiff has not joined Mr. C as a co-defendant that they are entitled to, in effect, a full defence and that, pursuant to the provisions of s. 35(1)(i) of the Civil Liability Act 1961, the plaintiff should be identified with the acts of Mr. C, not a party to these proceedings.

43. In his preface to the fourth edition of the Civil Liabilities Acts, Mr. Anthony Kerr quotes a judicial source as describing the Civil Liability Act 1961 as "*a catalogue of metaphysical conundra*". With reference to the entirety of the 1961 Act, such a criticism is, I suggest, unfair. The Act itself is a wondrous creation drafted by a renowned Legal Academic, piloted through by a reforming Minister and subject to detailed opposition scrutiny by a number of the leading members of the Round Hall at the time. However, were those remarks to be confined to s. 35 of the Act, it would be hard to argue the contrary.

44. As O'Donnell J. stated in *Hickey v. McGowan* [2017] 2 I.R. 196:-

> "*One of the main provisions of the 1961 Act was to allow the allocation of liability (and consequently damages) between defendants and indeed other concurrent wrongdoers responsible for the damage suffered by the plaintiff…"*

45. Under s. 11(1) of the 1961 Act "*two or more persons or concurrent wrongdoers where both or all are wrongdoers and are responsible to a third person (in this part called the injured person of a plaintiff) for the same damage…*".

46. Clearly, based upon my findings so far, the defendants and Mr. C are concurrent wrongdoers.

47. Section 35(1) states:-

> "*(1) For the purpose of determining contributory negligence—*
>
> *…*
>
> *(i) where the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has become barred by the Statute of Limitations or any other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer;."*

48. In this case, proceedings have been initiated against the named defendants only. A separate Plenary Summons dated 19th

October, 2017, has been issued by the plaintiff against the O'M sisters and Mr. O'C bearing number [2017 No. 9361 P.] and a separate Plenary Summons dated 19th September, 2017, has been issued against Mr. C bearing record number [2017 No. 8373 P.]. Each of these writs claim damages for assault and trespass to the person. The plaintiff in his reply to the defence offers to assign to the defendants the benefit of these Plenary Summonses.

49. The plaintiff submits that as the other concurrent wrongdoers, and in particular Mr. C, have not been joined in these proceedings given that the time limit for a personal injury action has passed that the plaintiff must be identified with all the negligence or fault of Mr. C and they contend Mr. C should be responsible for the entirety of the injury and, accordingly the plaintiff should be identified with all the fault of Mr. C and not be entitled to succeed.

50. The defendants submit that they had no obligation to join Mr. C as a third party especially on the basis that the plaintiff well knew of the existence of Mr. C and his involvement and submit that the proceedings for assault and trespass to the person do not defeat the provisions of s. 35 as they are not made in the same proceedings. The defendants also seek to distinguish between an action in assault against Mr. C and an action in negligence for personal injuries and submit that the actions for assault against Mr. C do not relate to the same damage at law.

51. The provisions of s. 35(1)(i) of the Civil Liability Act were always known to be a legal nuclear deterrent, the consequences of which were uncertain and left unspoken. It is to the credit of the good sense of the Round Hall over the years that s. 35(1)(i) has been kept in the arsenal as a deterrent for over 50 years and was not allowed to slip into the untrustworthy sphere of a judicial determination.

52. Indeed, the most recent edition of McMahon and Binchy 2013, there is no case cited referencing section 35(1)(i). However, the "*good sense*" of the Round Hall must have diminished in recent years as s. 35(1)(i) has been subject to judicial comment.

53. Some recent Supreme Court cases have referred to the subsection. O'Malley J. in *Roche v. Wymes* [2017] IESC 57 at para. 50 referred to the subsection stating:-

> *"…that if damage to a plaintiff is caused by concurrent wrongdoers, and the claim against one of them becomes statute-barred, the plaintiff shall be deemed responsible for the acts of that wrongdoer."*

54. A strict reading of s. 35(1) might utilise the fact that subsection is stated to be "*for the purposes of determining contributory negligence"* and seek to debate issues of injuria and damnum. However, the judgment of O'Donnell J. in *Hickey v. McGowan* (above), puts an end to any such "*metaphysical conundra*". As O'Donnell J. stated:-

> *"It seems to me that this section can be understood more readily and more naturally as merely a deeming provision which deems the liability of the statute barred defendant a form of contributory negligence which can then be pleaded against the plaintiff in reduction of the plaintiff's award. The purpose of a deeming provision is to give a meaning to something for a particular purpose which it would not otherwise have more generally. Breach of contract or an intentional tort is not normally contributory negligence if committed by the plaintiff, but when committed by a concurrent wrongdoer not sued and now protected by the Statute of Limitations, it is deemed to be so for the limited purposes of the identification provisions of the Civil Liability Act."*

55. O'Donnell J. in *Hickey* (above) did go on to indicate that there may be certain cases in which the strict effects of s. 35(1) might operate entirely too harshly and expressly held open the prospect of the section being further examined in detail. However, for the reasons outlined below, I have come to the conclusion that I need not depart from the ordinary meaning of the Act as summarised by O'Malley J. in *Roche* (above) and by O'Donnell J. in *Hickey* (above), i.e. if damage to a plaintiff is caused by a concurrent wrongdoer and the claim against one of them becomes statute barred, the plaintiff shall be deemed responsible for the acts of that wrongdoer.

56. I do not accept the submission by the plaintiff that as the Statute of Limitations must be pleaded and a party might decide not to rely upon the statute and indeed exclusions might arise even if reliance was made and that accordingly, the mere efflux of time is not sufficient as a judicial determination must be made that the action is statute before s. 35(1)(i) could be successfully invoked. It is clear that the subsection is only relevant where the concurrent wrongdoer has not been sued and therefore is not in a position to plead the limitation provisions. Accordingly, where s. 35(1)(i) is pleaded, a court must make a determination as if the un-joined concurrent wrongdoer was now joined and pleaded the Statute of Limitations. Clearly, the two year limitation period for a personal injury summons has expired. The plaintiff also clearly could not rely upon any date of knowledge provisions, and accordingly if the personal injury summons was the only pleading to be considered, s. 35(1)(i) would apply. The limitation period, however, for an action for trespass to the person or assault had not expired when the separate writs were issued.

57. Had the plaintiff sued Mr. C in these proceedings that would have included the case made against him for damages for assault and trespass for the person. An assault may, of course, be a negligent or intentional or reckless but given the plea in the criminal courts of guilty, a plaintiff would not rely upon mere negligence against Mr. C. I do not accept the submissions of the defendant that because Mr. C has been sued in assault rather than in negligence that he is not being regarded as a concurrent wrongdoer by the plaintiff or that the plea of the plaintiff's action in assault somehow is insufficient for the plaintiff as an answer to a plea of section 35(1)(i). It is true that the assault actions do not necessarily require proof of personal injuries but in an assault action brought arising out of this incident against Mr. C, it flies against reason to suggest that personal injuries would not be proved. The plaintiff does not, in my view, have to frame his case against Mr. C as a negligent personal injury action in order to prevent s. 35 operating. As O'Donnell J. made clear in *Hickey*, the liability of the concurrent wrongdoer might arise in acts other than those which constitute negligence or want of care:-

> *"…it would make little sense to read the identification provisions of s.35 as only having a practical effect in relation to those acts of a concurrent wrongdoer which constitute negligence or want of care."*

58. Whereas clearly, the plaintiff has decided in these proceedings to "*throw all the loss upon one defendan*t" and clearly he has done so for precisely the same reason as the defendants have chosen not to issue third party proceedings against Mr. C, such considerations are not relevant to my determination.

59. The plaintiff's case is not statute barred against Mr. C. The plaintiff has a live unbarred action for trespass to the person against Mr. C and the plaintiff has offered the benefit of any such action against Mr. C to the defendants in this case.

60. Had the plaintiff joined Mr. C as a co-defendant, absent any contributory negligence on the part of the plaintiff, the plaintiff would be entitled to a decree jointly and severally against the existing defendants and Mr. C. In such circumstances, the plaintiff

would undoubtedly enforce his judgment against these defendants. These defendants would presumably also after judgment seek to have an order of indemnity or contribution against Mr. C and it is likely that the large preponderance of the contribution would be ordered against Mr. C if these defendants were not given a complete indemnity. Given my finding that the defendants do not have a defence on the basis s. 35(1)(i), I do not have to determine the amount of the contribution or indemnity that would have been ordered against Mr. C or, therefore, the extent of any reduction in the plaintiff's damages had the s. 35(1)(i) defence succeeded.

61. Section 35(1)(i) ought not to be given any extra effect than the ordinary meaning of language and clearly as the plaintiff's claim against Mr. C for his injuries caused by the assault has not been barred, then the utilisation by the defendants of s. 35(1)(i) does not offer a defence.

62. Accordingly, the plaintiff is entitled to recover in full against these defendants, no submissions were offered that there should be any differentiation between the liability of the two defendants.

Quantum
63. There can be no doubt that the injuries sustained by the plaintiff were of the most serious kind. There is very little difference between the medical experts in this regard.

64. The plaintiff in this case is, as stated, a most pleasant young man born on 13th July, 1985 who is a psychiatric nurse into which profession he followed his father. He was employed by the HSE in North Lee Mental Health Services from 2008 up to the accident and was, at the time, with his fiancé, now his wife, studying a Higher Diploma in Acute and Enduring Mental Illness which was a necessary precursor for promotion to the grade of Clinical Nurse Manager 2 which he desired. The plaintiff married his fiancé in 2014 after the accident, and she is shortly expecting their first child.

65. The plaintiff was taken by ambulance to the nearby Mercy Hospital, Cork and at 5:30pm on the same day he was transferred to the Cork University Hospital. He was, in effect, unconscious and was intubated. His head injury was significant. He had a fracture in two places of the skull, bilateral multifocal intraparenchymal haemorrhage and haemorrhagic contusion of the left frontal lobe and both temporal lobes, both cerebral hemispheres and there was a volume of subarachnoid haemorrhage and a small volume of a left dural haematoma in the same place. He had a transverse fracture of his right temporal bone with blood filling the middle ear cavity. There was a no displaced right parietal fracture and his sinuses also contained blood. He was transferred to the Cork University Hospital in the afternoon of 31st and admitted under intensive care and was unconscious for many weeks and he was detained in hospital to assist his recovery until the end of November. The plaintiff commenced rehabilitation under Dr. Hanranhan and a multidisciplinary approach was adopted. The plaintiff was identified with having a brain injury affecting his cognition, an injury to his inner ear which affected his hearing and this is still affected and the brain injury was affecting his voice. He had problems with dysphasia and with reflux when he drank liquids. He underwent rehabilitation with speech and language, occupational physiotherapy under the supervision of Dr. Hanrahan.

66. An attempt was made to get the plaintiff back to work at the end of 2012. He was viewed by the occupational health doctor for the HSE who was persuaded that it would be in the plaintiff's best interest if he got back to some work. This he did under a most sympathetic employer. He returned to work initially under supervision and on a part time basis and gradually the part time became fuller, though the plaintiff did not return to the same work with the same responsibilities as he previously had. He previously worked on his own initiative but now he worked in groups and did not administer drugs. This is still the position.

67. After he was released from hospital, the plaintiff went to the care of his supportive parents in Middleton even though he had been previously living in an apartment in Cork.

68. The defendants' consultant neurosurgeon, Mr. George F. Kaar agrees that the plaintiff suffered a serious and significant brain injury. Of that, there can be no doubt.

69. The plaintiff's senior clinical neuropsychologist, Mr. Mark Mulrooney, states:-

> *"In reviewing this man's current profile there appears to be reasonable evidence of premorbid functioning at the upper end of average approaching the 75th percentile relative to his own age cohort. There is a marked and significant impairment which the examiner would identify as being moderate to severe in regard to reduction in overall cognition having regard to current intellectual functioning. There is even more marked impairment approaching real significance at two standard deviations in reviewing verbal memory and visual memory. These are most likely attention loaded deficits and at three years post accident are likely to continue. There is evidence of dedradion of executive functioning which was more apparent in language and behavioural manifestations including preservation of thought, rigid fixation behaviour and some deterioration in mood perception…"*

70. The plaintiff manages in relation to his memory impairment by keeping a system of notes to remind him to do various tasks and this works in a practical level.

71. Though the plaintiff has made great strides and has been congratulated by all the experts for this, as was stated in evidence, his brain cells will not regrow and he is going to be left with a permanent deficit. The real source of his improvement has been the plaintiff's ability to cope with his disability due to the therapies learnt at Headway and from his other medical and therapeutic assistance.

72. Happily, the plaintiff married in 2014 and though he indicates that his mood is not what it used to be and that he can be difficult at home, he is extremely grateful that his fiancé continued to support him and has married him and he is looking forward to the joys and burdens of fatherhood.

73. Notwithstanding the fact that he manages to work, and that he does so without complaint, I do not believe that he will regress back to his previous level of independence.

74. Before the accident, the plaintiff was studying with his fiancé for a higher qualification which, he hoped, allow for a promotion. Certainly promotion would not be reasonably possible without such extra qualifications. He was unable to continue with his advance qualifications are the accident due to memory problems and I do not believe as a matter of probability that he will be able to return to such fairly intense academic work.

75. Given his initial ambition to go on the course, the level of his commitment to his job, his enthusiasm to utilise all the coping strategies learnt in order to be able to maintain his present job and also the level of his family connections with the psychiatric

services, I believe that had it not been for the indexed event, the plaintiff, having qualified with his advanced diploma, would have gone on for promotion for Clinical Nurse Manager 2 and advance his career.

Damages
76. Damages must be assessed on the basis of (a) special damages to date, (b) loss of earnings to date, (c) loss of earnings into the future, and (d) general damages.

(a) Special damages to date

77. Past special damages have been agreed in the sum of €75,243.39 being made up of €40,000 for retrospective care provided for by his family and €17,100 in respect of loss of earnings to date.

(b) Future loss of earnings

78. I have been furnished with the actuaries' reports from the plaintiff's and the defendants' actuary. I believe that the plaintiff would have achieved promotion to Clinical Nurse Manager 2. The age of 35 given by the actuary for his promotion is reasonable and, therefore, the actuarial total of the plaintiff's future loss of earnings amounts to €235,808 to which sum should be added the sum of €97,696 for future pension and loss of future lump sum of €23,911, totalling together the sum of €357,415. I believe that this is a more realistic basis for assessing the plaintiff's loss than that compiled by the defendants' actuary, Mr. Byrne which concentrated on loss of premium payments but not factoring in the fact that the plaintiff will be promoted. Actuarial figures are, of course, to be seen as guides rather than rules and the figures do not allow for *Ready v. Bates* or other deductions. Given the fact that the plaintiff would be working in the secure employment of the HSE, any true *Ready v. Bates* reductions would be likely to be small. The figures from the plaintiff's actuary assumed that the promotion would have taken place at 35 years of age which is not unreasonable and in the circumstances, I will assess the total of their future loss of earnings in the sum of €325,000.

(c) General damages

79. I have previously expressed my concerns in relation to the second Book of Quantum and the method of its compliance. However, in this case the book is of no real significance as they do not refer to brain as opposed to generalised head injuries.

80. The brain injury is the plaintiff's main disability. From my findings above, the plaintiff though he has made a reasonable recovery is left with a permanent ongoing sequelae of a very serious nature.

81. The plaintiff is not in a position of someone with a catastrophic injury all of whose needs including transportation and holidays and accommodation are allocated for in special damages and accordingly, the "*cap*" on general damages is not relevant other than in general terms.

82. Each plaintiff must be examined as an individual to ascertain the sum of money reasonable to himself and the defendants to compensate him for the injury he has suffered. One does not commence such evaluations by comparisons and comparisons treated in that manner would almost always results in a downward spiral. One must look at the plaintiff's case in the round. It is true that the injuries sustained might not be described as "*catastrophic*", however, the plaintiff is clearly fully conscious of all he has suffered and all that he has lost and will continue to lose. The plaintiff has had a most significant and serious injury with permanent serious effects into the future. His enjoyment of life and career have all been adversely affected.

83. Being fair to both parties, I will assess general damages as follows:-

Pain and suffering to date €200,000

Pain and suffering into the future €150,000

Summary

Special damages to date €75,243.39

Future loss of earnings €325,000

General damages to date €200,000

General damages into the future €150,000

Total €750,243.39

84. Observing the total sum, I believe the same is fair and reasonable in all the circumstances and award same.