THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 105

Kelly J.
Peart J.
Irvine J.

No. 15COA/2014

Between

Teresa Ennis

Plaintiff/Respondent

and

The Child and Family Agency

Defendant/Appellant

And

Jarlath Egan

Defendant

Judgment of Mr. Justice Kelly delivered on the 18th day of May 2015

Introduction
1. In the small hours of the morning of Saturday the 1st October, 2005, three persons were unlawfully in No. 10 Percy Cottages, Magazine Road, Athlone, Co. Westmeath. They were (to use the nomenclature applied in the High Court) Mr. C, Mr. D and Ms. A. Entry to the premises was made by breaking a window at the back of the house. That was done by Mr. C and Mr. D.

2. At about 4.30 am on that day Mr. C and Mr. D went upstairs in No. 10, piled up mattresses in one room and set them alight. The fire that ensued caused major damage to No. 10 but also damaged the neighbouring house at No. 11.

3. The plaintiff is the owner of No. 11. She brought proceedings against the Health Service Executive (HSE) (to which the Child and Family Agency (CFA) is successor) and Jarlath Egan, (Mr. Egan). Mr Egan is the owner of No. 10 Percy Cottages. In the High Court, Hogan J., held that there was no basis on which a claim could be made out against Mr. Egan and, presumably, dismissed the case against him, although that fact is not recorded in the formal order made on the 23rd October, 2014 and perfected on the 3rd November, 2014. No appeal has been taken against that determination by the High Court.

4. The judge did however find in favour of the plaintiff against the CFA and awarded damages of €75,414 against it. It is against that order that this appeal is brought.

5. In order to understand how the CFA was found liable to the plaintiff in respect of the criminal wrongdoing of individuals who were not its servants or agents and over which it had no control, it is necessary to examine the position of Ms. A.

Ms. A.
6. Ms. A was born on the 13th August, 1987. She had the misfortune to be born into a very dysfunctional family and was placed in care at two years of age.

7. In August 1998, she was committed to the care of the HSE by order of the District Court.

8. In August 2004, Ms. A began to reside in a HSE residence, known as Shannon Cottage which was situated at 6 Percy Cottages. The HSE personnel dealing with her were conscious of the approach of her eighteenth birthday in August 2005. She herself was anxious to live independently and the HSE thought that the prospect of her being able to stay in rented premises close to Shannon Cottage a desirable one.

9. A number of detailed reports were prepared by Ms. A's guardian ad litem in the last year of her minority. Those reports set out her many difficulties and described the various occasions on which she had absconded from care, often in unsuitable male company.

10. In December 2004, her guardian ad litem prepared a report for the High Court expressing concern in respect of plans for independent living on the part of Ms. A upon attaining her majority. The guardian thought that such a plan was *"contra indicated by (Ms. A's) past history and will, I believe, lead to a personal crisis . . . it would be more likely that (Ms. A) would quickly revert to volatile substance abuse to manage her feelings of anxiety, any attempt to fast track independent living without her having received sustained therapeutic intervention and support will set her back".*

11. While those reservations were expressed by the guardian ad litem in December 2004, no such concerns were contained in the guardian's report of May 2005. So, it was decided to proceed with the endeavour to have Ms. A live independently. This was not done until she became an adult.

No. 10 Percy Cottages
12. In the early part of 2005, Mr. Egan purchased No. 10. It was not in good condition.

13. Mr. Egan was a university student and he spent much of the summer renovating the house in order to prepare it for letting. At the end of July 2005, the work was completed and he placed an advertisement in a local newspaper advertising the premises for letting.

14. One of the social workers attached to Shannon Cottage saw the advertisement for the letting of No. 10 and viewed the premises. She was of opinion that it would a suitable residence for Ms. A. She arranged with Mr. Egan that Ms. A would take a letting of the

premises.

15. The lease commenced on the 25th July, 2005. The monthly rent of €550 was to be paid by the HSE for the first two months and thereafter the costs were to be split between the HSE and Ms. A in the form of rent allowance. The lease arrangement was very informal and unwritten.

16. Ms. A attained her eighteenth year on the 13th August 2005. Shortly afterwards steps were taken to have her move into No. 10 on a phased basis. All of that was completed by the 2nd September, 2005.

Trouble

17. In the middle of September 2005, Mr. Egan received complaints from neighbours about loud noise emanating from No. 10. He telephoned the HSE personnel in No. 6 and asked them to see to it that Ms. A would turn down the music. Some days later he was requested by the HSE to fix a light bulb in No. 10. On that occasion he found the premises in an untidy condition and he went down to the HSE personnel in No. 6 and requested them to arrange for the property to be tidied.

18. At about the same time, Ms. C, the owner of No. 12 Percy Cottages complained to the gardaí and to the HSE about loud noise emanating from No. 10. She was visited by a representative of the HSE who told her that Ms. A would no longer be regarded as a suitable tenant in No. 10.

19. On the 24th September, 2005, there were reports of a break-in to No. 10. The HSE staff found the property "in a *complete* mess". In addition to items having been stolen the staff noted that *"every chair in the kitchen was broken, clothes were thrown everywhere, food was on walls and lipstick was used to write abuse and nicknames".*

20. The HSE social workers spoke to Ms. A about her behaviour, her choice of friends and her attitude to alcohol and drug misuse. The social workers cleaned up the premises and arranged for Ms. A and her sister (who was also in care) to help them in the process. That night the HSE staff received a call from Ms. A to say that she wanted to leave No. 10 and move to a new flat elsewhere in Athlone. She feared that the youth responsible for the break-in on the 24th September would return.

21. On the 29th September, in mid-morning, a social worker attached to the HSE went to No. 10 to encourage Ms. A to get up out of bed. She did so, but not until 2.30 pm. She was taken to Shannon Cottage for lunch. After lunch she returned to No. 10 in order to tidy up the premises along with HSE personnel.

22. That evening a meeting took place with the landlord Mr. Egan at about 6.00 pm. Ms. A was present at that meeting.

23. Mr. Egan outlined complaints that he had received from other neighbours and referred to the break-in and the property that was damaged or stolen. He expressed the view that it was best that Ms. A leave the premises. She was "cheeky" towards Mr. Egan when confronted with the damage done to his property.

24. Later Mr. Egan met two HSE social workers along with members of his family and the HSE personnel agreed that the condition of the property was unacceptable. They asked Mr. Egan to provide a bill in respect of the damage which had been done and agreed that Ms. A would leave the property immediately.

25. Meanwhile, Ms. A had been brought by staff to visit her sister at another HSE residence known as Retreat Lodge. Ms. A and a staff member returned that evening to No. 6 where she was provided with her dinner. A note taken on that occasion said that Ms. A *"was glad to be back in care and she felt that she was not ready or able to live alone".* However in the later evening Ms. A left No. 6 and was followed by staff. They tried to persuade her to return, but she refused. She was observed purchasing cans of lager from a shop. She finally returned to No. 6 and told staff she wanted to go out the following night with a named male. The staff explained to her that that person was a convicted rapist, but she paid no heed to their warnings and said that she thought he was "ok".

26. The following day, Friday the 30th September, 2005, Ms. A and HSE's social workers met with Mr. Egan in No. 10 to assess the damage to his property. At that time the tenancy was terminated and the key was returned to Mr. Egan. The HSE staff and Ms. A returned to Retreat Lodge.

27. It is clear from the evidence given by Mr. Egan that the property had been vacated by Ms. A on the evening of the 30th September following his meeting at about 6.45 pm. The keys had been returned to him and Ms. A was no longer legitimately entitled to be on his premises. The HSE staff who gave evidence agreed that the property was vacated on the 30th September. All of Ms. A's belongings were moved out of it and Ms. A was taken to Retreat Lodge.

28. Unfortunately, Ms. A left Retreat Lodge without permission in the company of her sister. The HSE staff telephoned her at 11.15 pm to warn her to return to the unit by midnight. She did not return. Rather, she telephoned at 12.50 am to request staff to come to collect her sister in the Battery Heights area of Athlone. She made it clear that she would not be home then and did not know what she would be doing later.

29. The HSE staff then went to the garda station at 1.30 am and accompanied two officers in a squad car to Battery Heights to look for both girls. Despite the garda search neither girl was found.

30. Another social worker later on travelled by taxi to collect Ms. A having made contact with her. She refused to get into the taxi and the social worker had no power to compel her to do so. Meanwhile Ms. A's sister arrived back in Retreat Lodge at around 4.30 am.

31. Athlone Fire Service recorded a telephone call at 5.01 am from Athlone garda station to say that No. 10 was on fire. The gardaí contacted Retreat Lodge at 5.50 am to inform the social workers that Ms. A had been detained by them as No. 10 was on fire and they believed that she had been involved in an incident. Ms. A was recorded as telling HSE staff that young men that she had been with had broken into No. 10 where they then had a party. She said that having smelt smoke she went upstairs and two bedrooms were on fire. She then escaped. There was blood on her clothes and she thought that the young men had been fighting and that the blood was from one of them.

32. On the following day, Saturday, the 1st October, 2005, Ms. A made a statement to the gardaí. She said that she had been drinking very heavily and had taken illegal substances. On walking back from Battery Heights towards Magazine Road, she met two young men, Mr. C and Mr. D. She maintained that the door to No. 10 was open and that Mr. C and Mr. D had been in there beforehand. A party went on inside and there was further drinking of lager. Eight persons were present for most of the party. By 4.30 am, her sister and three other youths had left the premises. Shortly afterwards Mr. C and Mr. D went upstairs and after a few minutes

there was a smell of smoke. Two upstairs rooms were on fire and the house was then evacuated. She made it clear that she had no keys to No. 10 and had given them back to the HSE social worker on either Thursday the 29th or Friday the 30th September 2005.

33. Mr. D made a statement to the garda admitting that he and Mr. C set fire to mattresses in No. 10. Having set fire to the mattresses they remembered that Ms. A and another companion were downstairs. They banged on the window and the premises were then evacuated.

34. I have set out this factual material (all taken from the facts as found in the High Court) in some detail. I do so because these facts are crucial in any consideration of the legal position which obtains.

The legal position of Ms. A.
35. There is no dispute, but that upon the attainment of her majority, the HSE ceased to have the many powers and entitlements conferred on it in respect of minors under the provisions of the Childcare Act 1991. When Ms. A ceased to be a child and became an adult, the only relevant statutory provision that could be utilised by the HSE was s. 45 of that Act. Section 45 provides as follows:-

> *"(1)(a) Where a child leaves the care of a health board, the board may, in accordance with subs. (2), assist him for so long as the board is satisfied as to his need for assistance and subject to para. (b), he has not attained the age of 21 years.*
>
> *(b) Where a health board is assisting a person in accordance with subs. (2)(b), and that person attains the age of 21 years, the board may continue to provide such assistance until the completion of the course of education in which he is engaged.*
>
> *(2) A health board may assist a person under this section in one or more of the following ways –*
>
> > *(a) by causing him to be visited or assisted;*
> >
> > *(b) by arranging for the completion of his education and by contributing towards his maintenance while he is completing his education;*
> >
> > *(c) by placing him in a suitable trade, calling or business and paying such fee or sum as may be requisite for that purpose;*
> >
> > *(d) by arranging hostel or other forms of accommodation for him;*
> >
> > *(e) by co-operating with housing authorities in planning accommodation for children leaving care on reaching the age of 18 years."*

36. It was in reliance on these statutory provisions that the HSE had arranged the accommodation for Ms. A at No. 10 Percy Cottages. As is clear from the evidence that tenancy had come to end prior to the break-in which in turn led to the fire at No. 10.

37. Ms. A. was at the time of the incidents in question an adult. She was undoubtedly an adult with a great number of difficulties, but the HSE, in endeavouring to assist her, were confined to the provisions of s. 45. The HSE had no statutory power to detain or seek to detain her even if such a course might have been considered desirable.

Expert Testimony
38. The plaintiff adduced evidence from a Dr. Patrick Randall who was a forensic psychologist with a particular interest in individuals who have committed sexual offences and adolescents displaying challenging or harmful behaviour.

39. Dr. Randall neither saw nor treated Ms. A at any stage. Nonetheless, he believed he could diagnose her pattern of behaviour from a consideration of the documents which were discovered in this litigation. He took the view that she was an acutely vulnerable young woman whose placements had often broken down. She had failed to cooperate with various therapies, had engaged in substance misuse and in sexual promiscuity. She had frequently absconded from secure environments. He saw a pattern of self harm, threats, assaults and substance misuse on her part, which had given rise to a wish to engage in destructive activities. Her behaviour was indicative of internal turmoil and distress. Had he been called upon to advise on steps to be taken to deal with her, he would have devised a behavioural care programme. He would have advised the HSE to engage Ms. A in conversation and to return to a place of safety.

40. Three things are of note in the testimony of Dr. Randall. First, he had never seen or met Ms. A. His assessment of her was entirely based upon an examination of documentary material.

41. Second, in the course of his cross examination he admitted that he did not know the boundaries of what can and cannot be done by social workers in respect of a young adult who is at risk. The following extract from his testimony is instructive. Dr. Randall was giving evidence of what he considered was the correct procedure to adopt in the circumstances which obtained on the night of the 30th September, 2005, when Ms. A left Shannon Cottage.

> *"Q. Do you know the boundaries of what the social workers can and cannot do?*
>
> *A. I would talk to them about that and in some cases for example if I use a slightly different example where the young person was under aged, the social care worker followed that person because a person was at risk. Now granted the person was under age and I can see the distinction that counsel is drawing in that he is now dealing with an adult versus a person (sic). However, the person we are concerned with here might be of chronological age of an adult and have those rights, but the young person is nonetheless very difficult and it is likely that they are not going to be as regulated perhaps as counsel might be when counsel leaves the home, as I might be when I leave the home. It is reasonable to say well this is somebody that might need more support.*
>
> *Q. Dr. Randall I asked you, you have already said in your direct evidence that you do not know the boundaries of what can and cannot be done by social workers for a young adult who is at risk. You don't know?*
>
> *A. Indeed.*

Q. And if I put it to you that there are – that social workers are not entitled to follow and keep a young person at risk inside at all times, just follow them around the town, stand outside houses that they go into and stalk them in that way. Do you have any view on that?

A. Judge, what I would say is that one wouldn't stalk them at a distance. You would be attempting to engage them and you would offer them a choice. You would offer them a choice of, 'look either I follow you around because I am concerned about your safety or failing that you come with me to a place where you are safe, where you have safety'.

Q. If they say to you 'no, leave me alone, I do not want you to follow me and I do not want to return to this place of safety with you, please respect my civil liberties and leave me alone', do you know what you can and cannot do in these circumstances?

A. I don't judge, no.

Q. Alright. Then you said the next step is when they tell you to, I think I might not put it quite as politely as that, but the next step you say is that they should, this multi disciplinary team that is following this child around Athlone or young person around Athlone should request the assistance of the gardaí and inform them of the difficulties, do you know if that was done that night?

A. I believe it was judge.

Q. Because the gardaí were informed that there was a young person at risk. A Ms. Casey went to the garda station, asked for gardaí to come with her around Athlone to look for her and was out in the early hours of the morning trying to hunt her down, but what can the gardaí do? They can't do anything. I mean how can you make a complaint to the gardaí about an adult that I am out in town and I have alcohol and I may be at risk, how can you make that complaint. Gardaí will facilitate social workers, but how far can that go?

A. They do judge I suppose in the cases where you have people at risk, they do facilitate.

Q. But anyway in respect of the three steps that you provided, you accept fairly that they were all met, that the social workers did engage with her, did try to bring her back, and did try to persuade her. Did try to find her, did bring the gardaí on board. So if a psychologist was present you wouldn't quite criticise him for directing that level of engagement, 2, 3 o'clock, 4 o'clock in the morning still looking for her. Would you criticise that?

A. No, I wouldn't judge."

42. That extract from the cross examination fairly sets out the extraordinary efforts that were made (as adduced in evidence) by social workers throughout the night to deal with Ms. A. It also underscores the impotence of the HSE to deal with an adult, albeit a very troubled one. That is not a criticism of the HSE but rather an acknowledgment of just how little power, statutory or otherwise, it has when dealing with an adult rather than a minor.

43. The third point of note in the testimony of Dr. Randall concerns his view as to Ms. A's propensity to manifest her destructive behaviour particularly where property is involved. Despite her many years of damaging property and her propensity to do so, she had no record of fire setting or arson. This is of minor importance since the trial judge found that the fire was not started by her.

Efforts

44. A variety of witnesses from the HSE gave evidence of the quite extraordinary efforts that they made to try and provide support for Ms. A. They went to great lengths, particularly throughout the night and early morning of the 30th September/1st October 2005. The trial judge found that the individual HSE personnel used their very best efforts to protect Ms. A's welfare in extremely difficult and challenging circumstances. He said that their dedication to duty – which went far beyond the call of duty – was most impressive and was to be hugely commended and appropriately acknowledged. I entirely agree. Indeed it is clear from the extract from Dr. Randall's testimony that he could find no fault with them and that they did all that he would have expected. They also involved the gardaí who fully cooperated, but were likewise restricted in what they could do. In truth, there was very little that they could do. They are not be criticised for that.

The judge's conclusions

45. The judge held that the HSE owed the plaintiff a duty of care by reason of its special relationship with Ms. A.

46. He then said:-

> *"Although the individual social worker showed huge commitment and dedication to the welfare of Ms. A, viewed objectively, it was negligent to conclude that Ms. A. was suitable for independent living when she (sic) plainly unsuited to this."*

He went on:-

> *"Against this background it can be said it was entirely foreseeable that the property would be damaged once Ms. A was left to her own devices essentially unsupervised in the property. It was further just and reasonable and in line with established precedent that a duty of care should be imposed. It follows that the plaintiff is entitled to damages as against the HSE in respect of the loss and damage which she has suffered as a result of this fire."*

47. I must confess that I have considerable difficulty in understanding how, having regard to his findings of fact, the trial judge reached these conclusions.

48. In a few moments I will follow the course which he took through a wide range of authorities both in this country and abroad in order to provide legal support for his conclusions. But legal issues cannot be decided other than by reference to the facts and in this regard it seems to me that the following matters are of crucial importance.

49. No. 10 Percy Cottage was broken into. The break in took place after the tenancy with Mr. Egan had been terminated.

50. Ms. A was not responsible for the break in. It was Mr. C and Mr. D who were. Ms. A was likewise not responsible for starting the

fire in No. 10. It was Mr. C and Mr. D.

51. At no stage did the HSE have any responsibility for or control over Mr. C or Mr. D.

52. Insofar as the HSE had a relationship with Ms. A, it was one which altered radically when she attained her majority. Thereafter the HSE had no powers of detention or coercion over her.

53. Whatever may be said about the decision that Ms. A should live independently, such independent living in No. 10 had ceased by the time it was broken into and set on fire.

54. In any event I find it difficult to classify the decision on independent living as being made negligently. The HSE could not compel Ms. A to reside anywhere and it had no coercive powers over her. There was uncontradicted testimony that independent living was the only option available for Ms. A.

55. No finding of negligence was or could be made against the HSE personnel and their endeavours to save Ms. A from herself on the 30th September/1st October.

56. These matters have to be borne in mind at all times when considering the case law.

57. I will now turn to a consideration of the authorities which were considered by the trial judge and relied on to support his conclusions.

The authorities

58. The trial judge began his consideration of the legal issues with an unremarkable and quite correct statement that the general principle is 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 for special circumstances. He went on to say that it has also been judicially recognised that the actions of troublesome children and delinquent juveniles often present a special case.

59. He began his consideration by referring to the decision in the House of Lords in *Dorset Yacht Co. Limited v. Home Office* [1970] AC 1004.

60. In my view this decision has little, if any, relevance having regard to the facts of the present case. In *Dorset Yacht*, three young offenders were in the custody of three officers and were working on an island near Poole harbour in Dorset. In breach of their instructions, the prison officers went to bed at night leaving the offenders to do as they wished. Seven of them escaped and went aboard a yacht which was nearby. They launched it and it collided with the plaintiff's yacht which was moored in the vicinity. They then boarded the plaintiff's yacht and damaged it. In the course of his speech, Lord Reid said of the prison officers:-

> *"If they had obeyed their instructions they could and would have prevented these trainees from escaping. They would therefore be guilty of the disciplinary offences of contributing by carelessness or neglect to the escape of a prisoner and to the occurrence of loss, damage or injury to any person or property. All the escaping trainees had criminal records and five of them had a record of previous escapes from Borstal institution. The three officers knew or ought to have known that these trainees would probably try to escape during the night, would take some vessel to make good their escape and would probably cause damage to it or some other vessel."*

61. The Home Office was held vicariously liable for the negligence of the prison officers in failing to take appropriate steps to detain the persons in their custody. In the instant case, neither the HSE nor its personnel had any powers of detention over Ms. A. She was not in their custody. Insofar as they were entitled to do anything on the night and early morning in question, no criticism was made of them, even by the plaintiff's own expert. The HSE personnel went to extraordinary lengths to try and deal with Ms. A's behaviour. Furthermore, the damage in this case was caused by strangers to the HSE over whom it had no control whereas it was the escaped detainees who did so in *Dorset Yacht.*

62. The trial judge then proceeded to examine how the Dorset Yacht principles had been subsequently applied by the English courts in cases dealing with arson and vandalism often involving teenagers and young adults.

63. The first case he considered was *Vicar of Writtle v. Essex County Council* 77 LGR 656. In that case a twelve year old boy was brought before a juvenile court on a charge of entering a local school as a trespasser. The police asked that the boy be remanded as it was known that he had been responsible for several fires in the area. He was remanded into the care of a local authority for eight days and placed in a community home. The house parent in charge of the home was not informed of the boy's fire raising propensities by the social worker who had been present in court. While at the home, the boy, in the middle of the day, walked out and set fire to a nearby church. The church authorities brought an action for damages against the local authority alleging negligence, in that it had failed to exercise proper supervision over the boy by placing him in a home where no restrictions existed, failed to heed a warning that the boy might have fire raising propensities, and failed to take any steps to prevent him for damaging any neighbouring property.

64. The church authorities succeeded before Forbes J. who held that a relationship of neighbourhood existed between the parties sufficient to establish a duty of care on the local authority towards the plaintiffs since the authority's duty towards the boy under s. 24(2) of the Children and Young Person's Act 1969, was that of a parent and parental responsibility extended to a consideration of the consequences of failure to exercise parental control.

65. The judge held that in the circumstances of that case, the duty of care owed by the local authority was the ordinary duty of a reasonable parent to control his child; that the local authority had not acted reasonably, having regard to the degree of risk, in failing to give warning to the head of the community home who would, had he been made aware of the boy's fire raising propensities, have kept him under closer observation and adopted a course of supervision which would have prevented him from walking out of the home and would therefore have prevented the damage.

66. It is clear that that the *Vicar of Writtle* case on its facts is far from the present one.

67. First, the HSE were not operating under a statutory provision analogous to s. 24(2) of the Children and Young Person Act 1969, and had no parental responsibility for Ms. A. Second, no powers of detention could have been exercised in the present case. Third, whatever her failings, Ms. A had never demonstrated any fire setting tendencies and in any event from the judge's findings of fact was not the person responsible for setting fire to No. 10. Having regard to these facts it is difficult to see the relevance of the *Vicar of Writtle's* case.

68. The judge then went on to contrast that case with a number of subsequent cases decided in England. In all these cases the plaintiff failed.

69. The first of these was *P. Perl (Exporters) Limited v. Camden London Borough Council* [1984] QB 342. In that case the plaintiffs had leased basement premises from the defendants and used them to store garments. The defendants owned the adjoining premises. Those premises had a broken lock on the front door. Unauthorised persons were often seen on those premises and burglaries had often taken place there. The defendants did nothing about complaints regarding the lack of security. During a weekend, intruders entered the defendants premises, knocked a hole through the common wall in the basement and stole garments from the plaintiffs basement. The plaintiff brought an action against the defendants claiming damages for negligence and succeeded. The decision was reversed in the Court of Appeal.

70. In the course of his judgment Waller L.J. said:-

> *"But no case has been cited to us where a party has been held liable for the acts of a third party when there was no element of control over the third party. While I do not take the view that there can never be such a case I do take the view that the absence of control must make the court approach the suggestion that there is liability for a third party who was not under the control of the defendant with caution."*

71. I entirely agree with this statement. What control could the HSE have exercised over Ms. A in the present case? The answer is none. Still less had it control over the intruders who actually broke into and set fire to the premises. The HSE personnel went to enormous lengths to try and persuade Ms. A to return to Shannon Cottage on the night in question but knew nothing of Mr. C and Mr. D and had no control over them.

72. Later in his judgment Waller L.J. said that

> *"The foreseeability required to impose a liability for the acts of some independent third parties requires a very high degree of foreseeability."*

I cannot accept that what happened here was reasonably foreseeable so as to impose a liability on the HSE.

73. Hogan J. went on to consider the decision of the House of Lords in *Smith v Littlewoods Organisation Limited* [1987] 1 A.C. 241. That was an appeal from the first division of the Inner House of the Court of Session in Scotland. In 1976, the defendant purchased a cinema building with the intention of demolishing it and replacing it with a supermarket. After some work had been done in June of that year the cinema remained empty and unattended. The security of the building was from time to time breached and vandalism occurred. That vandalism included an attempt to set fire to the cinema. On the 5th July, 1976, a fire was deliberately started in the cinema by children or teenagers as a result of which it burned down and an adjacent café, billiard saloon and a nearby church belonging to the pursuers were seriously damaged.

74. The House of Lords rejected the claim that the defendant should be held liable in negligence. The Law Lords were of the view that there was nothing inherently dangerous in the abandoned building and the defendant had no advance knowledge of the potential fire.

75. In the course of his speech Lord Mackay of Clashfern cited with approval from Lord Radcliffe's dictum in *Bolton v. Stone* [1951] A.C. 850:-

> *". . . unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour, there has been no breach of legal duty."*

Lord Mackay said of this:-

> *"This is the fundamental principle and in my opinion various factors will be taken into account by the reasonable man in considering cases involving fire on the one hand and theft on the other but since this is the principle the precise weight to be given to these factors in any particular case will depend on the circumstances and rigid distinctions cannot be made between one type of hazard and another. I consider that much must depend on what the evidence shows is done by ordinary people in the circumstances to those in which the claim of breach of duty arises."*

I agree.

76. The trial judge then considered *Breslin v. Corcoran* [2003] 2 I.R. 203, where Fennelly J. observed that the plaintiffs in Smith had lost their case *"because there was no evidence that the defendants had knowledge of the fact that the vandalising trespassers in the disused cinema were in the habit of starting fires"*. Neither was there any such evidence in the present case.

77. The trial judge considered a series of Irish authorities involving the destruction of property and the causing of injury by the actions of third parties. They included *John C. Doherty Timber Limited v. Drogheda Harbour Commissioners* [1993] 1 I.R. 315, *Breslin v. Corcoran* [2003] 2 I.R. 203, and *Flanagan v. Houlihan* [2011] 3 I.R. 574. The common feature of all of these three cases is that in every instance the plaintiff failed. In the Doherty case a claim was made against the Harbour Commissioners in circumstances where it permitted consignees of shipments to Drogheda Port to unload and leave the goods on the harbour quayside. The quayside was unenclosed, no security was provided and the general public used the quayside as a form of thoroughfare. The plaintiff unloaded a cargo of timber and paid the harbour dues, but some days later the timber was set on fire by a group of children. Whilst Flood J. accepted that goods on the harbour quayside could be liable to damage by third parties, that fact was not sufficient to give rise to a duty of care. He held that the relationship between the plaintiff and the defendant was that the defendant gave *"a bare permission which carried no further obligations of care on the part of the defendants for the very simple reason that it would be virtually impossible to effectively implement. In my opinion, the inference to be drawn from the relationship of the parties is that each party knew that the goods were placed and retained on the quayside at the consignee's risk".*

78. In *Breslin*, the Supreme Court rejected a claim arising from the fact that the first defendant parked his car in a central Dublin street for a short period and carelessly left his keys in the ignition. A thief got into the car and drove it away at speed. The thief crashed into the plaintiff as he crossed the road. The Supreme Court took the view that the theft of the vehicle was foreseeable, but that it was not foreseeable that the car would be driven in a negligent manner by the thief. Fennelly J. said:-

> *"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."

79. Again in *Flanagan's* case, Feeney J. rejected the proposition that a publican owed a duty of care to road users in respect of the supply of alcohol to patrons who are thereafter likely to drive. He took the view that the imposition of a duty of care in those circumstances would be impractical and place an impossible burden on publicans. There was no effective means whereby such publicans could ascertain whether patrons would later drive while under the influence of intoxicants.

80. It is clear that the facts of this case are far removed from those in the cases just cited and considered by the trial judge. But they all stress the test of foreseeability which must be met before a legal liability can be found.

Glencar
81. Having traversed all the above mentioned authorities the trial judge then came to consider *Glencar Exploration plc v Mayo County Council (No 2.)* [2001] 1 I.R. 84, which is the governing authority in this jurisdiction.

82. The *Glencar* case was an appeal from a decision of my own to dismiss a claim for damages which was brought against Mayo County Council arising out of the imposition of a ban by it on gold mining on Croagh Patrick. That ban had been held to be *ultra vires* the Council. The ensuing claim for damages involved a consideration of whether the County Council owed the plaintiff a duty of care in the manner in which it had imposed the ban. I held that it did not and the Supreme Court upheld that decision.

83. A consideration of the decision in *Glencar* shows that a fourfold test is applicable in establishing legal liability.

84. The four matters that must be considered are: (i) reasonable foreseeability, (ii) proximity of relationship, (iii) countervailing public policy considerations, (iv) the justice and reasonableness of imposing a duty of care.

Reasonable foreseeability
85. Before a liability is established for injury or damage to property, such injury or damage must be reasonably foreseeable.

86. On the facts of this case as found by the trial judge I am unable to conclude that the damage here was reasonably foreseeable by the HSE.

87. Whilst it is probably correct to say that Ms. A was not a suitable person for independent living, the fact is that she was at all material times an adult and that the HSE had no coercive powers over her. In any event she was not independently living in No. 10 at the time of the fire. In addition the judge failed to take account of the uncontradicted testimony that independent living was the only available option for Ms. A. However, even if it can be said that the HSE were wrong in so concluding, how could it ever have been foreseeable that premises formerly occupied by Ms. A with the help of the HSE would be broken into and set on fire by third parties in whose company Ms. A was and that as a result damage would be caused to the neighbouring house?

88. I am reminded of the observations of Lord Griffiths in *Smith v. Littlewoods,* where he said:-

"A series of foreseeable possibilities were added one to another and, hey presto, there emerged at the end of it the probability of a fire against which Littlewoods should have guarded. But, my Lords that is not the common sense of this matter."

89. Neither is a finding of liability on the CFA the common sense conclusion that one would come to in the present case given the findings of fact made at trial.

90. Having failed the test of reasonable foreseeability it is not necessary to consider the other headings identified in *Glencar*. I will however make some general observations on the fourth of those namely, the justice and reasonableness of imposing a duty of care on the CFA in this case.

91. It would be neither fair or just or reasonable to visit a liability on the CFA on the facts of this case. To do so would be to make it liable for the criminal wrongdoing of persons over whom it had no control or indeed any dealings whatsoever. The court should be mindful that a too ready imposition of a duty of care on the CFA could have a stultifying effect on it in the discharge of its functions.

92. The court should be slow to add to the difficulties of social workers and CFA personnel in trying to deal with problem persons such as Ms. A by a too ready imposition of a liability towards third parties.

Conclusion
93. One cannot but have sympathy for the plight of the plaintiff but there was, in my view, no basis for finding a duty of care owed to her by the CFA and still less a breach of such alleged duty.

94. I believe the trial judge was in error in concluding as he did and I would allow this appeal.

Peart and Irvine JJ. agreed.