Neutral Citation Number: [2011] IEHC 105

THE HIGH COURT

2006 4199 P

BETWEEN

MARY FLANAGAN

PLAINTIFF

AND

MARY HOULIHAN

DEFENDANT

AND

CONCEPTA KELLY AND SEAMUS KELLY

THIRD PARTIES

Judgment of Mr. Justice Feeney delivered on the 4th day of March, 2011.

1. The background to the third party issue which is the subject matter of this judgment arises out of an appalling and fatal traffic accident which occurred on the 31st March, 2005. On that day Mary Flanagan was driving her car on the main Sligo to Bundoran road near Bunduff Bridge, Tullaghan, when she was involved in a collision with another motor vehicle. She was travelling in the direction of Bundoran and was accompanied by her daughter, Anne MacSorley. The collision took place at approximately 4pm on a straight stretch of road adjacent to a shop known as "All Cash Stores". The road at the point of impact was wide with each carriageway being over twelve feet, six inches in width and there was a hard shoulder on each side. The total road width was over 43 feet. Mary Flanagan's car collided with a car driven by the late John (also known as Jonnie) Connolly which was heading in the direction of Sligo. The cause of the collision was that John Connolly's car crossed on to the incorrect side of the road and collided with Mary Flanagan's oncoming car some four feet and eight inches over the centre line. The collision resulted in two fatalities, one being John Connolly, the driver of the car which crossed on to the incorrect side, the other being Anne MacSorley, who was a front seat passenger in her mother's car.

1.2 There is no dispute but that the accident was caused by the driving of the late John Connolly in that he drove on to the incorrect side of the road without warning and collided with an oncoming car. Not only were John Connolly and Anne MacSorley killed as a result of the accident but Mary Flanagan sustained serious personal injuries. She commenced a claim in relation to the personal injuries and damages that she sustained in the accident. Proceedings were brought against the nominated representative of John Connolly (deceased), namely, Mary Houlihan, the defendant. In March 2007 the defendant brought an application seeking to join Concepta Kelly and Seamus Kelly as third parties to the proceedings. An order joining them as third parties was made by this Court on the 5th March, 2007. The claim against the third parties was that they or their servants or agents were negligent and in breach of duty in serving alcohol to the late John Connolly prior to the collision and it was claimed that alcohol had been served to him in circumstances where the third parties knew or ought to have known that, following the consumption of the alcohol, John Connolly would drive a motor vehicle on the public roadway and would thereby constitute a danger to himself and other road users.

1.3 The defendant served a third party statement of claim wherein it was pleaded that it had been admitted on behalf of the defendant that there was negligence on the part of John Connolly (deceased) in and about the driving of his motor vehicle at the material time and it was further pleaded that that negligence was caused or contributed to by the deceased being under the influence of alcohol. The defendant also pleaded that the collision the subject matter of the proceedings and the personal injuries and loss arising therefrom as suffered by the plaintiff were caused or contributed to by the negligence and breach of duty on the part of the third parties. The third parties were identified as being at all material times the owners and occupiers of a public house known as the Diamond Bar, Tullaghan, County Leitrim. The defendant pleaded that the third parties or their servants or agents served and continued to serve alcohol to John Connolly immediately prior to him being involved in the collision and that they knew, as was his custom that he intended driving a motor vehicle having consumed alcohol. The particulars of negligence and breach of duty alleged against the third parties as set out in the third party statement of claim served by the defendant were that the third parties, one or both of them, their servants or agents, were negligent and in breach of duty in:

> (a) Selling and serving alcohol to John Connolly (deceased) when they knew or ought to have known that he intended driving a motor vehicle.
>
> (b) Serving an excessive quantity of alcohol to John Connolly (deceased) when they knew or ought to have known that he intended driving a motor vehicle.
>
> (c) Failing to take any or any adequate steps to prevent John Connolly (deceased) driving his motor vehicle when they knew or ought to have known that he was intoxicated.
>
> (d) Continuing to serve alcohol to John Connolly (deceased) when they knew or ought to have known that he had consumed an excessive quantity of alcohol and was unfit to drive.
>
> (e) The defendant reserves the right to adduce further particulars.

Relying on those particulars the defendant claimed an indemnity or in the alternative a contribution in respect of the plaintiff's claim and costs.

1.4 Particulars were raised by the solicitors on behalf of the third parties and in replies to particulars it was claimed that John Connolly (deceased) had consumed a minimum of five to six pints of Guinness shortly prior to driving his car and that he was observed driving on the incorrect side of the road. It was further stated that the collision the subject matter of the proceedings occurred on John

Connolly's incorrect side of the road. It was also claimed that a toxicology report following post mortem established that John Connolly had an ethanol reading of 242mg% which was claimed to equate to roughly an alcohol reading three times the statutory limit. It was also claimed that immediately prior to the collision John Connolly had been observed driving on the incorrect side of the road for a distance of some fifty yards and that the collision occurred on a straight stretch of road and on the deceased's incorrect side of the road. The defendant claimed that the third parties knew or ought to have known that the deceased always arrived and departed from the third parties' premises by car and it was claimed that the third parties or their servants or agents could have requested John Connolly not to drive, or threaten to report him to An Garda Síochána, or reported him to An Garda Síochána, or asked him for the keys of his vehicle.

1.5 The third parties delivered a defence to the third party statement of claim which claimed that the accident had been solely caused by the negligence of John Connolly and that the defendant was not entitled to any relief against the third parties. It was also denied that the defendant was entitled to an indemnity or contribution. The third parties gave particulars of negligence alleged against John Connolly (deceased) and included within the particulars a claim that he had consumed an excessive amount of alcohol and that he had driven his motor car when he knew that he had consumed a large amount of alcohol and had exposed himself to a risk of injury of which he knew or ought to have known. The third parties denied all the particulars pleaded by the defendant.

1.6 The issue heard by this Court was whether or not the third parties or either of them or their servants or agents should indemnify the defendant or alternatively contribute to the defendant in respect of the plaintiff's claim and costs. By agreement between the parties the Court was informed that the plaintiff's action against the defendant had been settled by the discharge of damages and costs without any deduction for contributory negligence and that the parties agreed that the issue for decision by the Court was whether or not on the facts of the case the defendant was entitled to an indemnity or a contribution.

2. A number of matters were effectively agreed or were established in evidence without dispute. Those matters included the following:

- John Connolly was an elderly man of 79 years of age at his death.

- The impact between the two vehicles was "a very heavy impact and both vehicles had momentum at the time of the collision".

- Prior to the collision on the road leading from the Diamond Bar to the place where the collision occurred, John Connolly's car was observed being driven in an erratic manner to the extent that it was crossing over on to the incorrect side of the road.

- John Connolly was entirely responsible for the collision and there was no contributory negligence on the part of Mary Flanagan.

- Prior to the accident John Connolly had been drinking in the third parties' licensed premises known as the Diamond Bar. The precise time that he left the premises and the quantity of alcohol he consumed was to some extent in issue and will be dealt with later in this judgment.

- There are two other public houses in Tullaghan and one was open on the day of the accident.

- During the period that John Connolly was in the Diamond Bar he purchased some five to six pints of Guinness and drank all of the Guinness except for approximately a half pint.

- The accident happened in or about 4pm in the afternoon.

- When John Connolly was involved in the accident he had an ethanol or alcohol level of 242mg% which was measured in a laboratory analysis of a blood sample taken as part of the post mortem process.

- The ethanol reading in the blood sample taken from the late John Connolly recorded a blood alcohol level which was approximately three times the statutory limit permitted under the Road Traffic Acts.

- John Connolly was negligent in driving his motor car and going on to the road having consumed an excessive amount of alcohol.

- The Diamond Bar is some one and a half to two miles from the scene of the accident.

- The scene of the accident is on the direct route from the Diamond Bar to John Connolly's home.

- The distance from the scene of the accident to John Connolly's home is a further two miles. The total distance from the Diamond Bar to John Connolly's home is approximately four miles.

- The Diamond Bar is a small local public house with a bar and a lounge area situated on the old Bundoran road.

- There is a parking area utilised by the public just across the road from the Diamond Bar.

- Seamus Kelly and Concepta Kelly are a married couple who own and operate the Diamond Bar.

- Concepta Kelly made a statement to An Garda Síochána on the 1st April, 2005, the day following the accident. Her husband, Seamus Kelly, made a statement on the 8th April, 2005.

- John Connolly was a regular customer of the Diamond Bar.

- John Connolly's usual means of transport to the Diamond Bar was to use his own motor car.

- It was his regular but not invariable practice to use his motor car to depart from the area where the Diamond Bar is located.

- On occasions John Connolly left his motor car adjacent to the Diamond Bar and returned home by other means.

• There are a number of taxis operating in the locality, particularly in the Bundoran area with a lesser number operating out of Kinlough.

• A list of the taxi drivers' names and their mobile telephone numbers was on display in the Diamond Bar.

• There were so few buses operating in the area that the capacity for John Connolly to use a bus was limited.

• On occasions John Connolly arranged to get a lift home from the Diamond Bar or took a taxi.

2.1 A number of matters were established to the satisfaction of the Court. This occurred as a result of the Court accepting the evidence given in respect of such matters as being credible and also ensued from evidence given to the Court which was not disputed in cross-examination and which was accepted by the Court. Those matters included the following:

• The evidence established that it was probable that the deceased, John Connolly, was at "a wake" some distance from his home on the night before the accident.

• On that night John Connolly left his car parked adjacent to the Diamond Bar.

• The Court accepts the evidence that John Connolly was not in the Diamond Bar on the day or night previous to the accident.

• In the light of the evidence which the Court heard concerning the habits and personality of John Connolly, the Court is satisfied that on the balance of probability the reason that John Connolly left his car parked adjacent to the Diamond Bar on the night before the accident was that he had consumed alcohol and had decided not to drive home.

• The Court accepts the evidence that John Connolly got a lift to the area of the Diamond Bar on the morning of the accident from a neighbour, Paul Rooney.

• Paul Rooney had on a number of previous occasions given John Connolly a lift to collect his car which had been parked outside the public house overnight.

• John Connolly was left in the area of the Diamond Bar shortly after 9.30am.

• The Diamond Bar did not open until 10.30am on the morning of the accident and John Connolly did not come into the premises until approximately 11.30am.

• Concepta Kelly was working in the Diamond Bar when John Connolly arrived and during the time that she remained in the bar she served him with four to five pints of Guinness.

• Concepta Kelly provided John Connolly with two bowls of soup and some sandwiches during the time that he was in the bar.

• At approximately 2pm or some short time thereafter Seamus Kelly took over from his wife who departed from the bar.

• At the time that Seamus Kelly took over from his wife, John Connolly was in the bar with one other customer. That customer was deceased by the date the Court heard evidence in this case.

• At the time Concepta Kelly handed over control of the bar to her husband she made no comment or observation concerning John Connolly.

• After Seamus Kelly took over in the bar John Connolly purchased one pint of Guinness.

• While John Connolly was drinking that pint of Guinness, Seamus Kelly left the public bar area where John Connolly was drinking and went upstairs in the premises to carry out some clerical work.

• When Seamus Kelly returned to the public bar after approximately five minutes, around 3.15pm., John Connolly had left the bar leaving approximately a half pint of Guinness in his glass. Neither Seamus Kelly nor Concepta Kelly were in the public bar when John Connolly decided to leave nor was any other bar person and the bar was effectively unattended at that time.

• The evidence establishes that it is probable that John Connolly drank four and a half to five and a half pints of Guinness in the Diamond Bar between 11.30am and 3.15pm on the day of the accident.

• Neither Concepta Kelly or Seamus Kelly noticed anything unusual about the condition of John Connolly and neither of them came to the conclusion that he had had too much to drink or was drunk.

• Both Seamus Kelly and Concepta Kelly were aware that it was the normal practice of John Connolly to drive to and from his home to their public house.

• On occasions when John Connolly had driven to the public house and he formed the opinion that he had drunk too much to drive home, he arranged for a taxi to be sent to the public house or to get a lift to his home. When he did that it was more common for him to use a taxi rather than get a lift.

• On a number of occasions John Connolly had left his car outside the public house and had gone home without driving his car.

• The evidence from Seamus Kelly and Concepta Kelly, which the Court accepts, is that John Connolly was a man who respected himself and that if he came to the view that he was not able to drive would leave his car behind and find an alternative way home.

• The evidence was that on the occasion when John Connolly decided not to drive, this decision had been taken by him

and there was no evidence that such decision was taken as a result of any request from the publican, his wife or any other member of staff.

• Seamus Kelly gave evidence that if a customer appeared to be unsteady on his feet or intoxicated he would advise that customer not to drive. Concepta Kelly gave evidence that she would not allow a customer to stagger out the door but would advise that customer to take a taxi.

• Both Seamus Kelly and Concepta Kelly gave evidence that they never had to advise John Connolly not to drive as he made his own decision in relation to that matter.

• The Court accepts the evidence of Seamus Kelly and Concepta Kelly that they dealt with John Connolly on the basis that he was the sort of customer who would decide of his own accord whether or not he was unfit to drive and, if he decided that he was unfit to drive, he would arrange a lift or have either the bar staff or a friend call for a taxi. The evidence established that John Connolly had left his car on a number of occasions but that it was not a frequent occurrence.

• The evidence established that John Connolly left the public house at 3.15pm or shortly thereafter and was not involved in the accident until approximately 4pm. As the scene of the accident was some five minutes by car away from the public house, the Court was left in the position that there was no evidence as to what John Connolly did for most of the period of approximately thirty to forty minutes immediately prior to the time of the accident.

• During the time that John Connolly was in the bar and was observed by both Concepta Kelly and Seamus Kelly, neither of them observed John Connolly to be in an intoxicated condition or to be drunk. The Court accepts that evidence.

• The expert evidence of Robert McQuillan, a consultant in emergency medicine, was that the blood alcohol level which was present in a sample of John Connolly's blood taken after his death of 242mgs% would approximate with the consumption of approximately nine pints of Guinness over a period of three hours.

• That estimation was an approximation which was dependent upon a number of circumstances and was based upon averages. Any equation between the blood alcohol level found in a person's blood and the amount of alcohol consumed would be affected by matters such as the size of the person consuming the alcohol, his food intake and whether or not there was any alcohol in his blood at the time that he commenced to drink. The calculation of nine pints of Guinness over a three hour period leadings to a 242mgs% blood alcohol level was based upon averages and upon the assumption that there was no alcohol present at the time that the first pint of Guinness was drunk.

• The evidence was that a blood alcohol level in excess of 80mgs% would be above the legal limit for the driving of a motor vehicle under the Road Traffic Acts.

• The expert evidence of Mr. McQuillan was that it is very difficult to ascertain blood alcohol levels from observation as there are so many variables.

• The Court accepts Mr. McQuillan's expert evidence that with a blood alcohol level of 200mgs% being present in a person it would be difficult not to detect that that person was drunk and that that person would "manifest significant intoxication". Such detection would require you to speak to or to observe such person.

• Mr. McQuillan's evidence that even for a person who was a regular consumer of alcohol with a blood alcohol level of 240mgs% it would be hard for that person not to significantly manifest intoxication.

• There is a potential conflict in evidence between the observations of Seamus and Concepta Kelly and the expert evidence of Mr. McQuillan. Based upon Mr. McQuillan's evidence on the amount of alcohol which was present in the blood sample taken from John Connolly after his death, he should have manifested the appearance of being intoxicated or drunk whilst the evidence of Seamus and Concepta Kelly is that they did not observe John Connolly to be drunk or intoxicated.

• A possible explanation for the failure of Seamus or Concepta Kelly to notice or observe that John Connolly was intoxicated is that there is evidence to suggest that he had consumed a considerable amount of alcohol on the previous evening and that therefore there could have been alcohol present in his blood from the previous evening or from the earlier consumption of alcohol between 9.30am and 11.30am, that is, the period of time up to his arrival in the Diamond Bar. There is also a period of some thirty to forty minutes from the time John Connolly left the Diamond Bar up to the time of the accident which is unexplained. The matter is further complicated by the fact that neither Seamus Kelly or Concepta Kelly were present when John Connolly left the public house and therefore were not in a position to observe him at that time. Notwithstanding Mr. McQuillan's expert evidence as to what would be likely to be observed of a person who had a blood alcohol level of 242mgs%, the Court is satisfied that Seamus Kelly and Concepta Kelly gave truthful evidence as to their observations. The evidence that they gave observed nothing untoward about John Connolly's condition during the time that he was in their public house is accepted by the Court as being accurate.

• The Court accepts the expert evidence to the Court given by Clive Kilgallen, a Consultant Pathologist in Sligo General Hospital, that a blood alcohol level identified in a blood sample taken at an autopsy on a day following death would give a reasonable representation of a sample that would have been taken in life and there would be no significant difference between the alcohol level present in the blood at the time of the accident and present in the sample taken at the post-mortem carried out on the following day.

• The evidence to the Court from Seamus Kelly and Concepta Kelly established that John Connolly was served five to six pints of Guinness over a period of approximately four hours and that he drank all but half a pint. That evidence was unchallenged and the Court accepts the evidence given on this point, not only because it was unchallenged and was set out in statements made by Seamus Kelly and Concepta Kelly in the days immediately following the accident, but also on the basis of the manner in which Seamus Kelly and Concepta Kelly gave their evidence.

• There is no evidence in relation to where John Connolly spent parts of the day leading up to the time of the accident. The relevant parts are the period 9.30am to 11.30am and the thirty to forty minute period from the time that he left the public house up to the time of the accident. Given the volume of alcohol in his blood at the time of the accident it is probable that John Connolly consumed more alcohol on the day of the accident than he consumed in the third parties'

public house.

• The Court also accepts the evidence of Jacqueline Gray who gave evidence to the effect that she had on a number of occasions drank in the Diamond Bar in the months prior to the accident and that she had never seen John Connolly to be intoxicated.

• The balance of the evidence satisfied the Court that John Connolly regularly drank a number of pints of Guinness but did not do so in such a manner as to appear to be intoxicated. The evidence also established that on a number of occasions John Connolly determined of his own violation that he had drunk too much to drive safely and left his car at the public house and returned home by alternative means. The Court also accepts the evidence of the third parties that at no time did they have to intervene to request John Connolly not to drive home as they had no occasion to make such request.

2.2 Based upon the above admitted facts and on the findings and conclusions which the Court has made from the evidence, as set out above, the Court must consider the claims made by the defendant against the third parties.

3. In these proceedings the defendant seeks to impose liability on the third parties as proprietors of a licensed premises. It is common case that there is no definitive decision in this jurisdiction which imposes an affirmative duty upon proprietors of licensed premises relying on facts and circumstances similar to this case. The parties have opened extensive case law from other jurisdictions concerning the approach that those jurisdictions have taken to the liability of the proprietors of licensed premises in respect of the intoxicated. Before considering the position in those jurisdictions it is necessary to identify, in brief, the statutory position in this jurisdiction in relation to the conduct and control of licensed premises. The Intoxicating Liquor Act 2003 amended and extended the existing Licensing Acts of 1833 to 2003. Part 2 of the Intoxicating Liquor Act 2003 deals with the conduct of licensed premises and s. 4 deals with drunken persons. A holder of a license commits an offence in supplying drunken persons with intoxicating liquor or supplying any person with intoxicating liquor for consumption by a drunken person. The legislation also prohibits a licensee from permitting drunkenness to take place in the licensed premises or in admitting any drunken person to the premises. Those offences are set out in s. 4 of the Intoxicating Liquor Act 2003 and a breach by the licensee is an offence under s. 4(2). Breaches of the terms of a licence by supplying drunken persons with intoxicating liquor or permitting drunken or disorderly conduct on the premises not only may constitute an offence resulting in fines but may in some instances result in an order for the temporary closure of the premises under s. 9 of the Intoxicating Liquor Act 2003. A licensee commits an offence in supplying "a drunken person" with intoxicating liquor. A drunken person is defined in s. 2 of the 2003 Act in the following terms, namely:

> "'drunken person' means a person who is intoxicated to such an extent as would give rise to a reasonable apprehension that the person might endanger himself or herself or any other person."

The legislation which has been enacted recognises that a licence is a privilege and places on licence holders the obligation to regulate the conduct of customers by ensuring that they will not be served alcohol if they are drunk and in ensuring that drunkenness does not take place in the licensed premises or that drunken persons are not admitted to the licensed premises. It also places an obligation on the license holder to ensure that he does not permit disorderly conduct to take place on the premises. The definition of a drunken person identifies such a person as being one who is intoxicated to such an extent as will give rise to a reasonable apprehension that the person might endanger himself or herself. Under the Road Traffic Acts there is a prohibition on persons driving a motor vehicle with a blood alcohol level in excess of a designated amount. The approach under the Road Traffic Act as to what would be commonly called a drunk driver is entirely different from what is identified as a drunken person under the Intoxicating Liquor Acts. A drunk driver is a person with alcohol in his blood above a designated level whether or not that person is a danger to himself or any other person. The definition of a drunken person in the Intoxicating Liquor Act 2003 identifies what must be established to prove that a person is a drunken person and those matters are not dependent upon any particular blood alcohol level but rather on the effect that alcohol has on the conduct and capacity of a person. In the light of the evidence which this Court heard from Mr. McQuillan there is no doubt but that a person who would be marginally in excess of the permitted blood alcohol level to drive a motor car would not be a person who would be within the definition of a drunken person under the Intoxicating Liquor Acts. For a person to be a drunken person under those Acts that person would have to be so intoxicated as to give rise to a reasonable apprehension that the person might endanger himself or any other person and that would mean that the conduct, appearance or behaviour of such a person would manifest a degree of intoxication that such apprehension was reasonable. It is important, therefore, in considering the facts of this case and the arguments made on behalf of the defendant, to acknowledge the differences between the legal definition of a drunk driver and a drunken person under the different legislation.

4. There is no doubt that alcohol impairs driving skills. Alcohol consumption is a voluntary act and is a human factor in many road accidents. Estimates have indicated that alcohol is a significant factor in almost one third of fatal road accidents. This has led to State intervention in a number of ways. This intervention has taken a number of forms including widespread public awareness campaigns to discourage motorists from driving after drinking alcohol. The State has also addressed the issue by the imposition of a more exacting approach to drink driving in the criminal law together with provisions providing enhanced powers relating to enforcement including mandatory alcohol testing. The Gardaí have been provided with the power to breathalyse any driver stopped at a mandatory alcohol checkpoint. The continued calls for a more stringent approach to drink driving with the resulting benefit in reducing alcohol related crash deaths and injuries resulted in the enactment of the Road Traffic Act 2010 (the Act of 2010) in July of that year. That Act lowered the drink driving limit from 80mg to 50mg as well as introducing a lower 20mg limit for learner and professional drivers. Those lower levels have yet to come into force but are provided for in the Act of 2010. The core of the approach to alcohol and driving has been based upon personal responsibility in the form of campaigns emphasising the responsibility of the driver parallel with more stringent provisions in the criminal law including the enactment of lower drink driving limits. That approach has sought to deter persons from drinking and driving and to place the personal responsibility on a driver.

4.1 Society's attitude to drink driving was considered in a recent judgment in the Supreme Court dealing with proceedings arising out of a road traffic accident and the issue as to how contributory negligence was to be assessed in relation to a person who elected to travel as a passenger in a motor vehicle when the driver had consumed alcohol. That case was Hussey v. Twomey & Ors. [2009] IESC 1 and in his judgment Kearns J. stated (at para. 23):

> "I think it fair to say that the society's understanding of the role of alcohol in driving cases had undergone radical change in the space of the last forty years. … (at 15). There has been undoubtedly an enormous sea change in society's attitude to drink driving since then, influenced no doubt by the extent of carnage on our roads and the effectiveness of multiple campaigns which inform the public of the hazards of driving whilst under the influence of even small quantities of alcohol. It is thus now commonplace, if not yet a universal practice, for groups of people on a night out to appoint one of the group as a designated driver who will drink no alcohol or alternatively to make arrangements whereby no member of the party will be driving under any circumstances. Thus, I think it can fairly be said that any measure of tolerance towards intoxicated drivers and their passengers, if indeed it formerly existed to any appreciable degree, is very much a thing of

the past." (para. 24)

Hussey v. Twomey illustrates society's change of attitude to drink driving. The change in attitude is to some extent testimony to the effectiveness of the multiple campaigns which inform the public of the hazards of driving whilst under the influence of even small quantities of alcohol. The approach adopted in this jurisdiction has been very much centred on the personal responsibility of the driver and to some extent on passengers' responsibility when they knowingly accept transport from a driver who they know to be intoxicated.

4.2 Central to the issue in this case and to the defendant's claim against the third parties is whether or not there is a duty of care on the third parties as suppliers of alcohol to protect a customer from risk resulting from self-induced intoxication and if there is such a duty that it is foreseeable that if breached the customer may cause harm to others when driving a motor vehicle. The defendant claims that the third parties were in breach of their duty of care towards a customer, namely, John Connolly and the public at large who were at risk of coming into contact with John Connolly after he left the third parties' pub in a state of intoxication. The defendant claims that the third parties were in breach of their duty of care towards John Connolly and the plaintiff on the day when the accident occurred by knowingly serving John Connolly an amount of alcohol in excess of the levels permitted by law while operating a mechanically propelled vehicle and knowing that John Connolly was likely to drive his car and in circumstances where it was foreseeable that members of the public who might be using the road might suffer injury as a result of John Connolly's driving. The third parties contend that there was no such duty of care and that for this Court to hold that there was such a duty would impose into the common law a new duty of care or cause of action where none has existed to date.

4.3 Within the last one hundred years the common law has developed the tort of negligence. The necessary elements to be present to establish the tort of negligence include; first, a duty of care; secondly, a failure to conform with the appropriate standard of care; thirdly, that loss or damage was caused to the plaintiff; and, fourthly, that there is a causal connection between the conduct complained of and the resulting loss and damage to the plaintiff. Notwithstanding the development of the tort of negligence and its increased scope, the common law continues to apply an individualistic position in relation to the question of affirmative duties. The courts have consistently recognised and enforced an approach that there is a difference between doing something and merely letting something happen. This is most clearly demonstrated by the approach adopted that there is no general duty to go to the assistance of another who is in danger. Whilst the courts have recognised that there is no general duty to act, it is also recognised that specific relationships may give rise to a particular affirmative duty. This has included consideration of whether or not there is a duty to protect incapacitated or intoxicated persons and their potential victims from injury.

4.4 The law of tort has evolved in such a manner that its evolution has been used as a device for identifying values, promoting safety and setting minimum standards of acceptable behaviour in society which has resulted in the law bringing about social change as well as being used as a means of delivering compensation. This has resulted in there being an intrinsic issue as to where the line is between individual and collective responsibility for injury and loss. That issue has been considered in many cases in different common law jurisdictions and has been applied by the manner in which the courts have addressed the existence and extent of a duty of care. It is clear from the authorities opened to the Court that different jurisdictions have adopted contrasting approaches and the common law has developed in divergent ways in relation to the so-called alcohol provider liability issue depending upon the history and culture in those countries. The decisions have also been guided by the statutory composition within each country.

4.5 The extensive and multinational authorities and legal commentaries opened to the Court have identified that different common law jurisdictions have adopted and continue to apply fundamentally different approaches to the legal question of whether there is a duty of care to protect intoxicated patrons and their potential victims from injury. I will return later to consideration of some of the individual authorities.

4.6 As indicated above, a defendant can be held liable in the tort of negligence if his or her negligent conduct results in reasonably foreseeable injury to the plaintiff. In considering the potential liability of publicans or alcohol providers, those persons could be held liable, under the law of tort, in respect of a customer who becomes intoxicated in one of two different ways. First, a publican could be held liable for harm caused to the intoxicated person and in that scenario the duty of care which would arise would be one of protection owed to the person who is intoxicated. Secondly, the publican could be held liable for the tortious behaviour of the intoxicated person and in that case the duty of care which would arise would be one owed to third parties. Any liability in the law of tort and duty arising thereby to protect the intoxicated customer and any liability and duty to protect third parties from that customer must be recognised as two entirely separate legal duties which are each governed by different legal rules and principles. The different approaches taken by different common law jurisdictions is illustrated by the approach taken by the Canadian courts as opposed to the approach adopted in the courts of the United Kingdom including Northern Ireland. An examination of the Canadian authorities demonstrates that the Canadian courts base their analysis of alcohol provider liability on the foreseeability of harm. A consideration of the approach of the courts in the United Kingdom demonstrate in relation to alcohol provider liability that the courts have approached that matter based upon the issue of duty of care and have consistently demonstrated a reluctance to impose alcohol server liability even in cases against commercial providers. The courts in the United Kingdom have approached consideration of the matter on the basis that adults are responsible for their own alcoholic consumption. The courts have followed an approach that for liability to arise the court must be able to identify an assumption of liability for the intoxicated customer. (See, for example, judgment of Carswell LCJ in *Joy v. Newell (t/a Copper Room)* [2000] NI 91 (CA (NI)).

4.7 In Canada the approach to alcohol provider liability has been, by and large, to impose tort liability on those who are in the business of selling and serving alcohol. That approach is embraced in the statutory law in the majority of the provinces and has led to a series of cases where alcohol providers or publicans have been held responsible for drunken customers. The liability of commercial hosts was established in Canada by the 1973 Supreme Court decision in *Jordan House v. Menow* [1974] S.C.R. 239. Even though the Supreme Court of Canada was divided in its analysis of the duty of care, the Canadian courts have consistently held thereafter that alcohol providers owe a broad duty of care.

5. In considering the common law approach to the issue of alcohol provider liability and the authorities opened to the Court, it is clear that there is a divergence in approach between that adopted in the USA and Canada, on the one hand, and in the United Kingdom and Australia, on the other hand. In considering the various judgments it is apparent that such divergence and the underlying approach and assumptions of the different national courts have a basis or foundation in the different countries' approach to alcohol and the cultural attitude to alcohol consumption. In the United States the eighteenth amendment to the Constitution resulted in nationwide prohibition being in force from 1920 until 1933. Even after prohibition was repealed, the majority of the individual States in the USA introduced and continue to maintain so-called dram shop laws. These laws hold retail establishments accountable by statute for any harm, death, injury or other damages caused by an intoxicated customer. The laws vary from state to state and some ten of the fifty States have no dram shop law. A number of the states where such laws are in force have liability limitations. In Canada prohibition was widespread in the 1920s even though the approach varied from province to province. It was not until 1930 that most of the provinces voted against prohibition even though Prince Edward Island remained a province where there was total prohibition

until 1948. In Canada even after the provinces voted against prohibition the Government continued to be significantly involved in relation to the sale and consumption of alcohol and adopted a paternalistic approach. A majority of the provinces have a higher legal drinking age than in the United Kingdom. In a number of the provinces the government maintain a monopoly over the retail sale of alcohol. In considering authorities from different common law jurisdictions, it is important to have regard to the legislative, regularity and cultural framework that exists in each country as there are significant differences.

5.1 The Court also has regard in considering the divergent approach to the central position of legislation regulating the sale and consumption of alcohol. In particular, this Court has regard to the warning contained in the judgment of Hardiman J. in the Supreme Court case of *O'Keeffe v. Hickey and Ors*. [2009] 2 I.R. 302. That was a case with dealt with the issue of the State's vicarious liability for the tortious acts of the defendants. In dealing with the role of the legislature, Hardiman J. stated (at 341, para. 123):

> "I have to say that I find some of the formulations, in the Canadian cases in particular, vague in the extreme and quite unhelpful. Asking 'whether it is just' to impose no fault liability is not a constructive or thought out approach, nor one likely to assist the discussion. It begs a huge number of questions. Imposing liability on an individual or entity on the basis of 'broader policy rationales' smacks, with great respect, of political or social engineering rather than the administration of commutative justice. And if the law is to change towards the notably vague Canadian formulation, that is so great a change from our present concepts of justice in this area that, in my view, it should be changed by legislation. I say this on the basis of the general separation of powers principles as outlined in my judgments in *Sinnott v. Minister for Education* [2001] 2 I.R. 545 and *T.D. v. Minister for Education* [2001] 4 I.R. 259, and out of respect for the legislature's exclusive power to make laws as expressed in Article 15.2 of the Constitution. This approach would also have the separate advantage of committing law reform in this area into the hands of those who will have to provide the wherewithal to fund the exceptionally generous regime of recovery which would be involved in following the Canadian model."

While that judgment dealt with a different subject matter than this case, it does illustrate the difficulty of applying the decisions of other common law countries' decisions where those decisions are to some not insignificant extent based upon broader policy rationales or cultural backgrounds or where such decisions are made within the context of long established statutory provisions.

6. In the USA the starting point for consideration of liability in tort is identified in various legal textbooks. The approach identified reflects the thinking that "human beings, drunk or sober are responsible for their own torts" (W. Page Keeton et. al., Prosser and Keeton on The Law of Torts, s. 53, note 27 (5th ed. supp 1988)). It would follow that under common law a plaintiff would generally not have an action arising out of injuries sustained to them as a result of their intoxicated state. This has resulted in two different approaches evolving. First, in the majority of States there are State laws where dram shop acts or civil damage acts have been enacted by state legislatures. Those laws impose civil liability upon sellers of alcohol for injuries caused to third parties by the intoxicated. The majority of the statutes do not allow an intoxicated patron to recover for his own injuries. Those statutes provide for strict liability and therefore the issue of negligence does not arise. The second way in which this matter has been dealt with in certain US states is by using a common law negligence theory premised on violation of statutory duties. This has resulted in a series of decisions which are based upon an analysis that if a state statute only provides criminal penalties for violation, the courts in some instances have been prepared to determine that such statute creates a specific duty of care. This means that a violation of the criminal statute operates to establish both duty and the breach of that duty in a common law civil negligence action. The approach taken within the individual states is far from consistent. In a number of states, contributory negligence or assumption of risk on the part of the injured plaintiff have barred an action, and, other states have barred actions by holding that it is the consumption of alcohol and not the dispensing of it which is the proximate cause of injuries inflicted upon others by an intoxicated person. As a general rule, there is no duty on a person to control the conduct of another to prevent harm to third parties unless there is a special relationship between the two. This approach is illustrated in the Kansas decision *McGee v. Chalfont* (806 p. 2d 980 [1991] (KAN)). In that case the court held that there was no duty owed to a third party by a person transporting an intoxicated person to his car. However, in the decision in a Colorado court the court held that liability was established where a tavern owner refused to serve an intoxicated patron but allowed his employee to jump start the patron's car as that constituted an affirmative act which gave the patron mobility which he otherwise would not have had (*Leppeke Seguara* 632 p. 2d 1057 [1981] (COLO)). Overall where decisions in the US have held alcohol providers liable they have done so either where there is an affirmative act for which the provider is responsible or where the state courts have relied on the statutory framework and imposed liability under common law negligence premised on violation of statutory duties. Where that approach has been adopted, such decisions are of little benefit to this Court in deciding how to apply the law in this jurisdiction. Absent reliance on violation of statutory duties, the authorities indicate that liability under common law in the US requires some form of affirmative act or assumption of liability.

6.1 The liability of an alcohol provider or a commercial host was established in Canada by the Supreme Court of Canada's decision in *Jordan House Ltd. v. Menow*. The facts of that case were that Menow was a regular patron of the defendant hotel and had been banned on a previous occasion due to his tendency to become drunk and abusive. The management permitted him to return and the entire hotel staff were instructed not to serve Menow unless he was accompanied by a responsible adult. Menow arrived in the hotel with fellow workers on the night in question and drank alone for some three hours. Eventually he was ejected by the hotel staff after he had become intoxicated and began to irritate other patrons. Whilst attempting to stagger home along the highway he was struck by a negligent driver and Menow sued both the driver and the hotel. The Supreme Court of Canada upheld both claims but was divided three/two in its analysis of duty of care. Laskin J. giving the leading judgment of the Court began with the words "This is a case of first instance". This meant that the Court was relying on first principles. Laskin J. determined that there was a duty of care on the defendant hotel and that duty arose from the facts of the case which established the hotel's special knowledge of the plaintiff, Menow, and he cautioned (at 250) that his decision did not impose using the words of the trial judge "a duty on every tavern owner to act as a watchdog for all patrons who enter his place of business and drink to excess". Laskin J. held that the hotel owners were liable in that they should have known given their knowledge of Menow that serving him the quantity of beer which he consumed might well result in him being incapable of taking care of himself when exposed to the hazards of traffic. That placed on the hotel owners a duty to take reasonable steps to ensure that the customer got home safely, for example by arranging safe transport for him, putting him up for the night in the hotel or calling the police. Ritchie J. in the same case in a one paragraph minority opinion (at 251) proposed a broader duty of care for commercial hosts. As a result of the commercial hosts' special knowledge of Menow's susceptibility to alcohol Ritchie J. determined that staff owed a duty not only to protect him when intoxicated, but also to prevent his intoxication in the first place. This wider duty implied that a foreseeable risk is inherent in the over service of alcohol. The decision in *Jordan House* was subsequently adopted in a number of Canadian cases and the analysis of Ritchie J. was followed (see *Canada Trust v. Porter* 2 A. C.W.S. (2d) 428 (1980) and *Schmidt v. Sharpe* [1983] 27 CCLT 1. The Supreme Court of Canada revisited the issue of alcohol provider liability in *Stewart v. Pettie* [1995] 1 S.C.R. 131. In that case the Supreme Court determined on the basis of the *Jordan House* decision that a duty of care was owed by commercial providers of alcohol to their patrons and to third parties who might reasonably be expected to come into contact with an intoxicated person, which would include a user of the highway. The facts of the case were that the plaintiff sued her brother-in-law in circumstances where both had attended a dinner theatre with their spouses and the couples were served by the same waitress throughout the evening who kept a running tab of the drinks consumed. Neither of the wives consumed any alcohol whilst Pettie consumed between five and seven double mixed drinks and was legally

intoxicated by the time he left the dinner theatre. The party of four discussed Pettie's driving capacity prior to departing from the theatre and none of them expressed any concern about him driving. On the way home, driving on a slippery road, the car lost control and struck a pole. The plaintiff was thrown from the car and was rendered quadriplegic. She sued not only Pettie, the driver, but also the owners of the dinner theatre. Major J. in writing for the court concluded on the basis of the principles identified in the *Jordan House* case that commercial establishments owed a duty of care to patrons who become intoxicated and he went on to reason that it was a logical step that such a duty was also owed to third parties who might reasonably be expected to come into contact with the patron. The Court concluded that in relation to the standard of care, it considered that positive steps need only be taken by a publican if there was a reasonably foreseeable risk that a patron would drive and the fact that the patron in issue on the facts of this case was accompanied by two sober adults negated that such a risk was foreseeable. On that basis a claim against the alcohol provider was dismissed. Consideration of the judgment indicates that the claim would in any event have failed due to a lack of causation because the court concluded that even if the defendant had intervened, the claimants would still have allowed the intoxicated patron to drive. The Canadian case law has developed to the extent where it can be said with some degree of confidence that the law imposes a duty on an alcohol provider and that that provider may be liable if there is a foreseeable risk that a patron will drive after having been served alcohol.

6.2 In the UK there have been a limited number of cases decided by the courts involving the potential liability attaching to others in respect of the intoxicated. In those cases the courts have adopted a relatively consistent approach in that they have been reluctant to impose any liability absent a clear assumption of responsibility. A recurring feature of the approach of the courts is the use of contributory negligence as a limiting factor. Consideration of a number of the leading authorities in the UK results in this Court being able to identify certain principles which have been followed in those cases. In *Barrett v. Ministry of Defence* [1995] 1 WLR 1217, Beldam L.J. delivered the main judgment for the Court of Appeal. That case arose in circumstances where the plaintiff was the widow and executrix of a deceased naval airman who had died after becoming so drunk one night at a naval base where he was serving that he passed out into a coma, became asphyxiated on his own vomit and died. The plaintiff alleged that the defendant as employer owed her husband a duty of care whilst he was under their control and a duty to prevent him becoming so drunk that he caused himself injury or death. The trial Judge found that the deceased had been a heavy drinker and that that fact was widely known. It was therefore foreseeable in the particular environment of the naval base, with unlimited quantities of cheap alcohol and a lax attitude to drinking, that the deceased would become heavily intoxicated and that in those exceptional circumstances it was just and reasonable to impose a duty of care on the defendant to protect a person of full age and capacity such as the deceased, from his own weakness. The trial Judge made a finding of contributory negligence against the deceased and reduced the damages by twenty five per cent. In the judgment of the Court of Appeal it was stated that to impose a duty on the defendant to control the actions of the deceased in order to prevent him from injuring himself would undermine the principle of individual responsibility. Beldam L.J. held (at 1224):

> "I can see no reason why it should not be fair, just and reasonable for the law to leave a reasonable adult to assume responsibility for his own actions in consuming alcoholic drink. No one is better placed to judge the amount that he can safely consume or to exercise control in his own interest as well as in the interests of others. To dilute self responsibility and to blame one adult for another's lack of self control is neither just nor reasonable and in the development of the law of negligence an increment too far."

In that case Beldam L.J. also considered the decision of the Supreme Court of Canada in *Jordan House* together with another Canadian authority and identified that in each of those cases the Court founded the imposition of a duty on factors additional to the mere provision of alcohol and the failure to strictly enforce provisions against drunkenness. Beldam L.J. went on to hold (at 1225):

> "In the present case I would reverse the Judge's finding that the appellant was under a duty to take reasonable care to prevent the deceased from abusing alcohol to the extent he did. Until he collapsed I would hold that the deceased was in law alone responsible for his condition. Thereafter, when the defendant assumed responsibility for him, it accepts that the measures taken fell short of the standard reasonably to be expected. It did not summon medical assistance and its supervision of him was inadequate."

The crucial element in any finding of liability was therefore the assumption of responsibility by the defendant in putting the deceased into his bunk after he collapsed and thereby assuming responsibility for him. It was because of that assumption of responsibility that the Court of Appeal held that the defendant had a continuing duty to exercise reasonable care and the steps taken were inadequate. The Lord Justice reviewed the Lower Court's finding in respect of contributory negligence where the deceased had been held twenty five per cent responsible and Beldam J. came to the conclusion that individuals should be made to take primary responsibility for their own actions and increased the deceased's level of contributory negligence from one quarter to two-thirds.

6.3 In *Jebson v. Ministry for Defence* [2000] 1 WLR 2055, the Court of Appeal adopted a similar approach as identified in the earlier decision in *Barrett v. Ministry for Defence* and Potter L.J. held that ordinarily an adult could not rely on his drunkenness so as to impose a duty on others to exercise special care. However, Potter L.J. went on to state (at 2066):

> "… In the ordinary way and in most situations, an adult (and these young men were adults) is not entitled to pray in aid his own drunkenness as giving rise to a duty or responsibility in others to exercise special care. However, that is not an invariable rule; nor is it one which is fair and just and reasonable to apply in circumstances where an obligation of care is assumed or impliedly undertaken in respect of a person who it is appreciated is likely to be drunk."

In that case the facts were that the plaintiff was a soldier who had fallen from the back of an army lorry when intoxicated after he had been on a night out with a group of soldiers. The night was organised by the Company Commander and the accident occurred when the soldiers were being transported back to their barracks. Potter L.J. in his judgment held that the fact that the Ministry of Defence had provided the transport for the soldiers, knowing that they were likely to become inebriated, was critical evidence which enabled the Judge to come to the conclusion that the defendants had impliedly assumed a duty of care towards the claimant and that it was foreseeable that if men were not supervised an injury could occur. It was on those facts and in those circumstances that a duty was imposed and the Court of Appeal upheld the finding that the claimant was seventy five per cent responsible for contributory negligence once more emphasising the Court's approach that individuals are primarily responsible for their own actions and that the plaintiff was "largely the author of his own misfortune". In both the cases considered by the Court of Appeal the defendant was the Ministry of Defence and to some extent the decision of the Court in each case to impose a liability was in part based to a degree on the nature of the relationship between the soldier and his employer. The judgments in both cases came to the conclusion that there was not an obligation to prevent another person becoming inebriated but that the common law did create a duty of care not to expose the plaintiff to further harm after having provided him with alcohol.

6.4 In the case of *Griffiths v. Brown* [1998] The Times, October 23 (QBD) the plaintiff had been injured crossing a road when he had been dropped by a taxi driver (the defendant) on the far side of the road. As he was crossing the road the plaintiff who was

significantly intoxicated was struck by a car and injured. The plaintiff claimed that the taxi driver was under a duty of care not to drop him off at a place where it was foreseeable that because of his intoxication he would be at a greater risk of injury than a sober person. Jones J. held that the only duty on the defendant was a duty to take reasonable care to carry the plaintiff passenger safely during his journey and to set him down at a place where he could safely alight. In the judgment Jones J. expressed the view that there would be a duty of care if a passenger had reached such a stage of intoxication as to be plainly incapable of taking care of his own safety. That was identified as the only circumstance where a duty of care might arise and be breached. In the facts of that case the plaintiff had consumed twelve to thirteen pints and was clearly intoxicated but the fact that he was able to walk without staggering and give instructions to the defendant was accepted by the Judge as being evidence that he possessed enough control over himself for liability not to be imposed. In the Northern Ireland case of *Joy v. Newell (t/a Copper Room)* [2000] NI 91 (CA (NI)), Carswell L.C.J. dealt with the issue of the liability of a publican in circumstances where the plaintiff in that case had entered the defendant's licensed premises is an already intoxicated state, sat on a bar stool and ordered a drink and shortly thereafter fell off the stool and suffered quadriplegia. The publican was sued and it was argued on behalf of the plaintiff that the publican or alcohol provider had an affirmative or positive duty to protect him whilst on the premises. Carswell L.C.J. dealt with the claims in terms of liability for pure omissions and rejected the claim based upon occupiers' liability on the ground that the bar stool was not unsafe. Carswell L.C.J. stressed that an affirmative duty could only arise where the defendant had assumed responsibility for the plaintiff's safety, and that the unlawful service of an intoxicated customer did not amount to an assumption of responsibility. In that case Carswell L.C.J. considered and rejected the Canadian authorities starting with *Jordan House* on commercial host liability and did so on the basis that he was of the view that they imposed "an unreasonable burden on licensees".

6.5 In the UK cases including the Northern Ireland case identified above there is no doubt but that each case is fact dependent. The authorities demonstrate a clear reluctance to impose liability unless there has been a clear assumption of responsibility and insofar as there is an exception to that approach it would appear to arise only in circumstances where a person is so intoxicated that they cannot look after their own safety or where they are plainly incapable of taking care of themselves.

6.6 Having considered the authorities from Australia which have been opened to the Court it is apparent that the Australian Courts have adopted a similar approach to the approach that the UK Courts have taken. The Australian Courts are consistent in their judgments in declining to impose alcohol provider liability. The common approach to be gleaned from the Australian cases, the legislation in that country, and in the individual states is that people are responsible for their own actions and that to drink or not to drink is a matter of choice for each individual. The High Court of Australia has adopted a uniform approach which has been identified as an individualistic approach to injury and duty in the context of intoxication. The approach of the High Court is mirrored in Australian legislation where different states have, within the last ten years, enacted statutes to limit liability in civil cases for inebriated plaintiffs who suffer personal injury.

6.7 In 2004 the High Court of Australia in considering an appeal from the Supreme Court of New South Wales addressed the issue of alcohol server liability. That case was *Cole v. South Tweed Heads Rugby League Football Club Ltd. and Anor*. [2004] HCA 29. The facts of Cole was that the plaintiff, Cole, had been run over in a motor accident and seriously injured whilst walking along the roadway after dark in a seriously inebriated condition. The Court heard evidence that the plaintiff had spent some nine hours on the defendant's premises drinking heavily and following the accident she sued both the car driver and the club. She was awarded significant damages in the New South Wales Supreme Court with liability apportioned thirty per cent each to the car driver and club and forty per cent to the plaintiff. The New South Wales Court of Appeal held the plaintiff entirely responsible and the majority of the High Court of Australia agreed. The plaintiff alleged that the club breached its duty of care to her by supplying her with alcohol when a reasonable person would have known that she was intoxicated and by allowing her to leave the premises in an unsafe condition without proper assistance. In his judgment Gleeson C.J. held (at para. 14):

> "A duty to take care to protect an ordinary adult person who requests supply from risks associated with alcohol consumption is not easy to reconcile with a general rule that people are entitled to do as they please, even if it involves a risk of injury to themselves. The particular circumstances of the individual cases, or classes of case, might give rise to such a duty, but we are not here concerned with a case that is out of the ordinary.
>
> Again, as a general rule a person has no legal duty to rescue another. How is this to be reconciled with a proposition that the respondent had a duty to protect the appellant from the consequence of her decision to drink excessively? There are many forms of excessive eating and drinking that involve health risks but, as a rule, we leave it to individuals to decide for themselves how much they eat and drink. There are sound reasons for that, associated with values of autonomy and privacy." (at para. 15).

Gleeson C.J. went on to consider an argument put forward on behalf of the plaintiff/appellant based upon the fact that it is an offence to supply liquor to an intoxicated person and even though on the facts the Court of Appeal had found that there was no breach of that statutory provision, Gleeson C.J. identified that the provision did not assist the appellant's argument and did so on the following basis (at para. 16):

> "A person may be at risk of physical injury following the consumption of alcohol even if the person is well short of the state of intoxication contemplated in the provision. As has been noted, the most obvious example of such a risk is that involved in driving a motor vehicle, and the risk becomes real and significant well before a person has reached a state at which a supplier is legally obliged to refuse service. If the argument for the appellant is correct the legal responsibility for the supplier is more onerous than that imposed by s. 44A."

Gleeson C.J. went on to hold (at para. 17):

> "It is possible that there may some circumstances in which a supplier of alcohol comes under a duty to take reasonable care to protect a particular person from the risk of physical injury resulting from self-induced intoxication. However, the appellant cannot succeed in this case unless there is a general duty upon a supplier of alcohol, at least in a commercial setting, to take such care. I do not accept that there is such a general duty. I would add that, if there were, it is difficult to see a basis in legal principle, as distinct from legislative edict, by which it could be confined to commercial supply. When supply of alcohol takes place in a social context, there may be a much greater opportunity for appreciating the risks of injury, for monitoring the condition of the consumer, and for influencing the consumer's behaviour. In a social, as in a commercial, context, the risk of injury associated with the consumption of alcohol is not limited to cases where there is an advanced state of intoxication. Depending upon the circumstances, a guest who has had a few drinks and intends to drive home may be at greater risk than a guest who is highly intoxicated but intends to walk home. If there is a duty of the kind for which the appellant contends, it would be the degree of risk associated with the consumption of alcohol, rather than the degree of intoxication, that would be significant. In many cases the two would go together, but in some cases they would not.

> The consequences of the appellant's argument as to duty of care involve both an unacceptable burden upon ordinary social and commercial behaviour, and an unacceptable shifting of responsibility for individual choice. The argument should be rejected." (para. 18).

Gleeson C.J. recognised the particular circumstances of individual cases or classes of case might give rise to a duty to take care to protect an inebriated customer but identified that the case under consideration was not a case which was out of the ordinary. In that case Callinan J. whilst expressing the view that a drinker was exercising autonomy for which that person should carry personal responsibility at law went on to deal with situations which might be described as exceptional. Callinan J. held (at para. 131):

> "I am also of the opinion that in general – there may be some exceptional cases – vendors of products containing alcohol will not be liable in tort for the consequence of the voluntary excessive consumption of those products by the persons to whom the former have sold them. The risk begins when the first drink is taken and progressively increases with each further one. Everyone knows at the outset that if the consumption continues, a stage will be reached at which judgment and capacity to care for oneself will be impaired, and even ultimately destroyed entirely for at least a period."

In arriving at the conclusion that there was no responsibility on the defendant in that case, Callinan J. expressly disagreed with any propositions to the contrary deducible from the Canadian cases referred to in argument, namely, *Stewart v. Pettie* and the *Jordan House* case (at para. 132). Earlier in his judgment Callinan J. had identified a number of factors pointing decisively against the recognition of a duty of care owed by publicans not to serve customers whom they know will become or have become intoxicated in order to prevent the customers causing injury to themselves. Callinan J. held as follows (at para. 130):

> "One is that if the duty existed it might call for constant surveillance and investigation by publicans of the condition of customers. That process of surveillance and investigation might require publicans to direct occasional oral inquiries to customers. Inquiries of this kind would ordinarily be regarded as impertinent and invasive of privacy. Quite apart from the inflammatory effect of these activities on publican-customer relations and on good order in the hotel or club, the impact of these activities on the efficient operation of the businesses of publicans would 'contravene their freedom of action in a gross manner'.
>
> The other significant matter is that if a customer reached a state of intoxication requiring that no further alcohol be served and the customer decided to depart, recognition of the duty of care in question might oblige publicans to restrain customers from departing until some guarantee of their safety after departure existed. … How are customers to be lawfully restrained? If customers are restrained by a threat of force, *prima facie* the torts of false imprisonment and of the assault will have been committed. If actual force is used to restrain customers, *prima facie* the tort of battery will have been committed as well as the tort of false imprisonment."

Callinan J. went on to consider the legislation in Australia and identified that such legislation made it lawful for the secretary or an employee of a registered club to use whatever reasonable force is necessary to turn out of the club intoxicated persons and then went on to hold (at para. 130):

> "But the legislation says nothing about using reasonable force to keep intoxicated persons in pending the appearance of some guarantee for their safety after departure. In short, if the tort of negligence were extended as far as the [appellant] submitted, it would 'subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms'."

6.8 The High Court of Australia revisited the same legal issues in the later case of *C.A.L. No. 14 Pty Ltd. t/a Tandara Motor Inn and Ors. v. Motor Accidents Insurance Board* [2009] HCA 47. The facts of that case were that the deceased had agreed with the defendant hotel to leave his motorcycle in the hotel storeroom, giving them his keys, while the deceased's wife would drive him home. He consumed a lot of alcohol and refused to give the hotel his wife's details, subsequently driving his bike and being involved in an accident which resulted in his death. His wife claimed that the hotel had a duty to phone her to collect him and the High Court rejected that claim. The Court concluded that the agreement with the hotel as regards the motor bike was terminable at will, for the benefit of the deceased, and did not mean that the defendants had assumed responsibility for the deceased. A duty to protect the deceased would interfere with his freedom to consume alcohol and accept responsibility for his own actions. The Court reasoned that trying to stop the deceased from driving his motorcycle would cause other torts and involve the criminal law. The Court held in that case that licensees owed no general common law duty to monitor or minimise their customer's alcohol consumption or to protect them from the consequences of their excess. In the judgment of the Court (at para. 52) the Court held:

> "There is in general no duty. The conclusion in this Court that the Full Court majority decision must be reversed as a practical matter overcomes these problems. However, even though the arguments in this Court proceeded in a much narrower way, being closely tied to the specific facts of this case, it is desirable to avoid repetition in future of what happened in this case by explicitly stating the fundamental reason why the Full Court majority decision on duty of care is wrong. The reason is that outside exceptional cases, which this case is not, persons in the position of the Proprietor and the Licensee, while bound by important statutory duties in relation to the service of alcohol and the conduct of the premises in which it is served, owe no general duty of care at common law to customers which requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume. That conclusion is correct because the opposite view would create enormous difficulties, apart from those discussed above [57], relating to customer autonomy and coherence with legal norms. The difficulties can be summarised as follows."

The judgement also went on to identify that expressions like intoxication, inebriation and drunkenness are difficult both to define and apply and the fact that legislation compels publicans not to serve customers who are apparently drunk does not make the introduction of a civil duty of care defined by reference to those expressions any more workable or attractive. The judgment went on to conclude (at para. 55):

> "A duty to take reasonable care to ensure that persons whose capacity to care for themselves is impaired are safeguarded also encounters the problems of customer autonomy[63] and legal coherence[64] discussed above. A further problem of legal coherence arises where legislation compels a publican to eject a drunken customer but the tort of negligence requires the person's safety to be safeguarded by not permitting the person to drive or to walk along busy roads, and hence requires the person to be detained by some means. Even if the customer wants to leave, the publican is caught between the dilemma of committing the torts of false imprisonment or battery and committing the tort of negligence."

The High Court went on in its judgment to consider the duty of care of publicans to persons other than customers (at para. 57) and stated:

> "The conclusion that, save in exceptional circumstances, publicans owe no duty of care to their customers in relation to how much alcohol is served and the consequences of serving it says nothing about whether publicans owe a duty to third parties who may be damaged by reason of the intoxication of those customers. Defendants owe duties of care not to the world, but to particular plaintiffs. Some of the arguments against imposing a duty of care on publicans to their customers may have less application where the plaintiff is a third party injured by the customer. The Supreme Court of Canada has recognised, in statements not necessary to the decision, that there is a duty of care to a third party[71]. The Supreme Court regarded this as a logical step from the conclusion that there is a duty to the customer[72]. In this country, since there is generally no duty to the customer, the step cannot be taken on that ground."

The Australian courts do recognise that publicans or licensees have a duty to ensure that their premises are physically safe and that duty extends to protecting customers from the violent, quarrelsome or disorderly conduct of others on the premises (see *Adeels Palace Pty. Ltd. v. Moubarak* [2009] HCA 42).

7. Both parties acknowledge that there is no direct judicial decision or precedent in this jurisdiction concerning the duty of care of a publican in a case such as this. A number of cases were referred to by the parties relating to the issues which impinge or impact upon the issues which require to be considered by this Court in addressing the question as to whether or not there is a duty on a publican to protect incapacitated persons, including their potential victims, from injury and if such duty exists the nature and extent of such duty. Personal injury claims arising out of assaults in licensed premises have frequently been litigated in this jurisdiction. In those cases, injured parties who were customers have sued the proprietors of public houses. In *Hall v. Kennedy and Rudledge t/a The White House* (Unreported, High Court, 20th December, 1993), Morris J. held that the proprietors of a public house were not guilty of negligence in failing to prevent an assault on the plaintiff who was a customer by another customer. The factual basis of that finding was that the violent customer had shown none of the signs or manifestations of drink such as should have alerted a reasonable publican or his staff to the prospect that he might assault another customer. Morris J. (at p. 5 of his judgment) identified the publican's duty in the following terms:

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

In that case, it was a lack of any specific knowledge on the part of the bar staff which was central to the Court determining that there was no liability. The judgment also identified certain steps available, within the law, which a publican could take when dealing with drunk and violent customers. Those steps included the ability to refuse to serve such a customer drink and to seek to remove the customer from the premises. Intrinsic in the approach to liability identified by Morris J. was the acceptance of an obligation to take reasonable care for the safety of a customer whilst on the premises. In the Circuit Court case of *Bridie Murphy v. Phyllis O'Brien* (1987) 6 1LT (ns) 75 (cc), Sheridan J. had to consider a case where a plaintiff who had "plenty to drink" was allowed into the defendant's public house and then three drinks were served to the group who she accompanied. It was uncertain as to whether the plaintiff herself had consumed any alcohol. Whilst descending the stairs to the toilets, the plaintiff fell, as the handrail did not go all the way down to the foot of the stairs. The evidence was that if a sober person had been using the stairs, the banister would have been adequate, but the plaintiff succeeded in her action, in part, due to her inebriated condition. In all the circumstances of the case, there was a two-thirds finding of contributory negligence made against the plaintiff. Sheridan J. imposed liability, not under the principle of occupiers' liability, but on the basis of *Donoghue v. Stevenson*, as the plaintiff was a prospective customer. In *Walsh v. Ryan* (Unreported, Lavan J., 12th February, 1993) the High Court had to consider a claim by a customer who had been assaulted by another customer who had arrived on the premises in an intoxicated condition. Lavan J. reached a conclusion similar to that of Morris J. in the Bridie Murphy case, and held that the plaintiff was entitled to succeed on the basis of occupiers' liability, but during the course of the judgment, also quoted the "neighbour principle" of Lord Atkin and referred to *Murphy v. O'Brien*. In the *Walsh* case, unlike the position in the Hall case, the publican knew of the customer's tendency towards violence and so was held liable to the plaintiff who was assaulted by that customer.

7.1 In an unreported judgment of Morris J. in *Murphy v. Ballyclough Co-Operative Creamery Ltd. and Ors.* (Unreported, High Court, 27th February, 1988), the Court dealt with an application to have the plaintiff's claim against the first and second named defendants struck out. The facts of that case were that the plaintiff, Denis Murphy, had gone to a meeting at a creamery in Mallow, County Cork where free alcohol had been provided. Following the meeting, the plaintiff went to the Roundabout Tavern where he consumed a considerable amount of drink and became inebriated. He was then driven by Kay Napier, another of the defendants, to his van, which had been parked some one mile distance from the Roundabout Tavern. Kay Napier stated that Mr. Murphy was sober at that stage, as he had only consumed four pints in her pub. On retrieving his car, the plaintiff drove to another hotel where, it was claimed, he was served one drink. The owners of that hotel denied that the plaintiff had been served any alcohol on their premises. After he left the hotel, he attempted to drive home and crashed his vehicle into a wall and was badly injured, rendering himself a paraplegic. The plaintiff brought proceedings, not only against the creamery, where he had received complimentary drinks, but against all the publicans and hoteliers who operated premises where he had drunk, thereafter claiming that each of those parties owed him a duty of care, and breached such duty by allowing him to drive his vehicle when he was drunk. On application by the first two defendants, that is, the defendants who were responsible for the creamery, the proceedings were struck out. Morris J. held that any negligence on the part of the first two defendants in providing alcohol to the plaintiff would have been overwhelmed by the alleged negligence of the remaining defendants, if established. Given the narrow range of focus in the judgment of Morris J. where he was dealing with a preliminary application to strike out a defence and where no evidence was heard, such authority is of no real assistance to this Court in addressing the issues herein.

7.2 The defendant seeks to rely, by analogy, on the decision of the Supreme Court in *Breslin v. Corcoran* [2003] 2 I.R. 203. It is contended that if a person can be liable for carelessly leaving the keys in a car, resulting in another person stealing that car and causing injury to another, it should follow that a publican can be liable, when, in breach of the criminal law, he serves a customer with so much alcohol that such customer is transformed from being a safe driver into being a dangerous driver, and then releases that person on to the highway. There are a number of difficulties with that line of reasoning. There is no doubt that if one leaves one's keys in a motorcar on a busy public highway, it is reasonably foreseeable that the car will be stolen. However, a separate and distinct question has to be asked as to whether it is foreseeable, as a reasonable probability, that if the car is stolen, it will be driven so carelessly as to cause injury to another. The facts in *Breslin v. Corcoran* case were that the first named defendant left his car outside a café in central Dublin, unlocked, with the keys in the ignition, so that he could go in to buy a sandwich, and when he came out, a thief had driven off in the car at speed. The car then turned in to another road, where it crashed into the plaintiff who was crossing the road. The plaintiff brought an action against the first named defendant alleging negligence in leaving the car unattended

with the keys in the ignition. The Supreme Court declined to find the first defendant liable due to the fact that the forseeability of the car being stolen, which was acknowledged, did not extend to the car being driven in a negligent manner. Fennelly J. held (at 215):

> "There is nothing in the present case to suggest that the first named defendant should have anticipated, as a reasonable probability, that the car if stolen, would be driven so carelessly as to cause injury to another user of the road such as the plaintiff."

In this case, the defendant claims that the third parties were negligent and in breach of duty in serving excessive quantities of alcohol to John Connolly, and/or in failing to persuade him from leaving the public house, and/or in failing to attempt to restrain or otherwise prevent him from driving. They also seek to rely on a claim that the third parties were in breach of the criminal law and that they participated in transforming John Connolly from a safe driver into a dangerous driver and then released him on to the highway. In considering those claims, it is important to consider which breach of the criminal law is being suggested. The defendant seeks to rely on the criminal law relating to drunk driving, which applies to drivers. The criminal law applicable to publicans is set down in the Intoxicating Liquor Acts. On the facts of this case, the Court is satisfied that it has not been established that the third parties were in breach of the criminal law under the Intoxicating Liquor Acts in supplying intoxicating liquor to a drunken person or in permitting a drunken person to consume intoxicating liquor or in permitting drunkenness to take place in the third parties' public house. The Court is satisfied that the evidence does not establish that John Connolly was a drunken person within the definition contained in the Intoxicating Liquor Act of 2003. A difficulty with the defendant's argument, based upon a claim that it was the third parties who released John Connolly on to the highway, is that it was John Connolly himself who decided to leave the third parties' public house, and it cannot be said that the third parties released him. He was entitled to leave the public house and indeed on the facts of this case did so without the knowledge of the third parties or any of their servants or agents. Insofar as it could be claimed that the third parties should have restrained John Connolly, the Court does not consider that that argument is well founded, as there is no legal basis for such restraint, and insofar as it is suggested that advice should have been tendered in relation to the risk of driving when drunk, the Court is satisfied that the risk attached to drunken driving is so well publicised and appreciated within the community, that such advice would be futile, as the import of such advice would have been well known.

7.3 It was argued by the defendant, that after John Connolly had been served two pints he should not have been served any further alcohol, given that he was likely to depart by car, if he indicated, in response to questioning, that he would not drive. That argument is impractical and would place an impossible burden on publicans. First, it would lead to a situation where publicans would have to question customers as to their future conduct on a recurring basis, making the management of the premises difficult, if not impossible. Secondly, there is no legal basis to permit of such questioning, and it would place the publican in a situation where customers could claim that the question raised by the publican had indicated that such customer was about to commit a crime. Thirdly, the publican would be faced with a situation that if he was informed by the customer that the customer was not intending to drive, that the publican would either have to serve the customer, provided he was not drunk under the Intoxicating Liquor Act 2003, or proceed on the basis that he did not believe the customer and refuse to serve him. The Court is in effect being requested to place a burden on publicans without the publican being provided with the legal safeguards to deal with such obligation.

7.4 In the light of the basis upon which the Supreme Court, in the *Breslin* case, declined to attribute liability to the car owner who left his car unattended with the keys in the ignition and held that to establish liability, it was a necessary requirement to look beyond the fact that it was foreseeable that the car would be stolen, and to consider whether the car owner should have anticipated as a reasonable probability that the car, if stolen, would be driven so carelessly as to cause injury to another, this Court is satisfied, on the basis of the facts of this case, that *Breslin v. Corcoran* is of no assistance to the defendant. This Court accepts the evidence which establishes that John Connolly had demonstrated a willingness to exercise his own judgment as to his capacity to drive, and on the day in question he had the capacity to exercise such judgment. The Court is satisfied that it cannot be contended, on the facts of this case, that the third parties knew that it was probable that John Connolly would drive his car, and would do so in such a manner as to cause injuries to other users of the road.

8. Earlier in this judgment, the claims made by the defendant against the third parties are set out; together with the particulars relied on. During the course of argument, it was submitted on behalf of the defendant that the third parties have a duty of care, as proprietors of a licensed premises, that when they have knowledge that a customer they are serving is likely to drive, and when that customer has consumed an amount of alcohol that would put him in excess of the blood alcohol level permitted under the Road Traffic Acts, that the third parties, as publicans, are under a duty not to serve such a customer any more alcohol. The defendant also argued that when the third parties, as publicans, had knowledge that a customer, such as John Connolly, was likely to drive, they had an obligation and a duty "not to serve such an amount of alcohol as would put him over the limit". The defendant also contended that when the third parties, as publicans, had knowledge that John Connolly was likely to drive having consumed an amount of alcohol that would put him over the legal limit permitted under the Road Traffic Acts, they must take reasonable steps to prevent him from driving. The defendant claims that such duty arises as a result of the special relationship between the third parties and the deceased, in that, he was a customer or patron of the third parties' pub and, also, that the duty arose by way of the neighbour principle and, further, that the duty arose through the third parties' knowledge of John Connolly. The defendant claims that the third parties breached their duty to John Connolly and to innocent road users by serving or continuing to serve alcohol to him, to a point well beyond the legal limit for driving a motorcar, while having knowledge of the fact that it was more likely than not that John Connolly would drive after he had consumed that alcohol.

9. In the light of those claims, and in the light of the authorities identified above, and recognising the absence of any authority within this jurisdiction, the Court must determine whether or not the third parties had the duty of care which it is claimed that they owed to John Connolly and to the plaintiff as a potential victim of his driving.

9.1 The third parties, as licensees and publicans, have certain, well-established duties towards their customers. The third parties owed various duties to John Connolly, including the obligation to take reasonable care to ensure that the third parties' premises, including its contents, were reasonably safe, and to ensure that the premises were conducted in an orderly manner and to conduct the sale of alcohol in such a manner so as to not permit the supply of alcohol to a drunken person, or to permit a drunken person to consume alcohol or to permit drunkenness to take place in the licensed premises. However, the duty contended for by the defendant extends beyond those well-established duties. The defendant's formulation of the duty of care seeks to place an obligation on a publican or licensee, where a customer regularly drives to the pub in question, to stop serving that customer if he has drunk an amount of alcohol that would place him at or over the legal limit for driving and to proceed on the basis that the publican must presume that the customer will drive his vehicle from the licensed premises. The defendant also seeks to impose a duty that if a customer, whom the publican reasonably expects to drive a motorcar, has consumed an amount of alcohol in excess of the legal limit for driving a motor vehicle, that they must, if necessary, not only advise that customer not to drive, but restrain by force such customer from driving and, if necessary, take by force the keys of the customer's car. The fact that the Oireachtas has identified particular strict limits in relation to the blood alcohol level permitted in a driver does not and cannot, of itself, impose a liability on a publican to desist from serving a customer an amount of alcohol which would place such customer over that legal limit. Indeed, to

impose such a duty, would place an impractical obligation on a publican and would be so vague and indefinite as to be incapable of compliance. Insofar as the defendant's formulation of the duty of care places an obligation of restraint or the taking by force of the keys of a customer, that obligation would be in direct conflict with the third parties' duty not to commit torts such as assault or false imprisonment. None of the recognised defences to those torts would be available to the third parties. If such a duty, as claimed, is to arise, such could only realistically be imposed by statute, and cannot arise from an expansion of the scope of the duty of care in negligence, where such expansion, were it to take place, would place publicans or licensees in a position where they had a potential obligation to commit a tort or a crime without any legal defence. This Court agrees with the analysis of the High Court of Australia in relation to this matter as set out in the *C.A.L. No. 14 Pty. Ltd*. case, where it was held that to impose the suggested duty to restrain, assault or falsely imprison a customer would subvert other principles of law and statutory provisions. As stated by the High Court of Australia in that case (at para. 130):

> "In short, if the tort of negligence were extended as far as the [appellant] submitted, it would 'subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms."

It is for the Oireachtas to impose such a duty by law where any necessary powers to comply with such duty are expressly provided so that the imposition of such duty can be dealt with by a publican acting within the law and can be considered both practical and feasible.

It is for legislation to strike such a balance and not for a court to impose such a duty, regardless of any balance of rights or obligations.

10. The defendant contends that if the Oireachtas has determined a maximum blood alcohol level for driving, and that such level represents the threshold for the commission of the crime of drunk driving, it follows that it is difficult to contend that civil liability should adopt a more lenient standard. This Court is satisfied that that such contention is without merit. It is not for a publican to supervise or enforce the provisions of the Road Traffic Acts. The obligation identified by the Oireachtas is placed upon the driver of a motor vehicle. It is the obligation of a driver of a motor vehicle to refrain from driving under influence and that obligation is individual to the driver and does not extend to other parties. This Court is not prepared to extend the common law duty of care imposed on publicans premised on violation of statutory duties which are placed on others and not on publicans. Any statutory violation by a publican of any statutory obligation placed on publicans has nothing to do with driving or the Road Traffic Acts. Where the courts have held passengers of drunken drivers guilty of contributory negligence for travelling in a car driven by an intoxicated person, those findings have been predicated on the passengers knowingly getting into a car to be driven by such a driver. It is the passengers' act in choosing to travel in such a car which grounds the finding of contributory negligence.

11. For completeness sake, it is appropriate for the Court to deal with the complaint made by the defendant that the third parties did not have a policy to monitor, observe and advise customers in relation to the quantity of drink and the danger of drunken driving. This Court is satisfied that such obligation does not arise other than to ensure compliance with the Intoxicating Liquor Acts and, in any event, on the facts of this case, the Court is satisfied that the evidence establishes that John Connolly was a courteous and civil man who was an experienced drinker and who had demonstrated an ability to take care of himself and behave in a sensible and responsible manner. On the day in question, the Court is satisfied that there is no evidence that John Connolly was so incapacitated as to be helpless or in jeopardy by a reduction in his capacity to make sensible decisions or judgments. The facts of the case also establish that on the day in question, neither Concepta Kelly nor Seamus Kelly were present when John Connolly left, and when they were with John Connolly, neither of them observed any of the expected or customary signs of drunkenness. The Court accepts that evidence. In those circumstances, the third parties could proceed on the basis that John Connolly was capable of looking after himself and of exercising his own judgment as to how he would go home. Insofar as the defendant contends that there was an obligation to advise John Connolly as they served him the third, fourth or fifth pint as to the dangers of drunken driving, even if there was such an obligation, the Court is satisfied that it could only arise in circumstances where the third parties were aware that John Connolly could not exercise his own judgment, and was so helpless or in jeopardy that he did not have the capacity to make sensible decisions or judgments. The Court is satisfied, on the evidence, that neither of the third parties observed or were aware of John Connolly being in such a condition.

12. The Court has considered the facts of this case, and in the light of the findings set out earlier in this judgment, and having considered the various authorities opened to it, the Court finds that the following determinations and conclusions can be identified. The third parties did not owe the duty of care claimed to John Connolly. In arriving at that conclusion, the Court has taken into consideration the fact that there has been no identified case within this jurisdiction to support the existence of such duty. In considering the different approaches adopted in other jurisdictions to such a duty, this Court is satisfied that the approach identified in the United Kingdom and Australian case law is to be preferred over the approach adopted by the Canadian courts as set out in *Stewart v. Pettie*. This Court is satisfied that Gleeson C.J., in the *Cole v. South Tweed Heads Rugby League Football Club Ltd*. case, correctly identified the lack of a duty of care on a publican and, in particular, this Court concurs with the statement in his judgment, as made at paragraph 14 and as quoted earlier in this judgment. The duty of care sought to be imposed by the defendant would, in the words of Gleeson C.J. (at para. 17):

> ". . . involve both an unacceptable burden upon ordinary social and commercial behaviour, and an unacceptable shifting of responsibility for individual choice."

In preferring the approach identified in the United Kingdom and Australian cases, the Court has had regard to the different statutory framework and legislative approach in Canada, which has resulted in the duty of care placed upon publicans in that country being based upon the legal obligations placed by legislation on those publicans. It was on the basis of the legal duty of care owed to patrons that the Canadian courts have concluded that it was a logical step that such a duty was also owed to third parties who might reasonably be expected to come into contact with a patron. The courts in the United Kingdom, in considering the obligation attaching to others in respect of the intoxicated, have adopted the relatively consistent approach that the law does not impose any liability, absent a clear assumption of responsibility. On the facts of this case, there is no assumption of liability by the third parties. The statement of Carswell L.C.J. in the *Joy v. Newell* case that an affirmative duty on the part of a publican could only arise where the publican had assumed responsibility for the plaintiff's safety is a statement with which this Court concurs. The third parties did not assume responsibility for John Connolly's safety and no duty of care arose. In both the Australian and United Kingdom cases, it has been recognised that there could be situations where responsibility or a duty of care could arise in exceptional circumstances. The courts have recognised that such responsibility or duty could occur in circumstances where a customer was so intoxicated that he could not look after his or her own safety and was plainly incapable of taking care of himself or herself. This Court adopts that approach, and in determining that the third parties owed no duty of care to John Connolly, it does so, in part, based upon its finding that he was not a person who was so intoxicated that he could not look after his own safety or was plainly incapable of taking care of himself.

12.1 The duty of care sought to be imposed by the defendant on the third parties includes in part an obligation on publicans to resort to commit acts which would result in the publican committing a tort or a criminal offence. To place such an obligation and to provide the legislative balance enabling such obligation to be carried out is for the legislature, not the courts. If there was such a duty on publicans or licensees, the law would require to be altered to provide the licensees with the necessary powers and privileges to carry out and enforce the steps necessary to comply with such duty.

12.2 This Court is satisfied that in applying and adopting the approach identified in the High Court of Australia in the *C.A.L. No. 14 Pty Ltd*. case, and in the Court of Appeal in England in *Jebson v. The Ministry for Defence*, there is generally no duty of care owed to the intoxicated, absent an assumption of responsibility or exceptional circumstances. In Canada, the duty of care owed to the intoxicated has been identified as the logical basis for the expansion of the duty of care to the third party victims of the intoxicated. This Court is satisfied that there is generally no duty of care to a customer, such as John Connolly, and therefore, a duty of care cannot be extended to third party victims on the basis of such duty. The defendant has failed to identify or establish in evidence any other ground to support there being a duty of care owed to third party victims. The duty of care relied upon by the defendant is based upon the duty of care which it is claimed is owed to the customer, that is, to John Connolly. The claim that there was a breach of that duty in serving, or desisting from serving, John Connolly, is rejected on the basis that there is no such duty. The claim by the defendant that there was a breach of duty by the third parties to the plaintiff flows directly from the alleged breach of duty owed to John Connolly. The defendant has not identified any separate or distinct breach other than the ones claimed to be owed to John Connolly. Absent a duty of care owed to John Connolly, a separate duty of care owed to the plaintiff could only arise if the defendant identified and established a separate and distinct breach. The defendant has not done so and there was no breach by the third parties of any duty owed to the defendant.

13. This Court is satisfied that there is no legal basis for the imposition of the duty of care contended for by the defendant and it follows that the defendant’s claim against the third parties should be dismissed.