Neutral Citation No: [2014] IEHC 440

THE HIGH COURT

[2007 No. 8425 P]

BETWEEN/

TERESA ENNIS

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

AND JARLATH EGAN

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 30th September, 2014

Part I: Introduction

1. Where a statutory body exercises a statutory power to provide assistance to a vulnerable young adult, can that body be held liable in negligence where it creates a situation where that young person is likely to engage in reckless behaviour which causes damage to a third party? This is the essential question which arises in the present proceedings.

2. The plaintiff is the owner of No. 11 Percy Cottages, Magazine Road, Athlone, Co. Westmeath. That property was extensively damaged by a fire which spread from the adjoining premises at No.10 Percy Cottages during the night of 1st October, 2005. That property had in turn been leased to a troubled teenager (whom I shall describe as Ms. A) who had been placed there some weeks earlier with the assistance and support of the Health Service Executive. The fire was started deliberately by two companions of Ms. A. following an all-night party which was held in the premises on the evening in question. The lease had been terminated on the previous day and Ms. A. and her companions had unlawfully re-entered the property, probably as a result of breaking a window to the rear of the premises.

3. The records of Athlone Fire Department show that it took one hour to bring the fire under control. No. 10 was all but destroyed and there was significant damage to No. 11. No. 6, No. 7, No. 8, No. 9, No. 12 and No. 13 all suffered smoke damage.

4. The plaintiff now sues the HSE and the owner of No. 10 Percy Cottages, Jarlath Egan, in negligence. Given that the fire was started deliberately, it is now agreed that what ever be the scope of the immunity conferred in respect of accidental fires by s. 1 of the Accidental Fires Act 1943, that Act has no application to the present case.

5. At the outset it is only appropriate to record that both Ms. Ennis and Mr. Egan are totally innocent parties so far as these proceedings are concerned. Ms. Ennis' house was all but totally destroyed by the fire and she has been forced to live in rented accommodation ever since. For his part, Mr. Egan had simply leased the property to Ms. A. As we shall shortly see in more detail, Mr. Egan terminated the lease once it became clear that Ms. A. was either unable or unwilling to look after the property and the fire took place after Ms. A. had (with others) unlawfully re-entered the property. The fire was deliberately started by two individuals who Ms. A. had apparently befriended. There is absolutely no basis on which a claim of negligence could ever have been made out against Mr. Egan. Both Mr. Egan and Ms. Ennis are simply innocent victims of circumstances.

The events from late July, 2005 to early October, 2005

6. While I will revert shortly to the facts in more detail having reviewed the evidence of the various witnesses, the following outline summary of events does not appear to be in dispute.

7. At the time of the events leading up to the fire Mr. Egan had been a university student who had just purchased No. 10 Percy Cottages. The house had been in poor condition and he spent the summer renovating the house in order to get ready for the rental market. As he was studying in NUI Galway at the time he set about finding a tenant for No. 10 and to this end he placed an advertisement in a local newspaper at the end of July, 2005. At this time the HSE ran a residential centre for troubled teenagers in its care at No. 6 Percy Cottages known as "Shannon Cottage". One of the residents was Ms. A, a teenager with a troubled and disturbed history. Ms. A. had a younger sister, Ms. B., who was also in care. Ms. B. was then 15 years of age and she resided at another HSE residence in the Athlone region known as "Retreat Lodge".

8. Ms. A. came from a dysfunctional family background and she had been in care since the age of two. She was due to attain her 18th birthday in August, 2005 and she was anxious to live independently thereafter. Having seen the advertisement for the letting of No. 10, one the social workers attached to No. 6 viewed the premises and considered it suitable. She then arranged with Mr. Egan that Ms. A. would take a letting of the premises. The lease commenced on 25th July, 2005. The monthly rent of €550 was to be paid by the HSE for the first two months and thereafter the costs were to be split between the HSE and Ms. A. in the form of rent allowance.

9. The plaintiff now sues the HSE and Mr. Egan in negligence. As I have already indicated, there is absolutely no basis upon which Mr. Egan could ever have been sued for negligence and the case against him can accordingly be dismissed. The case against the HSE is, however, a different matter and it is necessary first to consider the background facts before examining the difficult legal issues which this action presents.

Part II: The Contemporary Records

10. Before reviewing the testimony given in oral evidence, it may be useful to review some of the contemporary documentary records which were also tendered in evidence.

The Guardian *Ad Litem* reports

11. There were several highly detailed reports prepared by Ms. A's guardian *ad litem* in the last year of her minority between 2004 and 2005. These reports detail her psychological and other frailties and chronicle the various instances in which she absconded from care, often in unsuitable male company. Thus, in a report for this Court in December 2004 the guardian expressed concern in respect of plans for independent living once Ms. A. reached 18 years:

> "Such a suggestion or plan is contra-indicated by [Ms. A.'s] past history and will, I believe, lead to a personal crisis...it would be more likely that [Ms. A.] would quickly revert to volatile substance abuse to manage her feelings of anxiety. Any attempt to fast-track independent living without her having received sustained therapeutic intervention and support will set her back."

12. It is only fair to observe that the same concerns are not contained in the guardian *ad litem* report of May 2005.

The diary entries maintained by HSE staff

13. The HSE social workers had very helpfully and conscientiously prepared a comprehensive day and night diary which detailed Ms. A's movements and behaviour. This is, in fact, a contemporary record of the events of Saturday 24th, Thursday 29th and Friday 30th September, 2005, insofar as it concerns Ms. A.

14. The records for Saturday 24th recounts how, following the reports of a break-in to No. 10, staff found the property "in a complete mess" In addition to items having been stolen, the staff noted that:

"every chair in the kitchen was broken, clothes were thrown everywhere, food was on walls and lipstick was used to write abuse and nicknames."

15. The HSE social workers spoke to Ms. A. about her behaviour and attitude, her choice of friends and her attitude to alcohol and drug misuse. The social workers then started a clean-up of the premises and arranged for Ms. A and Ms. B. to help them in the process. Later that night staff received a call from Ms. A. to say that she wanted to leave No. 10 and get a new flat elsewhere in Athlone as she feared that the youth who were responsible for the break-in would return.

16. When Ms. Anne-Marie Carey, a social worker attached to the HSE, came on duty at No. 6 some time around mid morning on 29th September, she went to No. 10 Magazine Road to encourage Ms. A to get up. Ms. A ultimately got up at 2.30pm. She said that she was hungry and she was then brought down to No. 6 (Shannon Cottage) for lunch. Staff and Ms. A later returned to No. 10 in order to tidy up the premises. They met with the landlord, Mr. Egan, at around 6.00pm. Mr. Egan had received complaints from other neighbours about the noise which had emanated from No. 10. There had also been a break-in and furniture and other items of property had either been stolen or damages.

17. Mr. Egan was reported as having said that it was best that Ms. A was leaving in view of the damage that had been done to the premises and the various complaints which had been made by neighbours regarding Ms. A. Ms. A. was reported as having been "cheeky" towards Mr. Egan when she was confronted with the damage done to the property.

18. Ms. A was then brought by staff to visit her younger sister, Ms. B, at Retreat Lodge. (Ms. B was also in care). Ms. A and HSE staff returned later than evening to No. 6 Magazine Road where Ms. A had dinner. The notes record her saying that "she was glad to be back in care and [she] felt that she was not ready or able to live alone". Ms. A then left No. 6 and was followed by staff. They tried to get her to return to No. 6 but she at first refused. She was observed purchasing cans of lager from a shop. She finally returned to No. 6 and explained to staff that she wanted to go out on the following night with a named male. The diary records:-

> "Staff explained that this person was a convicted rapist and to go out with him would be a dangerous and serious mistake due to his history. Staff spoke at length to her about this but she seemed not to take anything in that was said to her and she stated that she thought he was OK."

19. On Friday evening, 30th September, Ms. A and HSE social work staff met with Mr. Egan again in No. 10 at about 6.45pm to assess the damage to the property. It was at that point that the tenancy was terminated and the key returned to Mr. Egan. Staff and Ms. A. returned to Retreat Lodge.

20. Later that evening, Ms. A left Retreat Lodge without permission in the company of Ms. B. Staff rang her about 11.15pm to say that her curfew was 12 midnight and that if she and her younger sister, Ms. B, did not return to the unit there would be serious consequences. The notes record her as having assured staff that she would be at home on time. Ms. A rang the unit at about 12.50am to request staff to come to collect her sister, Ms. B, in the Battery Heights area of Athlone. Ms. A. said that she would not be home yet and did not know what she would be doing later. At that point staff went down to the Garda station at 1.30am and accompanied two Gardaí in a squad car up to Battery Heights to look for the two girls. The Garda car drove all round Battery Heights but the girls were nowhere to be seen. The Gardaí then returned to the Garda station.

21. It appears that another social worker, Ms. Margaret Galvin, later travelled by taxi to collect Ms. A having made contact with her. Ms. A refused to get into the taxi with her. Ms. B arrived in Retreat Lodge at around 4.30am. The fire service subsequently received a telephone call at 5.01 am from Athlone Garda Station to say that No. 10 was on fire. At 5.50am Athlone Garda Station rang Retreat Lodge to inform the social workers that Ms. A had been detained in the station as No. 10 Magazine Road was on fire and Ms. A had been involved in an incident. The diary extract records Ms. A as later telling staff that the young men she had been with had broken into No. 10 Magazine Road where they then had a party. She said that having smelt smoke she went upstairs and two bedrooms were on fire, and she then escaped. There was blood on her clothes and she thought that the young men had been fighting and that the blood was from one of these young men.

22. Ms. A herself made a statement to the Gardaí on Saturday 1st October, 2005, where she explained that she had been drinking very heavily and that she had taken illegal substances. She stated that they walked back from Battery Heights towards Magazine Road. They met two other young men, Mr. C and Mr. D outside the house. Ms. A maintained that the door of the house was open and that Mr. C and Mr. D had been in there beforehand. A party went on inside and there was further drinking of cans of lager. Eight young people were present for the most of the party, including Ms. A., Ms. B., Mr. C and Mr. D and four other youths.

23. By about 4.30am the drink had been consumed and Ms. B. and three other youths (including Mr. Lennon and Mr. Lynch) left the

premises. Shortly thereafter Mr. C and Mr. D went upstairs and a few minutes later one of the remaining members of the party smelt smoke. Everyone then went upstairs and where it was found that the two rooms upstairs were on fire. The house was evacuated. Ms. A. later said in her statement to the Gardaí "when we ran outside I [saw C and D] outside the house laughing. I just knew they were after doing it. Nearly five minutes after they left we smelled the smoke".

24. Ms. A. also stated that she had no keys to No. 10 Magazine Road having given them back to Ms. Celine Casey, social worker, on either Thursday 29th or Friday 30th September 2005.

25. Mr. D. made a statement to Gardai admitting that he set the fire to mattresses along with Mr. C. He said that he had been very drunk at the time and that while the mattresses were initially slow to light, but then the smouldering mattresses turned to flame and they ran out. They then remembered that another companion and Ms. A. were downstairs. They returned, banged on the window and Ms. A. and the companion then evacuated the premises.

Notes of the case conference meeting held on 3rd October 2005

26. At a case conference held on 3rd October, 2005 (which was held shortly after the fire) the minutes of the meeting record that the assessment of the professionals involved in Ms. A.'s care was that she was not "ready for independent living and that she would benefit from either supported lodgings or sheltered type accommodation for either one to two years."

Part III: The Oral Evidence

27. At this point it may be useful to summarise the evidence of the various witnesses. Ms. A. herself was not called as a witness by either party. In some instances – which are generally indicated – the evidence of the witnesses can be supplemented by reference to statements made to the Gardaí in the immediate aftermath of the fire or to the HSE diary extracts

Dr. Patrick Randall

28. The first witness called by the plaintiff, Dr. Patrick Randall, gave evidence that he was a forensic psychologist with long experience in the profiling of lay and clerical sex offenders. He had previously worked at the Childrens' University Hospital, Temple Street, the Granada Institute and St. John of Gods. In 2009 he founded Forensic Psychological Services and his particular interest was individuals who have committed sexual offences and adolescents displaying challenging or harmful behaviour.

29. While Dr. Randall accepted that he had not actually seen or treated Ms. A, he nonetheless insisted that he could diagnose Ms. A's pattern of behaviour from a consideration of the documents discovered in these proceedings. From an assessment of these clinical notes and other similar evidence, Dr. Randall described Ms. A as an acutely vulnerable young woman whose placements had often broken down. She had failed to cooperate with various therapies, had engaged in substance misuse, had engaged in sexually promiscuous activity at a young age and had frequently absconded from secure environments. Dr. Randall saw a pattern of self harm, threats, assaults and substance misuse had left her with a negative influence and a wish to engage in destructive activities. This sort of "acting out" behaviour was indicative of internal turmoil, distress and destructive behaviour. He noted that she had engaged in this activity at a very young age.

30. Dr. Randall was not greatly surprised by the depiction of the incidents which had taken place from the time when Ms. A. moved into No. 10 Percy Cottages on 7th September, 2005, onwards. He noted that the house had been left in a state of disarray and that there had been complaints from the neighbours. There was no evidence that Ms. A was capable of discipline and that she needed support with living skills. Dr. Randall noted that social security payments had been spent on alcohol and that Ms. A. saw no reason why items which were damaged in the house should not immediately be replaced by the HSE. Dr. Randall said that had he been called upon to advise on the steps to be taken, he would have devised a behavioural care programme. He would have certainly advised that Ms. A. should not be left out of sight. He would further have advised the HSE to engage Ms. A in conversation and to return to a place of safety.

31. While Dr. Randall's capacity to offer an opinion in his capacity as a forensic psychologist to offer a clinical diagnosis in respect of a patient he had never treated or even see, I found him to be a highly distinguished witness whose evidence I entirely accept.

Teresa Ennis

32. The plaintiff, Ms. Teresa Ennis, gave evidence that she was the owner of No. 11 Percy Cottages, Magazine Road. She had no dealings with the new tenant in No. 10, although she was aware that Ms. A had previously been staying at No. 6, Percy Cottages ("Shannon Cottage"). On the evening of 30th September, 2005, she was in her house from about 9.00pm onwards. At some stage later that evening she smelt smoke and rang the Gardaí. The fire had engulfed No. 10 and also caused substantial damage to other properties (especially smoke damage to her house at No. 11). Since the fire she has been living in rented accommodation.

Geraldine Conway

33. Ms. Conway gave evidence that she was the owner of No. 12 Percy Cottages. Once Ms. A. (whom she did not know) moved into No. 10 in early September she noted that there had been loud noise and loud music. She complained to the Gardaí and also rang Retreat Lodge to complain. A representative of the HSE came to the visit her about a week before the fire and she advised them that Ms. A should no longer be regarded as a suitable tenant in the premises.

34. It was fortunate that Ms. Conway was not present in her house on the night of the 30th September/1st October. Her house had also suffered some minor smoke damage but she is not maintaining a claim against the HSE.

John Lennon

35. Mr. John Lennon admitted in evidence that he was in No. 10 Percy Cottages on the evening of 30th September and the morning of 1st October. He said that he was let into the house by Ms. A who had the key to the back door. Under cross examination by Mr. Bland S.C. for the HSE, he denied there had been a break in to the house. He admitted, however, that he been on a drinking session with Ms. A and her friends both earlier that evening and later when they repaired to Percy Cottages some time in the late evening of the 30th September. He said that he was gone before the fire started. He stated that Ms. A had let them in and then realised she should not have been there.

Lee Lynch

36. Mr. Lynch said that he had been drinking with his friends on the steps at Battery Heights on the evening of 30th September where they met Ms. A. and her younger sister Ms. B. Ms. A. suggested that as it was cold that they should all go back to her house at No.

10 Percy Cottages. This was not the first time that he had been in No. 10.

37. Mr. Lynch rejected the suggestion that he himself had broken in by the back of the house and had opened the door. He insisted that Ms. A had let them into the premises, but he admitted that it was not the first time he was in the house. While he accepted that he had been drinking with others on the night of the fire, he said he was not there at the time of the fire.

Jarlath Egan

38. Mr. Jarlath Egan gave evidence that he was the owner of No. 10 Percy Cottages. He stated that he had purchased the house earlier that year and that he had renovated the property over that summer. He placed an advertisement in the local newspaper and one of the social workers attached to Shannon Cottage expressed an interest in viewing it. She thought the property was appropriate for Ms. A. given that it was very close to Shannon Cottage and it was agreed that the HSE would arrange for Ms. A to lease the property at the rent of €550 a month. There was no discussion between the parties regarding the suitability of the tenant.

39. At some stage in mid-September Mr. Egan said that he had received complaints from neighbours about the loud noise emanating from his property. He said that he had rung No. 6 and asked them to see to it that Ms. A. turned down the music. A few days later he had been requested by the HSE to come to fix a light bulb. He found the premises in an untidy condition and he went down to No. 6 to request them to arrange for the property to be tidied.

40. Some time around 28th September Mr. Egan received a telephone call from Ms. Celine Casey, social worker, to say that there had been a break-in in the premises, that a wardrobe had been taken and other damage was done to the property. Mr. Egan met two HSE social workers along with his brother, Joseph, and his father, Brendan, which meeting I think on the balance of the evidence took place on the following evening, September 29th. The members of the Egan family looked over the property and could see that there had been considerable damage to the house, and that it was agreed that this was unacceptable. There was, for example, tomato ketchup spread over the table, crockery was damaged, items were missing, wallpaper had been removed from one of the bedroom walls and one of the walls had been disfigured with lipstick and crayons.

41. In his statement to Gardaí, Mr. Egan said that he had found a name written with lipstick on the wall. When he confronted Ms. A about this name she said that the individual in question came from Battery Heights. The HSE social workers agreed that the condition of the property was unacceptable. They asked Mr. Egan to do up a bill in respect of the damage which had been done and it was agreed that Ms. A would then leave the property immediately. He had understood the HSE staff would arrange to clean up the property and give up the key.

42. While Mr. Egan thought that there had been just one meeting with the HSE social workers in the premises which was held on September 30th, I think that having regard to the HSE diary extracts and the evidence of Ms. Casey that there probably was two meetings, on the 29th and the 30th September. This, however, is not a matter of any real moment, because so far as Mr. Egan was concerned the property had been vacated by Ms. A. on the evening of September 30th.

Ms. Barbara Geraghty

43. Ms. Geraghty gave evidence that in 2005 she was manager of child residential services in the Midlands. She was line manager in respect of Shannon Cottage. She observed that Ms. A. had been previously been detained in residential care settings in the period leading up to her 17th birthday in August 2004. There was thereafter no power to detain her. It was at that point that Ms. A commenced living in Shannon Cottage.

44. She explained that although Ms. A. was a pleasant young lady, she was a very vulnerable individual who had been damaged in her life experience and who posed a threat to herself and to others. Ms. Geraghty described the extensive steps taken by social work staff to engage with Ms. A., often involving actions over and above the call of duty.

Ms. Celine Casey

45. Ms. Casey said that she was a social care worker with the HSE with qualifications in counselling and psychotherapy. She knew Ms. A. since 2001`and she sought to prepare Ms. A. for independent living. To that end she and other social workers focussed on imparting essential life skills such as attending to personal hygiene and cooking. The social workers sought to develop her self-confidence and self-esteem and they had seen many changes in Ms. A.'s behaviour which were for the better.

46. Ms. A. began to reside in Shannon Cottage in August 2004. She was anxious to live independently and the HSE sought to assist her in this regard as her eighteenth birthday approached. The prospect of her being able to stay in rented premises close to Shannon Cottage seemed an appealing one. Shortly after her 18th birthday steps were taken to have Ms. A. move into the premises on a phased basis.

47. Ms. Casey described received a telephone call from Ms.A. on 24th September to say that there had been a break-in. When she arrived in the house it was in a state of disarray: there was graffiti on the walls, the coffee table was broken and there was other damage to the furniture and the crockery. Ms. A. was quite upset and scared, but she also expected that items which had been stolen or damaged would be quickly replaced by the HSE. In addition, the house was in a messy state and the washing up had not been done.

48. Ms. A. wanted to vacate the premises as she was afraid. Ms. Casey then sought to liaise with management about where Ms. A. would go if she vacated the premises. Ms. Casey described the clean-up of the property on 29th September and on the 30th. She thought that there was only one meeting with Mr. Egan and that this took place on Friday 30th and that Mr. Egan's father and brother were also present.

49. At all events, she agreed that the property was vacated by Ms.A. on that Friday, 30th September. All her belongings were moved back to Retreat Lodge and the keys were returned to Mr. Egan. As Ms. Casey was then going on duty at Retreat Lodge, she brought Ms. A. with her by taxi. At 8.20 pm Ms. A and Ms. B. left Retreat Lodge and the social workers endeavoured to stay in contact with them and, failing that, to follow them. She recounted the efforts (already summarised above) to liaise with the Gardaí to find them at various stages through the night. Ms. B. arrived back to Retreat Lodge on her own and Retreat Lodge subsequently received a telephone call some time after 5am to say that there had been a fire at No. 10. She then received another telephone call from the Gardaí to say that the fire alarm, at No. 6 was going off. She had to go down to No. 6 and de-activate the alarm.

50. Ms. Casey observed that that the entire team had been working towards the goal of independent living for Ms. A. for the best

part of a year. There were, in truth, few other options available. She thought that Ms. A. was "a really nice person" who was capable of independent living. Ms. Casey acknowledged that Ms. A. had frequently absconded in the past and that at least some of the various Guardian *Ad Litem* reports had expressed deep concerns regarding the prospect of independent living.

Part IV: Findings of Fact

51. At this juncture I can summarise my findings of fact:

52. First, at the time of the fire, Ms. A. was a highly vulnerable young person with a troubled history. She was associating with a rough crowd and she showed almost no regard for discipline or good order. She was drinking heavily and she was also resorting to drug taking. Her conduct at this time was impetuous, reckless, promiscuous and ill-disciplined, with almost no sense of personal responsibility.

53. This attitude manifested itself in various ways. She was entirely indifferent to the damage which had been done to the premises immediately prior to her departure, as she expected that items which had been damaged or broken or stolen would be simply replaced by the HSE. She came and went from both Shannon Cottage and Retreat Lodge as she pleased and was prepared to associate with persons who posed a real threat to her and others. I accept the evidence of Dr. Randall that Ms. A. was simply unsuitable for independent living.

54. Second, the individual social workers endeavoured to use their very best efforts to protect Ms. A.'s welfare in extremely difficult and challenging circumstances. Their dedication to duty – which went far beyond the call of duty - was most impressive and must be hugely commended and appropriately acknowledged.

55. Third, Ms. A's unsuitability as a tenant had become crystal clear in the few short weeks she had resided in No. 10. She was simply unable to manage the premises. Property had been extensively damaged and walls had been defaced by ketchup and make-up. The HSE further had been made aware of the fact that the neighbours had complained of the loud music and raucous behaviour associated with late night parties, given, that, for example, Ms. Conway had telephoned Retreat Lodge to complain.

56. Fourth, the meeting between the HSE social workers, Ms. A and Mr. Egan whereby it was agreed to terminate the tenancy took place on the evening of Thursday 29th. A further meeting was held on the evening of Friday 30th.

57. Fifth, at the first meeting it was agreed that the tenancy would be terminated immediately and that the HSE would re-imburse Mr. Egan for the damage done to the property. It was further understood that the Ms. A. and HSE staff would tidy up the property and remove Ms. A.'s belongings.

58. Sixth, the property was vacated at some stage by early Friday evening at the latest. I think that the keys were probably handed back to Mr. Egan at that juncture. Certainly, so far as Mr. Egan was concerned, Ms. A. had by that stage finally vacated the premises.

59. Seventh, Ms. A. left Retreat Lodge with her sister Ms. B. later on that Friday evening and went to meet some of her friends. She rebuffed all entreaties from social workers to return to Retreat Lodge. The social workers contacted Gardaí and sought unsuccessfully to locate her at various stages during that night. Even when she was located by Ms. Galvin, Ms. A. refused to get into the taxi to be brought back to Retreat Lodge.

60. Eight, Ms. A drank heavily that evening and had taken drugs. In the early hours of the morning of Saturday 1st October she either suggested to her friends that they repair back to No. 10 Percy Cottages for a further drinking party or she agreed to a suggestion to this effect which had been made by others.

61. Ninth, entry to the Cottage was most probably effected by the simple expedient of going around the back and breaking a back window. This was probably done by Mr. C and Mr. D. Ms. A was at all events quite indifferent to the fact that she and others were unlawfully in the premises.

62. Tenth, the fire was deliberately started at around 4.30am in the early morning of 1st October by certain persons – most likely Mr. C. and Mr. D. - who had entered the property unlawfully along with Ms.A and who were present at the party. They went upstairs, piled up mattresses in one room and set the mattresses alight. The others (including Ms. A.) evacuated the premises once they had smelt smoke and discovered that the property was ablaze.

Part V: The Legal Issues

In what circumstances can a third party be liable the actions of another?

63. The general principle is that one party is not liable for the actions of a third party, save where a duty of care has been found to exist by reason of special circumstances. This is the general principle which the courts have consistently sought to apply, but it has also been judicially recognised that the actions of troublesome children and delinquent juveniles often present a special case.

64. In this context the seminal decision of the House of Lords in *Dorset Yacht Co. Ltd. v. Home Office* [1964] A.C. 1004 may be considered a useful starting point for an examination of how these principles have been applied in practice. In that case young offenders were working under the supervision of three prison officers on an island near Poole Harbour in Dorset. In breach of their instructions the officers simply went to bed at night leaving the trainees to their own devices. Not surprisingly, seven offenders escaped during the night and went aboard a yacht which they had found nearby. They then launched this yacht which then collided with the plaintiff's yacht which was moored in the vicinity. Then they boarded the plaintiff's yacht and did further damage to it. The plaintiff company then sued the Home Office in negligence in respect of this damage.

65. The House of Lords found for the plaintiff. In a celebrated judgment, Lord Reid noted that there had been negligence on the part of the prison officers concerned ([1970] A.C. 1004, 1026):

> "If they had obeyed their instructions they could and would have prevented these trainees from escaping. They would therefore be guilty of the disciplinary offences of contributing by carelessness or neglect to the escape of a prisoner and to the occurrence of loss, damage or injury to any person or property. All the escaping trainees had criminal records and five of them had a record of previous escapes from Borstal institutions. The three officers knew

> or ought to have known that these trainees would probably try to escape during the night, would take some vessel to make good their escape and would probably cause damage to it or some other vessel. There were numerous vessels moored in the harbour, and the trainees could readily board one of them. So it was a likely consequence of their neglect of duty that the [plaintiff's] yacht would suffer damage."

66. Lord Reid then dealt with the argument that the Home Office could not be liable because of the general principle that ([1970] A.C. 1004, 1027):

> "…no person can be responsible for the acts of another who is not his servant or acting on his behalf. But here the ground of liability is not responsibility for the acts of the escaping trainees: it is liability for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind. So the question is really one of remoteness of damage. And I must consider to what extent the law regards the acts of another person as breaking the chain of causation between the defendants' carelessness and the damage to the plaintiff."

67. Lord Reid then proceeded to reject the argument that the wrongful actions of the escaping young offenders broke the chain of causation, saying that ([1970] A.C. 1004, 1030):

> "But if the intervening action was likely to happen I do not think it can matter whether that action was innocent or tortious or criminal. Unfortunately tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case….I think that the taking of a boat by the escaping trainees and their unskilful navigation leading to damage to another vessel were the very kind of thing that these Borstal officers ought to have seen to be likely. There was an attempt to draw a distinction between loss caused to the plaintiff by failure to control an adult of full capacity and loss caused by failure to control a child or mental defective. As regards causation no doubt it is easier to infer *novus actus interveniens* in the case of an adult but that seems to me to be the only distinction. In the present case on the assumed facts there would in my view be no *novus actus [interveniens]* when the trainees damaged the [plaintiff's] property and I would therefore hold that damage to have been caused by the Borstal officers' negligence."

68. It may be useful to consider how the *Dorset Yacht* principles have been subsequently applied by the English courts in cases dealing with arson and vandalism, often involving teenagers and young adults. We may start with *Vicar of Writtle v. Essex County Council* (1979) 77 L.G.R. 636. In that case a 12 year old boy had been charged before a juvenile court with entering a local school as a trespasser. The local police had asked that the child be remanded into social work care because he had a known propensity for starting fires. The social workers (who had been present at the court hearing) did not inform the house parent in charge of the home where the child was to stay of the child's propensities. While at the home the child walked out during the middle of the day and set fire to a local church.

69. Forbes J. held (77 L.G.R. 636, 673-674) that there had been negligence on the part of the defendants:

> "....a propensity for fire-raising is well-known as one which produces serial consequences. A man charged with arson who has one or more convictions for that offences is commonly regarded as dangerous because of the high probability of further offences of the same nature. Children are no different. The fact that a child is merely suspected of fire-raising does not seem to me to lower the probability of the committal of an offence of arson below something which is very likely to happen...."

70. Forbes J. concluded that there had been negligence on the part of the defendants (77 L.G.R. 636, 674) in failing to convey to the care home the information in their possession regarding the child's propensities:

> "Should the country council have foreseen that failure to communicate the information about the boy's propensities to the home was very likely to result in damage of some kind by fire? If I am right they knew both that if the boy eluded control it was very likely that such damage would result, and that, unless some strict watch were kept, the boy would find it easy to elude such control. It is clear from the concern shown in the contemporary records that the administration that it was vital that information of this kind should be passed to the house. Why? For only one reason that I can see, namely, that the warning of these propensities should allow the home to take such precautions as would obviate the risk."

71. The decision in *Vicar of Writtle* may be contrasted with the subsequent decision of the English Court of Appeal in P*. Perl (Exporters) Ltd. v. Camden LBC* [1984] Q.B. 342. In that case the plaintiffs had leased basement premises from the defendants and used them for the storage of garments. The defendants were also the owners of the adjoining premises. Unauthorised persons were also often seen on the premises. Burglaries had taken place there and the defendants had done nothing about complaints regarding the lack of security. Intruders broke into the premises one weekend, knocked a hole through the common wall of the basement and stole garments which were the property of the plaintiff.

72. The Court of Appeal held that there was no duty of care. Waller L.J. stated ([1984] 1 Q.B. 342, 352) that "the foreseeability required to impose a liability for the acts of some independent third parties requires a high degree of foreseeability."

73. Robert Goff L.J. observed ([1984] 1 Q.B. 342, 359-360) that he knew of no case where:

> "...in the absence of a special relationship [it was held] that the defendant was liable in negligence for having failed to prevent a third party from wrongfully causing damage to the plaintiff....Is every occupier of a terraced house under a duty to his neighbours to shut his windows or lock his door when he goes out, or to keep access to his cellars secure, or even to remove his fire escape, at the risk of being held liable in damages if thieves thereby obtains access to his own house and thence to his neighbour's house? I cannot think that the law imposes any such duty."

74. These issues were further considered by the House of Lords in *Smith v. Littlewoods Organisation Ltd.* [1987] 1 A.C. 241. In that case the defendants had purchased an old cinema building in May 1976 with a view to demolishing it and replacing it with a supermarket. The previous owners had engaged contractors to remove furniture and equipment which might be of value to them, but the building remained unused for a six week period. During this period the security surrounds had been breached by children and young people and some vandalism (including an attempted fire) had taken place. In early July 1976 a fire was deliberately started in the cinema by some teenagers as a result of which the cinema burned down and an adjacent café and a nearby church were damaged.

75. The House of Lords rejected the claim that the defendants should be held liable in negligence. The various speeches of the Law Lords stressed that there was nothing inherently dangerous in the abandoned building and the defendants had no advance knowledge of the potential fire. As Lord Griffiths explained ([1987] 1 A.C. 241, 251):

> "There was nothing of an inherently dangerous nature stored in the premises, nor can I regard an empty cinema stripped of its equipment as likely to be any more alluring to vandals than any other recently vacated premises in the centre of a town. No message was received by Littlewoods from the local police, fire brigade or any neighbour that vandals were creating any danger on
>
> the premises. In short, so far as Littlewoods knew, there was nothing significantly different about these empty premises from the tens of thousands of such premises up and down the country. People do not mount 24-hour guards on empty properties and the law would impose an intolerable burden if it required them to do so save in the most exceptional circumstances. I find no such exceptional circumstances in this case and I would accordingly dismiss the appeals."

76. Lord Goff gave the contrasting example ([1987] 1 A.C. 241, 273) of where a substantial quantity of fireworks were stored in an unlocked garden shed and where it was generally known that the fireworks were so stored in this fashion:

> "Suppose that a person is deputed to buy a substantial quantity of fireworks for a village fireworks display on Guy Fawkes night. He stores them, as usual, in an unlocked garden shed abutting onto a neighbouring house. It is well known that he does this. Mischievous boys from the village enter as trespassers and, playing with the fireworks, cause a serious fire which spreads to and burns down theneighbouring house. Liability might well be imposed in such a case; for, having regard to the dangerous and tempting nature of fireworks, interference by naughty children was the very thing which, in the circumstances, the purchaser of the fireworks ought to have guarded against."

77. Lord Goff then continued ([1987] 1 A.C. 241, 274):

> "But liability should only be imposed under this principle in cases where the defender has negligently caused or permitted the creation of a source of danger on his land, and where it is foreseeable that third parties may trespass on his land and spark it off, thereby damaging the pursuer or his property. Moreover it is not to be forgotten that, in ordinary households in this country, there are nowadays many things which might be described as possible sources of fire if interfered with by third parties, ranging from matches and firelighters to electric irons and gas cookers and even oil-fired central heating systems. These are commonplaces of modern life; and it would be quite wrong if householders were to be held liable in negligence for acting in a socially acceptable manner. No doubt the question whether liability should be imposed on defenders in a case where a source of danger on his land has been sparked off by the deliberate wrongdoing of a third party is a question to be decided on the facts of each case, and it would, I think, be wrong for your Lordships' House to anticipate the manner in which the law may develop: but I cannot help thinking that cases where liability will be so imposed are likely to be very rare."

78. It is interesting to note that in *Breslin v. Corcoran* [2003] 2 I.R. 203, 212 Fennelly J. subsequently observed that the plaintiffs in *Smith* had lost their case "because there was no evidence that the defendants had knowledge of the fact that the vandalising trespassers in the disused cinema were in the habit of starting fires."

79. At this juncture it may be convenient to consider some of the Irish case-law dealing with the deliberate destruction of property and injuries caused to others by the actions of third parties. We may start with *John C. Doherty Timber Ltd. v. Drogheda Harbour Commissioners* [1993] 1 I.R. 315. That was a case where the defendant harbour authority had permitted consignees of shipments (including the plaintiff) to Drogheda port to unload and leave goods on the harbour quayside. The quayside was unenclosed, no security was provided and the general public used the quayside as a form of thoroughfare. The plaintiff unloaded a cargo of timber and paid the harbour dues, but several days later the timber was deliberately set on fire by a group of children and the consignment was virtually entirely destroyed.

80. While Flood J. accepted that whilst exposed in that position the goods "could be liable to damage by third parties, either deliberate or accidental", this fact alone was not sufficient in itself to give rise to a duty of care ([1993] 1 I.R. 315, 320-321):

> "It is undoubtedly true that it was foreseeable that whilst exposed in that position the goods could be liable to damage by third parties, either deliberate or accidental, but that fact must have been manifest not only to the defendant but also to the users of the facility…the reality of the relationship was a bare permission which carried no further obligations of care on the part of the defendants for the very simple reason that it would be virtually impossible to effectively implement. In my opinion, the inference to be drawn from the relationship of the parties is that each party knew that the goods were placed and retained on the quayside at the consignee's risk. Further, the consignee being the person primarily involved, it was for him to evaluate and assess the risk of damage to his goods. If damage flowed from his failure to take steps to eliminate or mitigate such risk the proximate cause of the damage would be his failure to act rationally and reasonably, and in my opinion, in the circumstances, would negative and override any duty of care on the part of the defendant alleged to arise from any proximity or neighbourhood of the parties. It follows that I am of opinion that in this instance there was no common law duty of care imposed on the defendant and the plaintiff's claim under this heading fails."

81. This matter was further explored by the Supreme Court in *Breslin v. Corcoran* [2003] 2 I.R. 303. In that case the first defendant quickly parked his car outside a café in central Dublin in order to buy a sandwich. The first defendant carelessly left his keys in the ignition and in the short interval a thief jumped into the car and drove the car away at high speed. The thief then crashed into the plaintiff as he crossed the road.

82. While the Supreme Court acknowledged that the theft of the vehicle was in these circumstances foreseeable, the Court held that it was not foreseeable that the car would be driven in a negligent manner by the thief. Having reviewed the authorities, Fennelly J. said ([2002] 3 I.R. 303, 214):

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

83. *Breslin*, therefore, was really a case where the chain of causation was broken by the wrongful conduct of the third party thief with whom the plaintiff had no special relationship and for whose subsequent conduct he could not be held responsible.

84. In *Flanagan v. Houlihan* [2011] IEHC 105, [2011] 3 I.R. 574 Feeney J. rejected the argument that a publican owed a duty of care to road users in respect of the supply of alcohol to patrons who were thereafter likely to drive. Feeney J. held that the imposition of a duty of care in such circumstances would be impractical and place an impossible burden on publicans, since there was no effective means whereby such publicans could ascertain whether patrons would later drive while under the influence of intoxicants.

85. How, then, should the *Dorset Yacht* principles be applied to the present case? In this regard, counsel for the HSE, Mr. Bland, stressed five fundamental points. First, he observed that there had not been any individual acts of negligence on the part of the HSE staff. Second, he emphasised that at the time of the fire, Ms. A. was of full age and that the HSE could not be said to be responsible for the independent actions of herself and her acquaintances. Third, he said that the chain of causation had, in any event, been broken once the tenancy had been terminated and the key returned. Fourth, he submitted that, having regard to the principles regarding the negligent exercise of a discretionary power set out in *Glencar Exploration plc v. Mayo County Council* [2002] 1 I.R. 84, the HSE could not be made liable, since it would neither be fair nor reasonable to do so. Fifth, he said that the existence of any duty of care was negative by countervailing policy factors, in that it would deter the HSE and other service providers giving assistance of this kind to vulnerable young adults at a time when they needed it most.

86. These arguments may now be considered in turn, starting with an examination of *Glencar Exploration*.

The test in *Glencar Exploration*

87. The modern Irish law of negligence may be said to date from the decision of the Supreme Court in *Glencar Exploration plc v. Mayo County Council (No.2)* [2002] 1 I.R. 84. Prior to that point, the Supreme Court's decision – or, perhaps, more precisely, the judgment of McCarthy J. - in *Ward v. McMaster* [1988] I.R. 337 had suggested that it was prepared to endorse the two-tier test propounded by Lord Wilberforce in *Anns v. Merton L.B.C.* [1978] A.C.728. The first limb of the test required an analysis of whether there was sufficient proximity between the parties as to give rise to a duty of care. The second limb involved an analysis of whether there existed policy considerations such as would negative the existence of such a duty of care.

88. It is perhaps unnecessary at this remove to subject the judgment of McCarthy J. in *Ward* to minute analysis in order to determine whether in fact his endorsement of the Anns principle formed part of the *ratio* of the Supreme Court's decision. It is, perhaps, sufficient to say that even by the date of the Supreme Court's decision in *Ward* in 1988, important voices in the common law world had expressed unease at many of these developments. This was particularly true in respect of any suggestion that the two stage test represented a universally applicable test governing the existence of a duty of care. Lord Brandon had expressed such a warning in *Leigh and Sullivan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] A.C. 785 and Lord Keith's speech for the Privy Council in *Yuen Kun-yeu v. Attorney General of Hong Kong* [1988] A.C. 175 may be regarded as having presaged the demise of this test. The end came quickly thereafter with the two major judgments of the House of Lords in *Caparo Industries plc v. Dickman* [1990] 2 A.C. 605 and *Murphy v. Brentwood DC* [1991] 1 A.C. 398.

89. This was the general backdrop to the Supreme Court's judgment in *Glencar*. Here the question was whether Mayo County Council owed the plaintiff a duty of care in the manner in which the Council had imposed a ban on gold mining, even if that ban had previously been held to be *ultra vires*. The Supreme Court answered this question in the negative.

90. Having traced the development of the law of negligence, both in England and elsewhere, Keane C.J. stated ([2002] 1 I.R. 84, 139):

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

91. So far as this latter point is concerned, the important observations of O'Donnell J. in *Whelan v. Allied Irish Banks* [2014] IESC 3 regarding the reasoning in *Glencar* must immediately be noted:

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

92. *Whelan* was a case involving an action for negligence against a firm of solicitors. It was against that background that O'Donnell J. went to say that it was just and reasonable that a duty of care be imposed on a solicitor when advising a client:

> "First, this was not a novel area where liability was being asserted for the first time. The essential components of the plaintiffs' claim were well established. It has been beyond controversy for more than half a century that an advisor may owe a duty of care when making statements which may be relied upon even if there is no contract or retainer covering the advice. It is also well established that a solicitor may owe a duty of care independent of contract, and indeed, owe a duty of care in respect of areas outside the original retainer. None of this is or was in

controversy. Second, the just and reasonable test in *Glencar* is also essentially a policy consideration and it has been determined long ago that it is just and reasonable that a solicitor, or indeed any other professional advisor, should owe a duty of care in such circumstances."

93. In this regard, the views of O'Donnell J. accord with the view expressed in McMahon and Binchy, *Law of Torts* (Dublin, 2013)(at 187):

> "What Keane C.J. appears to have done here is to graft on to the *Ward v. McMaster* test a further step of justice and reasonableness, rather than regard that step as replacing the second step of the *Anns* test."

94. It follows, therefore, from an assessment of both *Glencar* and *Whelan* that while proximity and foreseeability remain the touchstones of the existence of a common law duty of care in negligence, these ingredients, while essential, are not *in themselves* sufficient. It must also be fair and reasonable to impose such a duty of care, which test also embraces broader policy considerations. In this context, the law is likely to be guided by precedent and established doctrine. Insofar as there are gaps in the common law duty of care, then absent special and unusual circumstances, the courts will generally fill in the interstices of any such gaps only where such developments represent essentially modest incremental changes which can be justified by reasoning by analogy with established case-law. Different considerations apply, of course, where it is contended that the law of negligence is "basically ineffective" to defend and vindicate constitutional rights: see, *e.g., Hanrahan v. Merck, Sharpe & Dohme Ltd.* [1988] I.L.R.M. 629, 636, per Henchy J. and *Sullivan v. Boylan (No.2)* [2013] IEHC 104.

95. It is against that general background that we can now consider whether the HSE should be made responsible for the conduct of third parties.

Should the HSE be made responsible for the conduct of third parties?

96. It is, of course, correct to say that, as a general proposition A is not responsible for the wrongful conduct of B where B is not acting as an employee or agent of A. But that principle is tempered where there is, in fact, some special relationship between A and B which falls short of agency or employment. This is especially so where A has assumed responsibility for B, whether in fact or in law and where A.'s negligence may lead to a state of affairs whereby it may be foreseen that damage could be caused to a third party by reason of the actions of B.

97. This is the principle which, after all, lies at the heart of the prison cases where it is clear that the prison authorities may be liable in negligence in respect of their failure to take appropriate precautions to protect prisoners from their fellow prisoners, especially if this could have been anticipated in a particular case: see, *e.g., Bates v. Minister for Justice* [1998] 2 I.R. 81, *Casey v. Governor of Midland Prison* [2009] IEHC 466, *Creighton v. Ireland (No. 1)* [2010] IESC 50 and *Creighton v. Ireland (No.2)* (2013). As Fennelly J. said in *Creighton (No.1),* "prisoners are entitled to expect that the authorities will take reasonable care to protect them from attack by fellow prisoners."

98. This also provides the explanation of the Supreme Court's reasoning in *Breslin* where there was assuredly no such relationship between the car owner and the thief. *Breslin* may also be said to exemplify a wider principle, namely, that the courts are naturally anxious, where it is possible to do so, to limit the consequences of a simple individual act of carelessness.

99. It is true that the HSE is not generally responsible for the conduct of those young adults who are have been – but are not now - under its care. Yet there may well be circumstances where there is a special relationship between the parties giving rise to such a duty of care. It must be recalled that the assistance given to Ms. A. was given not simply gratuitously, but was provided pursuant to an express statutory power. Section 45(1) of the Child Care Act 1991 provides that:

> "Where a child leaves the care of [the HSE, it] may, in accordance with subsection (2), assist him for so long as the [HSE] is satisfied as to his need for assistance and…he has not attained the age of 21 years."

100. Section 45(2) further provides that the HSE:

> "…may assist a person under this section in one or more of the following ways –
>
> (a) by causing him to be visited or assisted….
>
> (d) by arranging hostel or other forms of accommodation for him;
>
> (e) by co-operating with housing authorities in planning accommodation for children leaving care on reaching the age of 18 years."

101. In these circumstances, there was a special relationship between the HSE and Ms. A. such as gave rise to a duty of care. The HSE had, after all, concluded that Ms. A. was suitable for independent living. It was HSE staff who had identified the premises as suitable and it was the HSE which endeavoured to monitor Ms. A. during the short period when she stayed in the premises. To their very considerable credit, all the social workers used their very best endeavours well beyond the call of duty to assist Ms. A., even to the point of searching for her during the night when she left Retreat Lodge on the evening of Friday 30th.

102. In this respect the present case can be distinguished from English decisions such as *P. Perl* and *Smith*. Those cases can all be explained by saying that, absent a special relationship, landowners owe no duty of care to neighbours or others to ensure that their property is not a likely prospect for thieves or vandals. The decision of Flood J. in *James C. Doherty* and that of Feeney J. in *Flanagan* are much in the same vein.

103. Next, painful as it is to say so, I am driven to the conclusion that there was, objectively speaking, negligence on the part of the HSE. That negligence consisted essentially in concluding that Ms. A. was suitable for independent living, when she patently was not and in failing to tell Mr. Egan of her background and propensities prior to entering into the tenancy agreement. Very little in Ms. A.'s troubled background suggested that she had either the sense of responsibility, discipline or the essential skill sets which made her suitable for independent living. She had a very long history of absconding from care homes and of engaging in personally reckless and promiscuous behaviour. Ms. A. furthermore associated with young males of a highly disreputable kind who themselves engaged in reckless and anti-social behaviour and who clearly had a negative influence on her.

104. One might add that her conduct in the days leading up to the fire was such as might well have put the professionals dealing with her on their guard. She had shown no insight into the vandalism (including the scrawling of graffiti on the walls) to the property in

which she was at least complicit. She was also cheeky towards Mr. Egan when he remonstrated with her about this vandalism and she had consistently shown little regard for the property, as evidenced by the graffiti, the late night parties and loud music and general disrespect to the neighbours. Given her past record of impulsive behaviour – which was well documented - the fact that she went out drinking on the night she had been evicted from the property with the youths who had had a consistently negative influence on her, some of whom at least had already done damage to the property, might well have been regarded as a warning signal.

105. While one must always guard against the dangers of assessing events with the benefit of hindsight, it is nonetheless difficult to disagree with Dr. Randall's conclusions in his expert report of May 16th, 2014 that it was reasonable to assume that the house which Ms. A. had just "vacated and recently defaced might well be a likely target of this impulsive behaviour."

106. These were circumstances which, taken in the round, were not altogether different to those of the *Vicar of Writtle*. It was accordingly entirely foreseeable that the property was likely to be damaged by both Ms A. and her circle of friends once Ms. A. went into possession of the premises. Reverting to the language of Lord Reid in *Dorset Yacht*, this was the "very kind of thing" which was likely to happen once Ms. A. was placed in a property of her own. This was especially so given that there were no responsible adults present who could place appropriate boundaries on their behaviour.

107. Nor do I consider that the chain of causation was broken once the tenancy was terminated and the keys to No. 10 Percy Place returned early that Friday evening. At the very least Ms. A. acquiesced in the suggestion that the party should return to No. 10 Percy Cottages in the early hours of Saturday morning. The very reason why Ms. A and her friends went back to No. 10 Percy Cottages was because they knew that the property was vacant and available. Some of them had already attended parties and drinking sessions in No. 10 in the previous week and, even if they had not, they knew that No. 10 was a place where they could engage in drinking sessions free from the control and supervision of a responsible adult. Even if Ms. A. no longer had the key to the premises, those who returned to No. 10 knew that they could easily gain access through the back window to an otherwise vacant property.

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

109. Take the position of Ms. Ennis. She has lost her house and has been forced to live in rented accommodation for the last nine years. She can justly say that none of this would have come about but for the actions of the HSE in placing a vulnerable teenager with a propensity for reckless and damaging behaviour in the house next door. Are her rights and interests to be disregarded in this equation?

110. Moreover, adopting the analysis of the just and reasonableness test so recently set forth by O'Donnell J. in *Whelan*, it can be said that the imposition of a duty of care in this type of situation is not novel and it finds expression in the English case-law in a series of cases from *Dorset Yacht* and *Vicar of Writtle* onwards. Clear analogies are to be found in our own prison cases, ranging from *Bates* to *Creighton (No.2).* Nor can it be said that what happened here was like the facts of *Breslin* where there was a single act of carelessness which enabled a third party to commit the tortuous acts which injured the plaintiff and where (unlike the present case) there was no special relationship between the ultimate tortfeasor and the careless citizen.

111. So far as the policy considerations are concerned, it must be recalled that, as O'Donnell J. pointed out in *Whelan,* the just and reasonable test itself encompasses policy considerations. It is sufficient to say in this context that if a duty of care can be imposed on the State in supervising and caring for prisoners, the same can be applied by analogy in respect of HSE staff charged with the equally demanding and difficult task of supervising troubled teenagers.

112. In this respect, the present case is very different from cases such as *X (minors) v. Bedfordshire County Council* [1995] 2 A.C. 633 on which Mr. Bland SC relied. In that case the House of Lords declined, on policy grounds, to impose a duty of care on local authorities who either use (or, as the case may be, failed to use) statutory powers to take children into care. Lord Browne-Wilkinson reasoned that, given the invariably fraught nature of these cases, there was a real risk that local authorities would be dissuaded by external factors (such as the risks and costs of litigation) from giving proper consideration to the exercise of their statutory powers. These were considered to be sufficiently powerful public policy factors in their own right which dissuaded the House of Lords from imposing such a duty of care: see especially [1995] 2 A.C. 633, 750-751, *per* Lord Browne-Wilkinson.

113. That type of consideration simply does not obtain in a case of this kind. It must be recalled that, as O'Donnell J. pointed out in *Whelan,* the just and reasonable test itself encompasses policy considerations. It is sufficient to say in this context that if (as has been made clear by a series of decisions of this Court and the Supreme Court) a duty of care can be imposed on the State in supervising and caring for prisoners, the same can be applied by analogy in respect of HSE staff charged with the equally demanding and difficult task of supervising troubled teenagers.

Part VI: Conclusions

Conclusions

114. In conclusion, therefore, I would hold that the HSE did owe the plaintiff a duty of care by reason of its special relationship with Ms. A. Although the individual social workers showed huge commitment and dedication to the welfare of Ms. A., viewed objectively, it was negligent to conclude that Ms. A. was suitable for independent living when she plainly unsuited to this.

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