THE COURT OF APPEAL
CIVIL

Neutral Citation Number [2020] IECA 344
Court of Appeal Record No. 2018/134

Costello J.
Power J.
Murray J.

NO REDACTION NEEDED

BETWEEN:

CIAN McCARTHY

PLAINTIFF/RESPONDENT

- AND -

JAMES KAVANAGH T/A TEKKEN SECURITY AND HERLIHY'S SUPERMARKET GROUP LIMITED

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Murray delivered on the 8th December 2020

The issues

1. In the early hours of the morning of 31 October 2011 the plaintiff was seriously assaulted on the public footpath outside a convenience store in the centre of Cork city. The store was

occupied by the second named defendant, with the first named defendant providing security services at the premises. In this action the plaintiff claims that the injuries he sustained as a result of that assault were attributable to the negligence of the defendants in the management and operation of the store.

2. The plaintiff's claim revolved around five undisputed facts. First, moments before the assault the plaintiff had been the subject of an unprovoked attack inside the store. Second, although known by them to be the innocent party in that altercation, the defendants decided to seek to diffuse that dispute by ejecting the plaintiff (but not his assailants) from the shop. Third, and to the knowledge of the defendants, upon the plaintiff being removed from the store his assailants immediately followed him out of the premises where they attacked him. Fourth, upon breaking free from those persons the plaintiff sought to take refuge in the shop, but the defendants refused him access to it. Fifth, in the course of being thus refused admission the plaintiff collided with a third party whose boyfriend responded with the swift and devastating blow that caused the injuries giving rise to the claim.

3. Cross J. determined that these circumstances combined to render the defendants (who were jointly represented at the trial) liable to the plaintiff for the injuries thus sustained by him. Essentially, he found that having ejected the plaintiff from the store when he was being pursued by his original assailants, the defendants owed him a duty of care which they breached by failing to re-admit him to the shop. Because an assault was the very event from which the defendants were required to protect the plaintiff, he held that the chain of causation was not broken by the fact that the injuries were inflicted by means of the deliberate and criminal action of a third party. He awarded damages of €750,243.39 in favour of the plaintiff and against both defendants.

4. This appeal is only against the finding of liability. It presents three broad issues:

(i) Whether the defendants owed a duty of care to the plaintiff of such scope that the defendants were, in the circumstances, in breach of that duty in failing to re-admit the plaintiff to the premises;

(ii) If there was such a duty and it was breached, whether the injuries suffered by the plaintiff were a foreseeable consequence of that breach of duty and/or the chain of causation between the breach and the injuries sustained by the plaintiff was broken by a *novus actus interveniens*;

(iii) If there was a breach of duty and causation, whether in the circumstances presenting themselves in this case and in particular the fact that the defendants and the individual who administered the blow to the plaintiff which resulted in his injuries were concurrent wrongdoers, the plaintiff is precluded by the provisions of s. 35(1)(i) of the Civil Liability Act 1961 from maintaining this claim.

The facts

5. Sunday 30 October 2011 fell on the weekend of the Cork Jazz festival, and the following day – a bank holiday - was Halloween. It was described by one of the security guards present in the store at the time as two of the busiest weekends of the year, in one weekend. That evening the plaintiff (then a twenty-five year old psychiatric nurse) and his then girlfriend (and now his wife), Mary O'Keefe, visited a public house in Washington Street and from there went with friends to a nearby licensed premises and nightclub. The plaintiff consumed a number of

alcoholic drinks in both premises. A plea of contributory negligence originally advanced in the defendants' defences was not pursued at trial, and it was not suggested that he was either intoxicated when he left the nightclub, or responsible in any way for what happened thereafter.

6. Save in two respects, what happened thereafter was not the subject of any dispute. At some time after 2 am the plaintiff and Ms. O'Keefe decided to go to the Centra shop on the Grand Parade, Cork, to purchase some food. They arrived there at 2.19 am and entered the premises. The gardaí had just left the front of the supermarket having dealt, the trial Judge found, with an incident or disturbance in front of the shop moments before the plaintiffs arrived. There were a sizeable number of persons in the shop, together with the staff and two uniformed security guards employed by the first named defendant - Mr. Furey and Mr. Pruchnicki.

7. The premises is a compact 24 hour convenience store. At the rear of the store there is a deli counter. From the front of the premises to the deli counter at the rear is a distance of 7.2 metres. The distance from the start of the aisles in the shop leading to the deli counter is approximately 4.2 metres, the aisle to the immediate right of the property on entry being 1.2 metres wide. Although the store was selling hot food this was solely for the purposes of consumption off the premises.

8. At the time of the events with which the proceedings are concerned, the store was one of the few shops still trading in the area and was extremely busy so that the security guards had to close the door into the premises to limit the numbers in the shop at any point in time. The trial Judge recorded in his judgment the CCTV cameras as showing '*a very large number of people milling around in front of the Centra supermarket*'. The evidence was that a lot of the people in the shop and gathered in the area immediately outside the shop had been drinking.

9. As the plaintiff and Ms. O'Keefe entered the premises Mr. Furey was towards the back of the property near the deli counter while Mr. Pruchnicki was near the front door. A queue had formed up on the right-hand lane in the store, turning slightly to the left in front of the deli counter. It was Mr. Furey's evidence that he had located himself in this position so that if people tried to go straight to the counter he could intervene and send them to the back of the queue. Mr. Pruchnicki, meanwhile, was controlling the number of people entering the premises, closing the door as and when he felt that there were too many people inside. He could see what was happening outside, stating at one point in his evidence that people were '*all over the place outside the door*'. It was common case that while the street generally was not crowded, the area immediately outside the store was.

10. The plaintiff and Ms. O'Keefe, upon entering the shop, made their way to the queue. Two sisters – Sinead and Barbara O'Mahony - were immediately in front of them. Seconds after the plaintiff and Ms. O'Keefe entered the premises a Christopher O'Callaghan came into the shop. He attempted to go straight to the deli counter, by-passing the queue, but was redirected by Mr. Furey to the back of the queue. Mr. O'Callaghan then attempted to jump the queue by moving upwards on the inside right of the aisle to join Barbara and Sinead O'Mahony. He jostled past the plaintiff carrying a large cardboard box which he had been wearing over his head by way of 'fancy dress' on his entry to the premises. The evidence was that the plaintiff said words to the effect that Mr. O'Callaghan should have some manners. This intervention prompted Sinead and Barbara O'Mahony to berate the plaintiff. Ms. O'Keefe's evidence was that she called Mr Furey over to assist, although the trial Judge also found that one of the O'Mahony sisters went over to Mr. Furey. An altercation between Mr. O'Callaghan, the O'Mahonys and the plaintiff ensued, with one of the O'Mahonys assaulting the plaintiff by grabbing him around his jaw.

11. Mr. Furey went over to the queue, possibly because he was called there by Ms. O'Keefe. He said that he saw a group of people shoving and pushing and shouting at each other with the plaintiff facing Mr. Furey, while Barbara and Sinead O'Mahony and Mr. O'Callaghan faced the plaintiff. He saw one of the O'Mahony sisters assault the plaintiff in and about his face and witnessed Mr. O'Callaghan '*getting involved and going for*' the plaintiff. His evidence was that he wanted to separate the plaintiff from Barbara and Sinead O'Mahony and Mr. O'Callaghan. He said that matters had got beyond a stage where the parties could be spoken to and the situation de-escalated. He was concerned that this commotion was occurring in an enclosed area with a number of people queueing and the consequent risk that injury could be caused to other people in the vicinity. Mr. Pruchnicki's evidence was that the situation in the queue was '*getting very out of control*'.

12. Although he believed the plaintiff to be the innocent party in the altercation and identified the other three as the '*aggressors*' Mr. Furey decided to escort the plaintiff (rather than the O'Mahony sisters and Mr. O'Callaghan) out of the shop. His reasoning was that it was easier to remove one person than the other three. Mr. Furey was not, it seems, aware of Ms. O'Keefe's connection to the plaintiff or that he was in fact separating the plaintiff from her.

13. Mr. Furey thus put himself between the parties involved, who (he said) were grabbing and pushing at each other. He began guiding the plaintiff from the deli counter queue. Mr. Pruchnicki, at the same time, went towards Mr. Furey to help him, the latter handing supervision of the plaintiff over to the former. However, as Mr. Furey did this he did not tell Mr. Pruchnicki that the plaintiff was the innocent party in the affair. Mr. Pruchnicki said in the course of his cross examination that he presumed that the plaintiff (who protested his ejection from the property) was a trouble maker and agreed that this was not the type of person

he was ever going to allow back into the shop again. He explained his state of mind at this time *vis a vis* the plaintiff, as follows:

> *'A. I believed obviously if he was handed over to me I believed he done something but he was taken out of the queue. That was my believing* [sic] *at the time.*
>
> *Q. He had done something. You don't know what it was?*
>
> *A. Something wrong.*
>
> *Q. He had done something wrong. You had no idea what it was, but you were doing the right thing by removing him from the premises?*
>
> *A. That's correct. Yeah.'*

14. As the plaintiff was escorted through the shop to, and out, its front door he was followed by Barbara and Sinead O'Mahony and by Mr. O'Callaghan. Mr. Furey requested these three not to follow the plaintiff but did not communicate to Mr. Pruchnicki that the three persons exiting the store immediately after the plaintiff had been involved in the row which had resulted in the plaintiff's ejectment from the premises. Mr. Furey stressed in his evidence that he did not have the power to detain Barbara and Sinead O'Mahony and Mr. O'Callaghan in the premises and that he could not prevent them from leaving if they wished to do so. They left the premises briskly either running or walking fast, pushing past Mr. Pruchnicki as they did so. Mr. Pruchnicki said that at first he did not connect the three people leaving the shop with the plaintiff.

15. The plaintiff was brought out of the premises at 2.25:16 am. When the plaintiff exited the premises he was followed by the O'Mahony sisters and Mr. O'Callaghan. At 2.25:19 am they are seen on the CCTV footage pushing past Mr. Pruchnicki who was standing at the door of the premises. Outside, one of the O'Mahony sisters attempted to hit the plaintiff about the head, while the other sister and Mr. O'Callaghan joined in the attack. The plaintiff offered no resistance to them, backing away while trying to cover his head to prevent these assaults. He managed to break loose from his pursuers and made for the front door of the shop seeking safety. He was captured on CCTV at 2.25:32 am just outside the entrance, being pursued by one of the sisters, with Mr. O'Callaghan behind her. Mr. Pruchnicki was by then back manning the front door, which he had now closed. As I have noted, Mr. Pruchnicki was not told that the plaintiff was the innocent party in the initial row. When the plaintiff tried to re-enter the shop, Mr. Pruchnicki prevented him from doing so. This occurred at 2.25:34 am. Mr. Pruchnicki's evidence was that outside the premises at this point '*people were everywhere ... [t]hey were all over the place outside the door, not necessarily queueing and trying to get in, they were all over the shop*'.

16. Precisely how Mr. Pruchnicki blocked the plaintiff from entering the premises presented one of the few disputed issues of fact between the parties. Mr. Pruchnicki said he put his hands up causing the plaintiff to bounce off him, while the plaintiff said that Mr. Pruchnicki had actually pushed him back. In this regard, the plaintiff's evidence was supported by two independent witnesses - Linda O'Shea (who was inside the store) and Cathal O'Sullivan (who was outside). Aisling Geary, a third independent witness heard Mr. Pruchnicki telling the plaintiff to stop but did not see him push the plaintiff. Examining the photographs, the judge said it was clear that whatever occurred and whether or not Mr. Pruchnicki 's hands were moving towards the plaintiff in a push or were merely held up, the force of the impact of the

plaintiff on Mr. Pruchnicki's hands caused him to stumble back towards a bystander - Ms. Hartnett - and towards the arms of Mr. O'Callaghan.

17. The trial judge said he believed that all witnesses were attempting to tell the truth as they saw it but examining the CCTV and the still photographs none of them showed Mr. Pruchnicki with his two hands raised in a blocking position as he maintained. The photographs did show the plaintiff in collision with Mr. Pruchnicki and being pushed or falling backwards and in particular a photograph exhibited in the report of one of the engineers showed Mr. Pruchnicki with not two hands, but one hand, raised. The trial judge concluded that what Mr. Pruchnicki did, in fact, was to push the plaintiff back towards the crowd and in particular towards Mr. O'Callaghan. However, Cross J. said he was not persuaded that the resolution of this factual dispute resulted in any substantial difference to the outcome of the case.

18. What is clear is that the reason Mr. Pruchnicki was not letting the plaintiff back into the shop was that he believed that he was '*a trouble maker*'. This was explored as follows in the course of cross examination:

> '*Q. When you see him being beaten up outside and coming back to the shop you're not going to let him back in because he's a trouble maker; isn't that right ?*
>
> *A. I seen* [sic] *him being chased, that's why I wouldn't let him back in.*
>
> *Q. If he was innocent and had done nothing wrong and was in trouble outside you'd have left him in?*
>
> *A. If he was innocent he wouldn't be taken out in the first place.*

Q. Forget that for a second. If he was innocent, he was the innocent party in all this, he's trying to get back in because people are trying to beat him up outside you'd have left him in; isn't that right?

A. I would.

19. The other issue of fact in dispute arose from the exact sequence of events following the plaintiff's unsuccessful attempt to re-enter the property. Cross J. determined on the basis of the CCTV stills that the plaintiff was pushed back in a falling motion and was grappled by Mr. O'Callaghan as he was falling. He said it was a combination of Mr. Pruchnicki's push and his entanglement with Mr. O'Callaghan that caused the impact with Ms. Hartnett. He was not persuaded that the resolution of this factual dispute significantly affected the outcome of the case.

20. Either way, the plaintiff stumbled backwards from Mr. Pruchnicki and this caused the plaintiff to trip over and knock Ms. Hartnett to the ground. Ms. Hartnett had nothing to do with the altercation but was standing on the pavement outside the shop. This collision occurred at 2.25:35 am. Ms. Hartnett was present with her boyfriend, Aidan Cullinane. Neither had been in the premises before this incident. Mr. Cullinane was behind or beside Ms. Hartnett when she was knocked to the ground. The collision with her prompted Mr. Cullinane to intervene and punch the plaintiff in the head rendering him unconscious, causing him to fall to the ground, crack his skull and suffer a serious head injury. As a consequence of the assault the plaintiff suffered a number of fractures to his skull and intercranial damage to his brain. He has been left with permanent disability as a result of the incident.

21. All of this occurred within a very short period of time. Thirty-nine seconds elapsed between Mr. Furey breaking up the altercation inside the shop between Sinead and Barbara O'Mahony, Mr. O'Callaghan and the plaintiff, and the plaintiff's assault by Mr. Cullinane. The interval between the plaintiff being removed from the shop and being struck by Mr. Cullinane was less than ten seconds. In that instant he was assaulted by the O'Mahony sisters, sought and was refused re-entry, collided with Ms. Hartnett and was struck by Mr. Cullinane. It was two seconds after being pushed back by the security guard Mr. Pruchnicki that the blow causing the injuries to the plaintiff was administered by Mr. Cullinane.

22. Mr. Cullinane was subsequently convicted of the offence of assault occasioning serious harm arising from this incident. He received a sentence of five years imprisonment, the last two of which were suspended. Mr. O'Callaghan and Sinead and Barbara O'Mahony were convicted of public order offences.

23. The defendants emphasise certain findings made by the trial Judge in respect of Mr. Pruchnicki's knowledge of what had occurred outside the premises immediately before the plaintiff sought to obtain access to it. Thus, at para. 4(xii) of his judgment, Cross J. said that Mr. Pruchnicki '*did not witness the plaintiff being beaten and pursued outside*'. Later in his judgment (para. 18) he said that Mr. Pruchnicki:

> '*had no reason to notice what was apparent to independent persons that immediately he left the shop, the plaintiff was being assailed by the pursuing threesome, was offering no resistance but shielding his head from their blows. Similarly, Mr. P[ruchnicki] had no reason to notice, and did not notice that the plaintiff had broken free from his assailants and was running to the shop door for safety. When he saw the plaintiff, attempting to re-*

enter the premises, Mr. P[ruchnicki] did not know that he had been assaulted both inside and outside the premises and was attempting reasonably to flee from his assailant.'

24. I draw specific attention to these findings because they do not necessarily correspond in full with the evidence given by Mr. Pruchnicki. I have quoted earlier a passage from his cross examination which operated on the basis that Mr. Pruchnicki had seen the plaintiff being chased ('*I seen* [sic] *him being chased, that's why I wouldn't let him back in*'). He said at another point in his evidence that when he saw - partially - what was going on outside the shop his thought was that this was probably the people who had been involved in the situation in the queue. At the same time, however, he said at one point that he did not actually witness any physical contact between the plaintiff and those who had run after him. However, he testified that he did see the chase. Mr. Pruchnicki explained what he saw in evidence, as follows:

'*They were trying to come back. Mr. McCarthy was first trying to run towards me and in my head at the time what I can remember there was something like not pleasant situation going on outside the door and just to avoid all this going back to the shop I stopped Mr. McCarthy from entering the shop by putting my hands up and blocking his entry.*'

25. Mr. Pruchnicki was not challenged on these statements. Ultimately, nothing turns on this, because – as I explain shortly – the trial Judge also found that had the defendants observed their legal obligations as he formulated them, Mr. Pruchnicki would have become aware of both the assault and the chase.

The findings of the trial Judge on the duty of care issue

26. The conclusion of the trial Judge that the defendants owed a duty of care to the plaintiff which they breached in the circumstances that presented themselves, was reasoned as follows. To begin with, he noted that the defendants admitted that they owed the plaintiff a duty of care while in the premises. He then decided that the defendants' admitted duty '*did not stop at the door of their premises*'. From there, he found that being aware of the dangers posed by a continuation of the row between the plaintiff on the one hand, and Sinead and Barbara O'Mahony together with Mr. O'Callaghan on the other, Mr. Furey ought to have noticed the latter following the plaintiff and ought to have advised Mr. Pruchnicki '*of the situation*'. Had this been done, he explained:

> '*This, at the very least, would have led Mr. P[ruchnicki], if he himself could not have persuaded the pursuers to remain in the store, to keep what was going on outside the store under observation and rather than pushing the plaintiff back as I find to be the case or blocking his re-admittance as he himself contends, he would have allowed the plaintiff back into the safety of the store. The neighbour question has been answered by Mr. P[ruchnicki] when he fairly said that had he known the circumstances he would, indeed, have not denied the plaintiff access to the store. A property owner or its security staff, duly entitled, may lawfully evict a customer from their premises, but that eviction cannot involve the person, in effect, being thrown to the wolves, with the property owner having no concerns of legal liability for anything that occurred once the eviction had taken place.*'

27. Referring to the decision of the Supreme Court in *Glencar Explorations v. Mayo County Council* [2002] 1 IR 84 Cross J. found that the injury to the plaintiff, though not necessarily the '*indexed injury*', was reasonably foreseeable as when the plaintiff was denied readmission, the defendants ought to have been aware that he was likely to have been assaulted and injured.

Thus, he said, the proximity test had been met. He explained why he believed it was just and reasonable to impose liability on the defendants, and why there were no public policy considerations militating against imposing such liability at para 23, as follows:

> '*It is just and reasonable to impose a duty of care upon the defendant as otherwise security guards could eject customers involved in a minor row and thereby subjecting their former customers to risk of more serious injury outside their premises.*'

28. The judge continued:

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

29. These various defaults were brought together and related to the duty he had identified, as follows:

> '*Having decided to eject the plaintiff Mr. F[urey] ought to have informed Mr. [P]ruchnicki that the plaintiff was, in fact, the innocent party. He did not do so. Having advised the three persons that they should not leave the premises Mr. F[urey] ought to*

have noticed that rather than accepting his advice, they were in hot pursuit of the plaintiff, he did not take any such notice. Furthermore, having seen the three in pursuit of the plaintiff, Mr. F[urey] should have notified Mr. P[ruchnicki] of this fact. He did not do this. Had Mr. P[ruchnicki] been aware of the facts, he would have kept the parties under observation and when he saw the plaintiff being assailed by his pursuers in attempting to return he would have admitted him rather than forcibly excluding him. Unfortunately, this did not occur. The defendants accordingly did owe a duty of care to the plaintiff and were in breach thereof.

The defendants' case on the duty of care issue

30. The defendants seek in their argument to tie together the conclusions of the Court in relation to the existence of a duty of care, its breach, the foreseeability of the events giving rise to the injuries sustained by the plaintiff, and their argument in relation to *novus actus interveniens*. The essential case they advance is that the duty of care owed by the defendants to the plaintiff did not extend to a duty in respect of the conduct of third parties such as Mr. Cullinane, and that in the absence of any special relationship between the defendants and Mr. Cullinane the imposition of responsibility on the defendants for the *criminal* actions of Mr. Cullinane cannot be justified.

31. The defendants accept that they owed *a* duty of care to the plaintiff. However, they define it in terms that would exclude from its scope a default of the kind relied upon here. They say they owed no more than:

'a duty to take reasonable care for the safety of ... customers by employing security staff, floor staff, operating systems of queueing, and expelling customers and refusing re-entry where that appeared reasonably necessary, as they did.'

32. This duty, they say, did not extend to policing outside of the Centra premises or to policing members of the public such as Mr. Cullinane who were not customers. They observe that this is the function of the Gardaí, and indeed that if the security guards were to have left their posts to police events outside the premises they would have been guilty of dereliction of duty. They stress two particular findings of the trial Judge to which I have earlier referred. First, his determination that Mr. Pruchnicki *'did not know that the Plaintiff was the innocent party and did not witness the plaintiff being beaten and pursued outside'*. Second, they emphasise that the trial Judge observed:

'Mr. P[ruchnicki] had no reason to notice and did not notice that the Plaintiff broke free from his assailants and was running towards the shop door for safety. When he saw the Plaintiff attempting to re-enter the premises Mr. P[ruchnicki] did not know that he had been assaulted both inside and outside the premises and was attempting reasonably to flee from his assailants'.

33. Thus, they note, the trial Judge did not root the finding of negligence in the action of Mr. Pruchnicki in refusing the plaintiff access to the premises *simplicter*. Instead, they observe, he focussed on the actions of Mr. Furey in failing to inform Mr. Pruchnicki that the plaintiff was *'the innocent party'* and that the persons following him out of the store – Sinead and Barbara O'Mahony and Mr. O'Callaghan – had assaulted him within the premises. The defendants say that the theory underlying the Judge's imposition of liability was thus that Mr. Pruchnicki ought to have granted the plaintiff access to the shop not because he knew that the former was being

assaulted, but because he ought to have known that he had done nothing wrong in the shop and that those who had assaulted him in the premises had left immediately after him.

34. However, the defendants say, it was wrong to impose liability on them for this omission of Mr. Furey. They say this because Mr. Furey could not have foreseen what actually happened. The point is made that Mr. Furey could not have known:

> '*the party of three would abandon the queue and pursue the Plaintiff outside; the party of three would assault and chase the Plaintiff outside; the Plaintiff would loop back to the store and seek readmittance; Mr. Pruchnicki would prevent him; Mr. Pruchnicki would push the Plaintiff back from the door; the Plaintiff would knock down a passer-by, Phoebe Hartnett; and as a result a second passer-by, Mr. Cullinane, would sucker-punch the Plaintiff.*'

35. This, the defendants contend, is simply too complex a chain of events to be foreseeable, and the damage resulting is in consequence too remote. Furthermore, and referring to the decision of Hogan J. in *Ennis v. Health Service Executive and Egan* [2014] IEHC 440, the defendants stress their claim that before a defendant can be found liable for the actions of third parties – criminal or otherwise – there must be a '*special relationship*' between the defendant and the third party and, they say, there was no such relationship between themselves and Mr. Cullinane.

Defining the issue as to the duty of care

36. The first of the three central issues in this appeal is accordingly not whether the defendants owed the plaintiff *a* duty of care. Instead, the debate is around the scope, measure

or nature of the duty admitted to be so owed. That issue is best defined from the vantage of the outcome: for the trial Judge to have been correct in the ultimate conclusion he reached in the case the duty owed by the defendants to the plaintiff had to both entail an obligation to admit the plaintiff to the shop when he sought re-entry, and encompass within its terms the protection of the plaintiff against the risk of assault by a third party. The critical question is whether the duty of the defendants extended thus far.

37. When addressing the obligation of a shop owner to those who enter its premises, neither the proposition that the former owes the latter a '*duty of care*' nor the identification of the damage against which the customer must be protected are usually controversial. The duty to persons entering the premises is to take reasonable care to avoid known or reasonably foreseeable risks of injury to those persons, what is '*reasonable*' and '*reasonably foreseeable*' depending on the facts and circumstances. It does not require any legal authority, or much common-sense, to immediately understand that where a defendant has invited such a number of persons into his premises where they are likely to be gathered together in a small space at a time and in a place where many will have consumed alcohol, and some may be intoxicated, the prospect of physical altercations between them is clearly foreseeable. It is a hazard against which the defendants are required to take some steps to protect their customers.

38. It was accordingly correct that the defendants' own formulation of their duty of care extended to ensuring that reasonable steps are taken to protect customers against the risk of physical injury caused on the premises by other patrons. That is why they include in their suggested duty an obligation to employ security staff and floor staff, to operate systems of queueing, and a duty to expel customers and refuse re-entry where that appears reasonably necessary.

39. While it is certainly the case that such a suite of obligations would not be imposed on most shop owners, those operating 24 hour retail or fast food outlets in locations where numbers of persons, many of whom were likely to have consumed alcohol, are liable to gather in close proximity to each other are clearly on notice of the risk to their customers presented by unruly patrons. That, presumably, was why they had security guards present on the premises at all. It follows that the defendants owed a duty to their customers to have in place reasonable measures intended to provide protection to persons entering the premises against the risk that others would conduct themselves in an unruly, or dangerous way.

40. So, it can be said with confidence that had the defendants employed no security staff, or exercised no control over the entry of persons to the premises, or neither operated nor superintended a system of queuing at the counters, a patron injured by third parties in a premises such as that in issue here, on an occasion such as presented itself in the early hours of the morning of October 31 would have enjoyed a strong case that the shop owner was in breach of the duty it owed to its customer. It must similarly follow that where such systems were in place, their negligent operation in particular circumstances could expose the defendants to legal liability for any damage suffered in consequence.

41. However, that duty will not usually extend to policing the curtilage of the property, to generally protecting those on the footpath against assault from third parties, or to providing a refuge from all who perceive themselves in danger of such an assault. The fact that the second named defendant owns and operates a shop premises, or that the first named defendant provides security and door services at that property, does not bring them without the generally applicable principle that, whatever his moral or ethical obligation, a bystander will usually be under no legal duty to intervene so as to protect a third party from injury or harm. This is the case even though the action required of the bystander may be slight and involve no personal risk or cost

and notwithstanding the fact that the risk of significant injury to the third party without that intervention is obvious (see *Dorset Yacht Co. v. Home Office* [1970] AC 1004, 127 (per Lord Reid), *Stovin v. Wise* [1996] 3 All ER 801, 818-819 per Lord Hoffmann, *Glencar Exploration plc v. Mayo County Council (No.2)* [2002] 1 IR 84, 138-139 per Keane CJ). It follows that in the context in which this case presented itself, the defendants would have had no duty of care to admit a stranger into their premises even if being attacked or pursued by a third party and even though a failure to so admit him would result, as a matter of probability, in his sustaining very serious injury at the hands of that third party.

42. The difficulty that presents itself in addressing the plaintiff's claim here is that the facts fall somewhere between these two situations. The injury of which the plaintiff complains was not inflicted on the shop premises, so the contention that the defendants are under a duty to protect the plaintiff against an injury that occurs on property under their control is, without extension, of no avail to the plaintiff. At the same time, the plaintiff was not simply a passer-by who was assaulted outside the shop or who sought refuge within the store from a threat originating solely on property, or arising from an event, over which the defendant exercised no control. He had been in the premises, and the immediate risk from which he sought to flee both originated on it and arose because of the effect of the actions of the defendants in ejecting him from the store when he was being pursued by those who had initially assaulted him there.

43. In straightforward negligence cases (and that means the vast majority of such claims), the atomisation of the tort between duty, scope, breach, cause and damage, provides a convenient – but often unnecessary - checklist for confirming or negating an asserted liability. In most situations these elements can be readily identified or out-ruled on the basis of intuition rather than analysis. In more complex claims the elements of the tort are not as easily segregated. This is particularly the case when a claim crosses the sometimes ill-defined line

between a duty to protect against harm from third parties and the obligation not to actually inflict it. In claims of this kind it is more difficult to answer the question of whether the defendant owes a duty of care without referring the scope of the duty so claimed to the type of damage against which it is asserted the defendant was required to protect the plaintiff. While it may not be necessary to explicitly observe Lord Bridge's exhortation in *Caparo Industries plc. v. Dickman* [1990] 1 All ER 568, 581 in all cases, once a claim in negligence strays outside the boundary of familiar legal relationships and defaults, it becomes important:

> *'It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless:*
>
> > *'The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it.*
>
> *(See Sutherland Shore Council v. Heyman (1985) 60 ALR 1 at 48 per Brennan J.)*

44. In a case such as this, where the operative duty and relevant damage are each necessarily defined by reference to the risk of harm posed by third parties, the elements of the tort of negligence become somewhat circular. While it can be said with confidence here that the defendant owed a duty of care to the plaintiff, the existence of a duty only engages the defendants' liability if it is of sufficient scope, and the issue as to the scope of the duty depends on whether it extended to protect the plaintiff from the risk of injury at the hands of third parties. Yet the answer to that question does not merely determine the scope of the duty, it also provides the answer to an important issue of causation. If the obligation of the defendants was to protect

the plaintiff against harm directly inflicted by third parties, then the fact that an injury is caused by such persons does not sever the chain of causation.

45. I say this because the defendants began their oral submissions to this Court by focussing on the issue of *novus actus interveniens.* This was, their counsel said, the central issue in the case. It might be said that in a circular inquiry any one point along the diameter is as good a starting point as any other. However, in this case the rules of causation are necessarily determined by the scope of the duty, and that in turn is a function of the harm against which the defendant is allegedly obliged to protect the plaintiff. That seems a particularly appropriate marker from which to begin.

The duty of care of the convenience store owner

46. In understanding how the dividing line is drawn between those injuries inflicted by third parties for which the defendants are properly responsible, and those for which they have no legal liability, it is necessary to address in more detail the precise extent of the duty that is imposed on the owner of a property such as the convenience store in issue here. The essential components of the duty do not require a detailed interrogation of the *Glencar* principles. The requirements of proximity, foreseeability and the broader policy considerations identified in that case clearly operate to impose *a* duty of care, and that duty obviously requires that the owner of a store or supermarket is under an obligation to customers to take reasonable care to protect them from a foreseeable risk of injury on the premises. The particular implications of that general duty will clearly depend on the nature of the premises in question. While noting the defendants' case that because alcohol was not served on the premises, that food was not sold for consumption on it, and that no entry fee was charged, the duty cannot be equated to

that of a publican or nightclub owner, the premises was one that – at least late in the night and at the early mornings of a weekend – was likely to attract large numbers of persons from nearby public houses and nightclubs. The duty of care imposed on the defendants in the management and operation of the shop had to accommodate that fact.

47. Thus, the duty acknowledged by the defendants does not in its essence differ from that articulated in respect of licensed premises by Morris J. in *Hall v. Kennedy* (Unreported, High Court, 20 December 1993). In *Hall*, the court refused to impose liability upon the defendant when the plaintiff was injured by another customer in the public house owned and operated by him. The customer had not shown signs of a propensity to assault other customers, and the defendant could not have foreseen the assault. Morris J. defined the operative duty as one:

> *'to take all reasonable care for the safety of the [customer] while on the premises. This would include ... 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].'*

48. However, the defendants are correct in suggesting that authorities dealing with establishments of the kind in issue in *Hall* can apply to a store of the kind in issue here only with significant qualification. The application of that duty to the owner of a premises such as that in issue in this action will in most cases differ on the facts from that imposed upon the owner of a public house or licensed club. It will not be usual that retail premises are likely to attract at one time large numbers of potentially unruly customers so that the foreseeability of harm necessitating the type of protective measures referenced in *Hall* will not generally present itself. Moreover, the obligation to have security personnel outside a premises deduced from

the judgment of Morris J. in *Hall* by Herbert J. in *Meagher v. Shamrock Public Houses Limited* [2005] IEHC 35 is of no relevance to a property which does not own open areas adjacent to its outlet, and for my part I cannot see that the obligation of the owner of a retail outlet will ever extend to a duty to patrol and protect persons on the public path or roadway. And, to repeat, the obligations envisaged in *Hall* are limited to circumstances in which the presence of unruly customers is reasonably likely. In *Meagher*, the evidence was that assaults and public order offences occurred every two or three weeks at the club.

49. Thus, the decision of Peart J. in *Rodgers v. J.A.C.K.S Tavern Ltd.* [2012] IEHC 314 makes it clear that, even in the case of public houses, there is no legal requirement that security personnel be employed as a matter of course. An obligation of that kind arises only exceptionally, and in circumstances where the owners are on notice of a real risk of injury to customers in the absence of such measures such as would arise where the premises was hosting an event which by its nature or experience was likely to involve troublesome patrons.

50. In that case the Court rejected the suggestion that the plaintiff could recover damages for an injury sustained following an assault by a customer of the defendant's licensed premises because no security personnel had been employed at the property. To impose such an obligation, Peart J. said, would mean that every public house would need to have security personnel both inside and outside the premises just in case an incident of assault might occur, even where there was no history of such occurrences. Because there was no reason for the defendant to foresee that there could be trouble on the evening in question (on which, as it happens, the defendant was hosting a Halloween function) there was no obligation of the kind contended for by the plaintiff to have measures in place to protect patrons of the public house against what Peart J. described as '*a spontaneous eruption of violence*'. There, it might be noted, Peart J. held that the duty of care to safeguard patrons operated not only while they were

present on the premises but also included a duty to do so immediately outside the premises (at para. 27). For present purposes I would observe that whatever about the extension of that obligation to areas comprising pub car parks or common areas controlled by the owner of a licensed premises, the proposition that the obligation to customers extends to a duty to patrol or intervene in disputes on the public footpath presents a range of difficult issues which, in particular, engage the '*just and reasonable*' component of the duty test adopted in *Glencar*. While Courts in other jurisdictions have been prepared to countenance such an obligation in the case of the owners of bars and hotels, these appear to have been – at least to some extent - influenced by broader obligations imposed by applicable licensing statutes (see, in particular, *Portelli v. Tabriska Pty. Ltd.* [2009] NSWCA 117 and *Orcher v. Bowcliff* [2012] NWSCA 1088).

51. The specific application of these principles to the obligation of a property owner where invitees are subjected to assault by persons outside their premises but arising from interaction on the premises themselves was addressed by Barr J. in *Lyons v. Elm River Limited and anor.* Unreported High Court 16 February 1996. There the plaintiff, a barrister, had attended a discotheque in a hotel owned and operated by the defendants. In the course of the evening a member of the party with whom he had entered the premises complained to security staff that he was being '*eyeballed*' by other patrons in a menacing way. It was his evidence that a member of his group was then given assurances that these persons would not cause him or his party any trouble. Those other patrons having left the hotel, when members of the plaintiff's party left the premises they were attacked by those they had encountered in the club. The assaults occurred just outside the building (but on the defendant's property) and in plain view of security guards employed by the defendants. The patrons sought assistance and to be readmitted to the hotel, both of which requests were refused. When the plaintiff left the

discotheque he was not warned by the security guards of the melee outside, and also was attacked. The defendants contended that their security staff had no responsibility for the safety of patrons once they left the interior of the hotel premises, asserting that they had been advised that in the event of trouble outside the building they should not intervene and would be committing an offence if they did so. Noting the obligation imposed on the defendants to take reasonable care for the safety of patrons on the hotel premises, Barr J. (in determining that the plaintiff was entitled to recover damages in respect of the injuries thus suffered by him) deduced eight aspects of that duty, including:

> '*(e) An obligation to take reasonable steps to rescue the plaintiff and his companions who were victims of unprovoked assault outside the exit door.*
>
> *(f) An obligation to open the exit door from the hallway and allow the plaintiff (and the other victims of assault) to reach the safety of the interior of the hotel'*

52. *Lyons* is important to the resolution of this case. It is a central feature of the defendants' case that – as it was put in oral argument – once they returned the plaintiff to '*the milieu from which he had entered the shop*' their duty was discharged. *Lyons* strongly suggests that this is wrong, and that at least in some circumstances events inside the premises can give rise to a duty of care extending, to some extent, to occurrences outside it.

53. Rather than addressing *Lyons* at the level of duty of care, the defendants focus on its implications for causation. For reasons to which I have already alluded, and to which I will return, I do not believe the issues can be segregated in this way. In any event, they say that before the defendants could have liability imposed upon them for the injuries intentionally

inflicted by Mr. Cullinane, they had to have a special relationship with him. They thus distinguish *Lyons* on the basis (they say) that the '*eyeballing*' within the premises referred to in the judgment in that case established the creation of a '*special relationship*' between the security staff and the group who eventually assaulted the plaintiff. No such '*special relationship*' they say existed between the defendants and Mr. Cullinane. Because there was no such '*special relationship*' between the defendant and the person inflicting the damage there could (the defendants say) be no liability imposed on the defendant when the plaintiff was assaulted.

54. I think that the proposition underlying this argument – that there was no '*special relationship*' between the defendants and Mr. Cullinane – must be correct. Mr. Cullinane had not been in the store, had had no prior relationship with the plaintiff, and his specific presence outside the store was neither foreseeable when the plaintiff was escorted out of the shop nor known when he was refused re-entry to it. The argument thus reduces the issue of whether the defendants owed a duty of care to take reasonable steps to protect the plaintiff against the assault perpetrated by Mr. Cullinane to two questions First, where A sues B for damage directly inflicted by C, must there be a '*special relationship*' between B and C before liability in negligence can be imposed upon B ? Second, if not, what is the principle by reference to which the Court should determine when such liability should be imposed?

The defendants' claim that there must be a 'special relationship' with the other wrongdoer

55. The authorities I have addressed in the previous section are important not merely because they provide a reliable framework derived from analogous situations within which the issue in these proceedings as to the scope of the duty of care owed by the defendants to the plaintiff can

be placed, but also because they make it clear that there is no universal principle in Irish law precluding liability in negligence for the consequences of the criminal actions of third parties. That reflects the conclusion reached, in some cases gradually and with somewhat greater difficulty, in other common law jurisdictions (see in particular *Lillie v. Thompson* 332 US 459 (1947), *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004, *Modbury Triangle Shopping Centre Ltd. v. Anzil* [2000] HCA 61, 205 CLR 254).

56. Apart from the policy issues presented by that election, the imposition of such liability (and in particular the principles by reference to which its scope is gauged) cuts across a range of familiar and related, controversies within the law of torts – when will liability be imposed for an omission as opposed to a positive action, when must the defendant confer a benefit on the plaintiff as well as desist from imposing a detriment, when will there be an obligation to rescue a plaintiff from a peril, and when will the chain of causation be broken by the intervening act of a third party? Noting the sometimes blurred line between act and omission, and the more recent tendency to reframe that distinction by reference to what Clarke CJ has termed as a '*do no harm principle*', there is no doubt but that '*the imposition of a duty of care which imposes a positive obligation to act to prevent damage arises in significantly more limited circumstances than those which impose a duty of care to refrain from acting in a way which may foreseeably cause proximate damage*', (*UCC v. ESB* [2020] IESC at 7.7 per Clarke CJ). The question presented by this aspect of the defendants' argument depends on the identification of the criteria by reference to which the line between the two can be drawn.

57. Here, as I have noted, the defendants seek to define these issues by a single principle. They say that they could only face liability for the injuries inflicted on the plaintiff by Mr. Cullinane if they had a special relationship with the latter. This proposition was central to their

defence of this part of the case. At some points it was expressed as an aspect of the law governing *novus actus interveniens.* Their first ground of appeal expresses this fundamental objection to the findings of the trial Judge as follows:

> '*He found that the criminal acts of Aidan Cullinane in forcefully and severely striking the plaintiff with a haymaker and causing him serious harm did not constitute a novus actus interveniens on the basis that they were "the very kind of thing" that the defendants were "bound to expect and guard against", when these excepting criteria potentially excluding acts from categorisation as a novus actus interveniens could be applicable only where the defendants had a special relationship with the said Aidan Cullinane and the defendants in fact had no relationship whatever, let alone a special relationship, with the same Aidan Cullinane'.*

58. However, in their written submissions, the defendants frame the issue as part of the test for a duty of care:

> '*In other cases defendants have been found liable for the actions of third parties, be they criminal or otherwise. However liability in those cases has been imposed on the basis of a "special relationship" between the defendant and the third party.*'

59. I mean no disrespect to the careful and comprehensively researched submissions of the defendants when I say that while neither of the statements in the latter paragraph is necessarily wrong, both are incomplete. The difficulty, I think, stems from a failure to acknowledge that whether a '*special relationship*' is required in this circumstance between the defendant (B) and another wrongdoer (C) depends on the nature and scope of the duty alleged to have been

breached to the plaintiff (A). If B owes a duty of care to A which encompasses an obligation to exercise control over C and B is, for that reason, said to be liable because such control was not properly exercised, then certainly a '*special relationship*' must exist between B and C. B could not exercise control without one. The same may be the case – at least in some circumstances - where the duty is alleged to arise from a voluntary assumption of responsibility by B to protect A from C.

60. But these are not the only situations in which one person may be found liable in tort to compensate for damage inflicted by another. B may be liable because he has created a situation in which A is exposed to a risk of damage from C not because he controls C, but because he controls A or (as the case may be) A's property. The relationships between employer and employee and bailor and bailee afford obvious examples. B may be liable because he creates the conditions which enable C to inflict the injury on A. And – as this case shows – B may be in a position to protect A from C not because he controls C or indeed creates the conditions in which C can inflict injury on A, but because he controls an aspect of the environment in which that injury occurs and because he has a relationship with A such that he must use that control to come to A's aid. That is the basis on which cases such as *Goldman v. Hargreaves* [1967] 1 AC 645 impose liability for omissions as between adjoining landowners (and see *UCC v. ESB* [2020] IESC at para. 11.9).

61. These examples can be mixed and matched, and there will be circumstances in which one overlaps with, or through the framing of obligations at a sufficient level of generality can be redefined as, the other. However, it is only by straining language to breaking point that it could be said that in all of these situations B has a '*special relationship*' with C – unless one uses that phrase in the entirely circular sense that because B is liable for injury inflicted by C

there is, for that reason alone, such a relationship. It is, I think, more illuminating to frame the inquiry at a more general level - whether B has created, exacerbated or controls what Clarke CJ has described as '*the risk of danger*' (*UCC v. ESB* [2020] IESC at 12.4). That may arise where B controls or otherwise has a '*special relationship*' with C, but it may also arise because B has it within his power to shield A from C and the relationship between A and B is such that he must use that power. Of course, B's relationship thus understood is not in and of itself sufficient to render B liable to A. It does, however, describe the necessary elements of liability for damage inflicted by a third party.

62. The defendants reference six authorities in support of the proposition upon which they thus rely. Five of these can be dealt with briefly. The first and best known, is the decision in *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004 where it was found (on assumed facts) that the defendant breached its duty to the plaintiff by failing to supervise boys it brought from a borstal to the locality in which the plaintiff maintained property, the boys proceeding to damage that property when they were left, unsupervised, to their own devices. In *Vicar of Writtle v. Essex County Council* (1979) 77 LGR 656, the defendant's negligence in failing to advise the persons in charge of a care home of the propensity to fire raising of a boy it entrusted to that home, was held to render it liable to the plaintiff for damage caused by the boy when he was permitted to leave the home unsupervised and cause damage by setting fire to the plaintiff's property. In *Bates v. Minister for Justice* [1998] 2 IR 81 the injuries of which the plaintiff complained were caused by a fellow prison inmate, but the Court determined that the defendant would have been liable for those injuries had they been preventable by the defendant taking reasonable steps (which it was found on the facts could not have been done). A similar principle was identified, and outcome obtained, in *Casey v. Governor of Midland Prison* [2009]

IEHC 466 while in *Creighton v. Ireland (No. 1)* [2010] IESC 50 the same duty was applied, and case remitted to the High Court to determine on the facts.

63. In one sense the facts of these decisions support the thesis suggested by the defendants in that in all of these cases liability was imposed on the defendants in a context where they could exercise some control over the persons who directly inflicted the damage, and because they either failed to exercise that control (*Dorset Yacht*), failed to warn of the danger represented by the person who directly caused the harm (*Vicar of Writtle*), or failed to take steps in regulating the environment in which that control was exercised so as to minimise the opportunity for harm to be inflicted on the plaintiff (*Bates, Casey* and *Creighton*). To that extent these cases can all be seen as affording examples of cases in which there was a '*special relationship*' between the defendant and the immediate wrongdoer.

64. However, two important points should be made about these decisions. First, it is not correct to say (as the defendants do) that they represent cases in which liability was imposed on the defendant *for the actions of third parties*. In each of these cases liability was imposed for the actions or omissions of the defendants themselves. That distinction – between liability for the actions of third parties and being legally responsible for one's own actions or omissions so as to face liability for the consequences of the actions of another – is more than semantics. It determines the proper focus of the inquiry in a case such as this which is not solely upon the quality of what the third party did or did not do, but instead is directed to the relationship between the acts and omissions of the defendant and the damage sustained by the plaintiff. The point, common to all these cases, is best made by Lord Reid in *Dorset Yacht* (at p. 1027):

'Even so, it is said that the respondents must fail because there is a general principle that 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.

65. Second, in none of the decisions was it decided that the organising principle governing the issue of whether B could be liable to A for harm inflicted by C was defined exclusively by the existence of such a relationship between the defendant and the third party. Each is explicable by reference to the broader rule I have suggested: in each case B created, exacerbated or controlled the risk of danger to A.

66. The decision which the defendants say does posit such a requirement, and upon which they concentrate their greatest focus is the judgment of Hogan J. in *Ennis v. HSE and Egan* [2014] IEHC 440. There, the defendants placed a troubled teenager (Ms. A) in a residential property adjacent to a house owned by the plaintiff. Some weeks after she was so placed in the property, the owner terminated Ms. A's lease but she re-entered the property the following day with two companions. The companions started a fire in the house which caused damage to the plaintiff's adjoining premises. She sought to recover the consequent losses from HSE. She succeeded before Hogan J. at first instance. While this Court overturned that decision (*Ennis v. The Child and Family Agency* [2015] IECA 105) the defendants in this case based their arguments of principle upon the decision of the High Court.

67. It is certainly the case that Hogan J. referred throughout his judgment to the *'special relationship'* between the defendant and Ms. A. At para. 96 of his judgment, he observed:

'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.'

68. However, I think that the Court here was articulating the particular features relevant to that case, of a more general principle identified by Hogan J. earlier in his judgment as follows (at para. 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'

69. The very difference in language suggests that these *'special circumstances'* are not confined to a *'special relationship'* between the defendant and the person directly responsible for the damage, although the subsequent analysis in the judgment shows that they may certainly include that situation. A consideration of *Dorset Yacht*, upon which Hogan J. placed very considerable reliance throughout his judgment, shows that the Court there was expressing a principle operative where (as in that case) there was a special relationship between the defendant and the person who inflicted the damage (see Lord Morris at p. 1030, Lord Pearson at p. 1055) but as also arising where there was a special relationship between the plaintiff and the defendant (see Lord Diplock at p.1060). Indeed, since the judgment in *Ennis*, *Dorset*

Yacht has been categorised by the United Kingdom Supreme Court as a case based not on the special relationship between the Home Office and the boys, but upon the more general proposition that the defendant had itself contributed to the harm giving rise to the claim. The defendant in that case, it will be remembered, brought the boys who caused the damage to the vicinity of the plaintiff's property and then left them to their own devices. In *Robinson v. Chief Constable of West Yorkshire* [2018] UKSC 4 at para 37, *Dorset Yacht* was described by Lord Reed as a case '*where the public authority created a danger of harm which would not otherwise have existed*'. Similarly, in *Poole Borough Council v. GN* [2019] UKSC 25 at para 28, Lord Reed referenced the decision in instancing the circumstances in which B would owe A a duty to protect him from harm he did not create:

> '*As in the case of private individuals, however, a duty to protect from harm, or to confer some other benefit, might arise in particular circumstances, as for example where the public body had created the source of the danger or had assumed responsibility to the protect the claimant from harm, see for example Dorset Yacht ...*'

70. In *Robinson,* Lord Reed presented the question of liability for danger arising from human agency by reference to two general principles. Speaking of the particular position of the police, but in terms applicable also to all, he explained (at para. 70):

> '*they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury arising from human agency, as in Dorset Yacht .... [they] are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility*'

71. Ultimately Hogan J. found on the facts that because Ms. A had a special relationship with HSE this resulted in HSE owing to the plaintiff a duty of care which it breached in concluding that she was suitable for independent living when she was '*plainly unsuited*' to this. Because of A's personal history with HSE he held that it was foreseeable that if left to her own devices and unsupervised in the property she might introduce companions who either in concert with her or alone could cause damage , as they did. In point of fact, this Court decided on appeal that HSE could not be held liable because at the time of the events in question, Ms. A had reached her majority and HSE thus had no control of any kind over her, had no relationship of any kind with the persons who inflicted the damage and, moreover, the damage was not reasonably foreseeable (see [2015] IECA at paras.67, 71, 72 and 88). However, even if one views the case as one in which HSE had some form of special relationship with Ms. A, Hogan J's legal analysis based the HSE's liability upon its being in a position of control over A to the extent that it could and did place her in the house. On that analysis the act which gave rise to legal liability in the view of Hogan J. was not the physical infliction of damage on the property: it was the placing of Ms. A in the house when HSE ought to have known that this was, in all the circumstances, inappropriate. The fact that the HSE had a '*special relationship*' with Ms. A framed the context in which they were in a position to bring that risk of damage to the plaintiff and, to that extent, can be properly described as a potential basis for liability. Exactly the same can be said of *Dorset Yacht.* However, as I have observed, the decision was overturned on appeal and while the examination of the legal principles conducted by Hogan J. is of assistance in understanding the theory underlying these cases, it does not support the thesis the defendants have sought to derive from it.

The defendants' relationship with the risk of harm

72. I have noted earlier that part of the difficulty with framing a test for cases such as this by reference to an exclusive requirement of a '*special relationship*' between the defendant and the person responsible for inflicting the harm is that in order to accommodate the decided cases the concept has to be extended beyond breaking point. *Lyons*, to take one example, has to be interpreted so that the actions of the assailants in *eyeballing* the plaintiff, created a special relationship between the defendant nightclub owner and the aggressors. Many other examples could be given: in *Scott's Trustees v. Moss* (1889) 17 R. (Ct. of Sess.) 32 (which was relied upon by Lord Reid in his speech in *Dorset Yacht*) the defendant was found liable for damage caused by a crowd of persons with whom he had no relationship other than that they had gathered to witness the arrival in the vicinity of a hot air balloon, the event being organised and promoted by the defendant. Presumably there, the fact that they responded to the advertisements of the event would have to have created such a relationship – even though none of the people in question paid a fee or entered into any legal relationship with the defendant in respect of the spectacle.

73. Although in one sense *sui generis,* the '*rescuer*' cases afford a good example at the level of principle of why the correct focus in all of these cases is upon the defendant's general relationship with the risk of harm and upon whether they caused or increased that risk for the plaintiff, not specifically with the person who directly inflicts it. In *O'Neill v. Dunnes Stores* [2011] 1 IR 325 a security guard employed by the defendant accosted two youths – A and C - pilfering alcohol in one of its supermarkets. Both A and C were intoxicated. The security guard chased A out of the shopping centre in which the store was located, apprehending him outside the premises. While he grappled with A, the plaintiff was entering the centre, and having been asked by an employee of the centre to assist the security guard and the security guard repeating the request for help, the plaintiff duly intervened. The plaintiff held A and the

police arrived. As a crowd gathered, C (who had arrived on the scene and left) returned carrying a chain with which he assaulted and seriously injured the plaintiff as the latter together with the security guard continued to restrain A.

74. The judgment of the majority of the Supreme Court (O'Donnell J., with whom McKechnie J. agreed) accepted that the '*state of affairs*' leading to the plaintiff's involvement in the restraint of A was unreasonable. There was no-one to assist the security guard in the shop, partly because he had no method of communicating with the managers on duty in the store. The specific circumstances were thus sufficient to generate a duty of care owed by the defendant to the plaintiff, breached by the unreasonable state of affairs that gave rise to the request that he intervene to assist the security guard in the first place (at para. 44):

> *'Mr. Byrne had to seek assistance from a member of the public, against all procedure, precisely because he had no effective method of seeking help from his co-employees. As Mr. Byrne frankly admitted, the risk of some struggle, violence and perhaps injury, was an inescapable part of the job. It was therefore entirely foreseeable that if a security guard was put in a situation requiring assistance and was obliged to seek assistance from a member of the public, and if that member of the public responded, then he may well have been injured in the offering assistance.*

75. As in this case, the defendant in *O'Neill* argued that no liability should be imposed upon it because the plaintiff's injuries were caused by the wrongful and criminal acts of third parties (see para. 36 of the judgment of O'Donnell J.). Yet, the consequence was that the defendant was obliged to compensate the plaintiff for injuries inflicted on him not even by the individual he was restraining, but by a different person altogether. The only relationship between the defendant and that third party was that he had been with the person restrained by the security guard in the defendant's supermarket. Looked at from the perspective of the '*special*

relationship' test postulated by the defendants in this case, it is impossible to see how the defendants could have faced legal liability for damage caused by the assault perpetrated by C.

76. In *O'Neill* the defendant negligently created a situation in which a person would be called upon to help, and once that happened it was foreseeable not merely that they might do so, but that that action exposed them to a risk of damage. That risk was thus created by the defendant itself: had it properly staffed and organised its undertaking, the security guard would not have had to call on the plaintiff, and the plaintiff would not have been put in danger. But the key feature of the case was their relationship with, and responsibility for, the source of the danger. Literally, in that case, the defendant called the plaintiff to the danger which ultimately eventuated.

77. The Court referred the parties at the hearing of this appeal to the decision in *Robinson v. Chief Constable of West Yorkshire Police* , inviting them to make written legal submissions in relation to the case (which both did). There, three police officers arranged and sought to execute the arrest of a suspected drug dealer on the footpath of a high street in the middle of a weekday afternoon. As they did so, and as the suspect sought to resist the arrest, the plaintiff, an elderly lady walking past them on the footpath, was seriously injured when first the suspect backed into her, and then all three men fell on top of her. The majority of the Court in determining that the defendants owed to the claimant a duty of care, and in declining to interfere with the finding of the court of first instance that it had been breached, concluded that the case was properly categorised not as one in which the defendants had failed to act so as to protect her from the risk of being injured, but instead as a situation in which the actions of the defendants themselves had resulted in her being injured. As Lord Hughes explained (at para. 122), the case was one of a positive act – namely arresting the suspect – which directly caused physical harm. The police officers ought reasonably to have foreseen (and in fact did foresee)

that the suspect was likely to resist arrest and, if he did so, pedestrians close to him might be knocked down and injured in the course of the escape. That reasonably foreseeable risk of injury was sufficient to impose on the officers a duty of care towards pedestrians in the immediate vicinity of the arrest, even though the immediate cause of that injury was the violent reaction of the suspect.

78. *Robinson* shows that liability for damage immediately inflicted by a third party may arise independently of an omission principle, or a duty to act so as to confer a benefit. The facts can be analysed in different ways. At its simplest, the police officers positively orchestrated an event as a result of which decision and its execution the plaintiff was injured. Viewed only slightly differently, the operative damage was caused by the third party, and the defendants faced liability because but for their actions he would not have inflicted it. The argument in the case thus provoked a discussion of liability both for omissions and for third party actions. Lord Reed addressed the specific question put in issue by the defendants in these proceedings – their claim that they should not be rendered liable for injury inflicted by another - stressing that at common law, liability is generally imposed for causing harm rather than for failing to prevent harm caused by other people (at para. 69(4)). One of the circumstances in which liability would be imposed for a failure to intervene, he explained, was '*where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm*'. Earlier in his judgment, he adopted the following summary from the academic literature (at para. 34):

> '*In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control*

over that source of danger or (iv) A's status creates an obligation to protect B from that danger'

79. This formulation is now important in this jurisdiction having regard to its adoption in *UCC v. ESB* [2020] IESC 38 (judgment in which was delivered following the oral argument in this appeal) (see para. 95 of the dissenting judgment of O'Donnell J. with which the majority, in this respect, agreed). There, the Supreme Court (by a majority) imposed liability on the defendants for damage caused not by the acts of third parties, but in respect of losses sustained by the plaintiff as a result of a flood event over which (it was decided by the majority) the defendants had by reason of their ownership of a hydro-electric dam, a special level of control. While the issue of naturally occurring events is in one sense different from the question in this case, it presents a similar issue of responsibility for damage not inflicted by the defendant itself.

80. It would be overstating matters to present the statement approved by Lord Reed as a distillation that in a single sentence solves all of the problems presented by cases of injury inflicted by third parties, but it provides a useful starting point, and I think facilitates progression to a general principle. *Dorset Yacht, Scott's Trustees v. Moss,* and *O'Neill v. Dunnes Stores* come within that general principle insofar as each was a case in which the defendants in one way or another themselves brought the danger or an increased risk of damage to the plaintiff. *Bates, Casey* and *Creighton,* are examples of a defendant exercising special control over the source of the danger, and indeed that is how the majority in *UCC v. ESB* rationalised the imposition of liability for damage caused by a failure to abate the flooding in that case (see paras. 11.9 and 13.2 of the judgment of Clarke CJ). *Dorset Yacht* can be so categorised as well.

81. *Lyons* may be an example of a voluntary assumption of responsibility: the defendant assured a member of the plaintiff's group when he drew their menaces to the attention of security staff and expressed concern as to the safety of the group that the latter knew the individuals and that '*there would be no problem*' (see p. 2 of the judgment). The evidence in that case was that the member of the plaintiff's group who made that inquiry said that the group would prefer to leave and they were assured that there would be no trouble (at p. 2 to 3 of the judgment). Had the plaintiff then left, the assault would not have occurred, and having given an assurance that this was not necessary, the defendant was under an obligation when '*trouble*' did arise, to intervene so as to protect the plaintiff from it. The case seems to present the elements of representation and reliance which characterises many (although not all) of those cases in which a representation has generated a duty of affirmative action (see *Mercer v. South Eastern and Chatham Railway Companies Management Committee* [1922] 2 KB 549 and *Welsh v. Chief Constable of Merseyside Police* [1993] 1 All ER 692). I should say that this analysis could be transferred to the instant case, although this depends on extending the doctrine to circumstances in which there was a coercive action, and (given that the plaintiff had no practicable option but to leave the premises) no reliance. For reasons I explain below, it is not necessary to address whether the doctrine falls to be so extended.

Application of duty of care principles to the facts

82. I have addressed at some length the principles governing the liability of a defendant for injuries inflicted by another – and the related issues of liability for omission to act - because the defendants' argument focussed so heavily on the relationship (or lack thereof) between the defendants and Mr. Cullinane. However that dispute begs a question, best framed by reference

to the comments of Lord Hoffmann in *Gorringe v. Calderdale MBC* [2004] UKHL 15, [2004] 1 WLR 1057 at para. 17:

> *'Reasonable foreseeability of physical injury is the standard criterion for determining the duty of care owed by people who undertake an activity which carries a risk of injury to others. But it is insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates the risk nor undertakes to do anything to avert it.'*

83. While in a narrow sense the immediately operative breach of duty identified by the trial Judge in this case was one of omission – the failure to allow the plaintiff back into the premises – that is an occurrence which presented four critical features. First, it was so close in time and cause to the events that occurred on the premises that it can, justifiably, be viewed as part of the single activity of managing and operating the store. Second, those events occurred at a point where the defendants owed a duty of care to the plaintiff to protect him from the risk of harm at the suit of third parties. Third, the operative negligence was immediately preceded by the ejectment of the plaintiff in such a way as to bring him to the very danger from which he immediately thereafter sought refuge. Fourth, it follows from the findings of fact made by the trial Judge that re-admission of the plaintiff was neither a costly nor a complex action. The very fact that the defendants' security guard said in evidence that had he known that the plaintiff was the innocent party in the dispute he would have re-admitted him shows that here, readmission could have been easily enabled. Thus understood, the plaintiff's complaint engages three separate but here inter-related circumstances which justify an obligation to take positive action to rescue – a close relationship to an activity in which a duty of care was owed, the delivery in the course of that activity of the plaintiff to the hazard from which it is contended

the defendants ought to have protected him and the failure to take a single and simple step that would have rescued him from that hazard.

84. This becomes clearer when the individual steps leading to the assault of the plaintiff are broken down. As of the point at which Mr. Furey intervened in the dispute between the plaintiff on the one hand, and the O'Mahony sisters and Christopher O'Callaghan on the other, they owed the plaintiff a duty of care to take reasonable steps for his safety on the premises. They decided to remove him. As they did this, they also owed him that same duty. It necessarily follows that that duty continued to subsist up to the point at which he was at the door of the property. At that point, the defendants knew that he was being pursued by his assailants, and they knew that he was the innocent party in that altercation. Had those persons attacked the plaintiff again *inside* the premises, the defendants would have been under an obligation to take reasonable steps to come to his rescue. They would have faced legal liability if they did not take those reasonable steps (but not a liability because he was assaulted *simpliciter*).

85. Instead, the plaintiff was ejected. However, that ejectment occurred at a point where the defendants knew (a) that the plaintiff had not initiated the altercation which had caused his removal and (b) that those who had were following the plaintiff outside. The rationale of *Dorset Yacht* points to the conclusion that having exposed the plaintiff to a source of danger, the duty they indisputably owed to him when he was in the store extended to an obligation to take reasonable steps to protect him from the danger to which they had delivered him when they removed him from the premises. To that extent *O'Neill* provides a good, if imperfect, analogy. The defendants brought about a situation in which they created a risk of danger for the plaintiff that would not otherwise have arisen and to which, but for their actions, he would not have been exposed. They created that risk at a point in time when they owed him a duty of care to protect him from precisely that danger. As the decision in *Lyons* makes clear, allowing

him back into the premises would have discharged that duty. They did not do that and (subject to the implications of the '*just and reasonable*' test) were therefore correctly found liable in negligence.

86. The danger from which the defendants were required to take reasonable steps to protect the plaintiff, it will be important to note later, was a danger of any injury that might reasonably be foreseen to follow from his being assaulted by Mr. O'Callaghan and the O'Mahony sisters on a crowded footpath outside the store. Had the plaintiff been attacked by those persons on the premises in circumstances that could have been avoided through the exercise by the defendants of reasonable care, the fact that such an onslaught provoked others embroiled in it to intervene and assault the plaintiff in the store would not have insulated the defendants from liability for injuries suffered by the plaintiff in consequence. The position was exactly the same when the plaintiff was ejected. Therefore, the duty owed by the defendants extended beyond a duty to merely protect the plaintiff against these three persons. It embraced an obligation to protect him against the harm arising from disorder provoked by them, and directed against the plaintiff, on the public footpath. They were, as in *O'Neill,* liable for damage produced by the '*state of affairs*' that resulted from their negligence.

The just and reasonable test

87. While it is well established that the owner of a premises such as that in issue in this case owes a duty of care to invitees who entered that property, the extent of the duty suggested here is novel and does not involve an established category of liability. To that extent it may fall to be judged against the '*just and reasonable test*' articulated in *Glencar.* In the course of his submissions, counsel for the defendants protested the implications of a duty of care of the kind contended for by the plaintiff. It could not, he trenchantly argued, be just and reasonable that

every shop would have to employ security guards, or that every premises which did so has to task them with surveying the delinquent possibilities of every passer-by so as to see if there might be a potential assailant outside the property before they eject a customer. To impose a duty of care which required the defendants to go into the street to break up fights would result in their abandoning the duties they did owe to persons inside the store. To admit persons who were being assaulted into the shop would risk altercations being brought to the other customers.

88. It seems to me that in most cases, these contentions will enjoy a coercive force. Where security personnel are employed in a premises, they will usually be fully entitled to adopt the course of action taken by the defendants' agents in this case. When four persons are fighting in a shop under the control of such agents it is obvious that their obligation to other customers requires that they try to break it up and diffuse it if they reasonably can. In most circumstances, it will not be possible for the security guards to know who is '*the innocent party*' – they are required, trained and equipped to maintain control in real time over a confined space populated by a number of people some of whom may be intoxicated, not to conduct an on the spot tribunal of inquiry. Ejecting some or all of those involved, and doing so without reference to innocence or guilt, is the obvious course of action. If one of those so removed seeks readmission, the security guard will be under no obligation to admit the original aggressor but will similarly have no way of discerning which of the participants in the dispute started it. The only credible resolution is that he does not owe a duty to re-admit any one of those involved.

89. Moreover, the imposition of a duty to admit persons who have been ejected because they are being physically assaulted outside the premises creates the real dilemma that if they are left outside they may suffer serious injuries, but if they are readmitted the shop-owner may bring the altercation back in to the store with consequent risk of injury to other customers and

members of staff. The resolution of that dilemma should usually be left to the judgment of the individual security guard in the moment and should not be conducted under the constraint of conflicting legal obligations.

90. Nor am I convinced that such personnel will generally have any role, where they have ejected persons from the store, in intervening to break up a dispute which continues outside the premises. I have alluded to this earlier. The cases that have so suggested have involved public houses, night clubs or hotels which have both been concerned with altercations continuing on property owned by the defendants, and which have arisen in a context where a large number of security personnel have been employed. None of that can be transposed to the context of a small retail outlet operating with a limited number of staff and abutting a public footpath. Putting to one side the fact that by leaving the premises, the defendants would potentially be creating a risk within the store of the very kind the security guards were hired to protect against, an obligation to break up fights outside the premises itself would involve the imposition of a duty to engage in a physical intervention with and potentially assault of third parties on the public highway which would, to boot, elude precise temporal or geographical definition or boundary. For my part, I am not convinced that it would ever be just, reasonable or proper to impose such a duty. Indeed, the remarks of Kelly J. (as he then was) in *Ennis v. Child and Family Agency* at para. 91 might be harnessed in support of these contentions : there he said that, on the facts of that case, it would not be just or reasonable to impose on the defendant liability for the criminal wrongdoing of persons over which it had no control and no dealings whatsoever, and that the imposition of such an obligation would have a '*stultifying effect*' on the discharge of its functions.

91. On the facts here, however, the issue was different, and those policy concerns simply do not arise. It is not suggested that every shop must employ security guards: the obligation only

arises in those premises where by reason of their size, situation and opening hours they are likely to attract large numbers of patrons, some of whom may be intoxicated, in a confined space. The defendants admitted that their duty extended to an obligation to have such a presence on the premises.

92. Nor is the question whether the defendants were obliged to leave the property to break up the fight: it was whether their obligation to the plaintiff arising from his presence in the store and ejection from it extended to a duty to allow the plaintiff back in to the store when he sought access to it. That occurred in the context of singular facts and simply did not present any of the issues so persuasively enumerated by counsel for the defendants. Everyone agreed that the plaintiff was the innocent party in the dispute, and everyone agreed that (collectively) the defendants knew that. There was, it must be emphasised, no doubt about this. This was a clear case not of rival groups rowing over some indeterminate cause, but of one individual being picked on in front of the security guard and being assailed for no good reason. Even then, it will be noted, that the trial Judge did not make a positive finding that the defendants breached a duty to the plaintiff when they ejected him *simpliciter*, even with his three assailants in tow. It was the failure to re-admit him after ejectment at a point when the risk of his being assaulted had become a reality, that constituted the breach.

93. The duty imposed upon the defendants in this case is discharged by taking reasonable steps – falling short of leaving the shop premises and becoming involved in an altercation on the public path – to protect an innocent person from a danger to which the defendants had themselves brought that person. It arises because, and only because, when the defendants refused to allow the plaintiff re-admission to the premises they knew four things:

(i) That the plaintiff had been escorted from the premises on account of an altercation in which he was the victim, not the instigator;

(ii) That those who were the aggressors had immediately followed him out of the premises;

(iii) That the plaintiff almost immediately sought re-entry to the premises

(iv) That by reason of (i) and (ii), he did so in a context where the persons whose attack he had been ejected so as to avoid were in the vicinity with the probable intention of continuing it.

94. That allowing the plaintiff readmission was such a reasonable step is demonstrated by the fact that Mr. Pruchnicki himself acknowledged that had he known that the plaintiff was the innocent party, this is what he would have done. The trial Judge accepted this, and while noting that Mr. Pruchnicki stated that he was concerned that allowing the plaintiff but not those in pursuit of him into the premises might create commotion in the store, I do not see any reason to interfere with that inference from the evidence. Mr. Pruchnicki did not allow the plaintiff back into the shop because he did not understand that he was the innocent party in the dispute. However, that does not avail the defendants. Mr. Furey knew and he could have communicated this to Mr. Pruchnicki as he handed the plaintiff over to him.

95. In circumstances where the plaintiff had been pursued, by the wrongdoers, out of the shop from which he had been ejected, he should have been allowed back in. This is *a fortiori* the case if (as Mr. Pruchnicki himself said in evidence) he knew that those same persons had assaulted and were pursuing him. I can see nothing unjust or unreasonable about imposing a

duty of this kind on the defendants. Once it is understood that it arises only where the defendants are in fact aware that the party they have ejected is not the wrongdoer, and when it is understood that the law does not impose an obligation of inquiry into the rights and wrongs of an altercation between patrons, there is no unrealistic burden on them. It merely requires that they take a simple step to rescue a party they know to be innocent from an altercation to which they themselves have delivered him.

96. The end point was succinctly, and I think correctly, put by Cross J. when he said (at para. 25):

> '*where somebody who has been, in effect, placed in danger by the actions of the defendants is attempting to avoid that danger and such danger can readily be avoided by the readmission of the party into safety then it is not only just and reasonable that the law should impose a duty but public policy considerations cry out for such a duty to be imposed.*'

The findings of the trial Judge as to causation

97. If the defendants had complied with their common law duty to the plaintiff as suggested by him, he would have been re-admitted to the shop premises upon being attacked outside it. The subsequent events would not have happened. He would not have fallen back against Ms. Hartnett and Mr. Cullinane would not have assaulted him.

98. However, it is only in the most simplistic of senses that the defendants could thus be described as being the '*cause*' of the subsequent injury. The event which immediately resulted in the plaintiff's injuries was the assault by Mr. Cullinane. That was not an inevitable

consequence of any act or omission of the defendants and they mount a forceful argument that they were not foreseeable consequences of anything the defendants did or did not do. Before the High Court and this Court the focus within the issue of causation was upon the implication of this intervening event.

99. The trial Judge addressed the defendant's argument that the assault by Mr. Cullinane constituted a *novus actus interveniens* at some length. His essential conclusions were based on the helpful summary of the relevant principles to be found in McMahon and Binchy '*Irish Law of Torts*' (4th Ed. 2013) para. 2-79, approved by the Supreme Court in *Hayes v. Minister for Finance* [2007] 3 IR 190, 206, and in particular the following two propositions:

> '*(2) If the third party's act is intended by the original wrongdoer, or is as good as programmed by him, or if it is an inevitable response to the defendant's act, or is very likely, then the original defendant is still considered the operative cause in law. The third party's intervention in these circumstances is not a novus actus which would break the chain of causation between the plaintiff's damages and the defendant's conduct. This is more obviously true when the intervening event is not a voluntary act at all: where A pushes B against C*
>
> .....
>
> *(4) The defendant (ie the original wrongdoer) will not be relieved of responsibility if the act or damage caused by a third party is 'the very kind of thing which the defendant was bound to expect and guard against and the resulting damage was likely to happen if he did not.'*

100. Having recited these principles, Cross J. recorded his finding that in this case '*there is a seamless rapid, almost instantaneous connection between the acts and inactions of the Defendants which I had held to constitute a breach of duty and what occurred to the Plaintiff at the hands of Mr. C[ullinane].* He observed as follows:

> '*In order for liability to exist, the precise nature of the harm to the Plaintiff does not have to be anticipated with particularity. What must, however, be clear is that when the Plaintiff was denied re-entry to the premises and pushed back into the crowd, injury to him was "the very kind of thing" which the Defendants were bound to expect and to guard against. In the circumstances, the Defendants knew or ought to have known that the Plaintiff was being exposed to, not alone a risk but the essential likelihood of, an assault which is precisely the kind of harm that he actually suffered and that the Defendants had a duty to prevent.*

101. He said:

> '*... there was no unbridgeable chasm between the actions of Mr. C[ullinane] and what preceded it. It was an instant reckless response to seeing his girlfriend, Ms. H[artnett] being knocked to the ground by the plaintiff that caused the blow. I hold that though criminal, Mr. C[ullinane]'s action was reasonably foreseeable to anyone asking whether the boyfriend of an innocent person knocked to the ground would violently react against who he perceived to be the assailant. It is the action of an incident* [sic.]. *I hold that under subpara. (2) of the summary of the law as contained in McMahon and Binchy ... that a response to the plaintiff being pushed over and knocking down Ms. H was "very*

likely". I also hold that the act or damage caused by Mr. C[ullinane] is, indeed as per Clause 4 (above) "the very kind of thing which the defendant was bound to expect and guard against ....'

The defendants' case on causation

102. The defendants focus in their submissions on what they describe as '*the singularly severe, criminal and outrageous punch of Mr. Cullinane*', contending that insofar as there was any causal connection between the actions of the defendants and the plaintiff's injuries, his actions constituted a *novus actus interveniens* the effect of which is to relieve the defendants of any liability. This intervention, they say, was not foreseeable. They note the observations of Fennelly J. in *Breslin v. Corcoran and anor.* (at [2003] 2 IR 203, 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 the 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'.*

103. Thus, the defendants say, even if the security guards had perceived the risk of an assault by one of the O'Mahony sisters or Mr. O'Callaghan upon the Plaintiff, by the time this occurred the initial queue jumping issue had ceased. When the plaintiff was removed, they say, the defendants had no grounds to believe that the subsequent actions of Mr. O'Callaghan and the O'Mahony sisters were '*the very kind of thing*' to be expected from them. On the contrary, they stress, they were being separated from the plaintiff.

104. The defendants proceed to argue that they could not have reasonably foreseen the actions of Mr. Cullinane and ought not therefore to be held liable for the injuries suffered by the plaintiff as a consequence of that assault. Because it was an intentional and reckless act, it broke the chain of causation. Quoting '*The Irish Law of Torts*' (4th Ed. 2013) at para. 2.56, they say that the more outrageous and reckless the conduct of the intervenor, the more likely it is to break the chain of causation. They also underline that Mr. Cullinane was not a patron of the store and came onto the scene after the alleged negligence of the defendants.

105. I have noted earlier the trial Judge's reference to the '*seamless rapid, almost instantaneous*' connection between the acts and inactions of the defendants and what occurred to the plaintiff. The defendants focus on these comments, contending that the trial Judge erred in finding that the proximity in time from the plaintiff's ejection to the assault suggested that Mr. Cullinane's actions did not constitute an intervening event, and relying in that regard upon the decision in *Hayes v. Minister for Finance.* There, the Court found that had there been any want of care of the Gardaí in continuing the pursuit for 28 miles of the plaintiff, who was driving a motorcycle, it did not cause or contribute to the plaintiff's injuries when he crashed.

106. The defendants further say that the trial Judge erred in concluding that the case fell within the second or fourth categories identified in the passage from '*The Irish Law of Torts*' quoted earlier. If a person stumbles into another, they say, a violent reaction is not reasonably foreseeable, let alone likely. They suggest that before Mr. Cullinane's criminal conduct could have been '*the very kind of thing which the defendant was bound to expect and guard against*', there had to be a '*special relationship*' between him and the defendants. They say that the former phrase conveys a high level of obligation to which one is tied by reason of such a special relationship, and repeat the contention based upon the decision in *Ennis v. HSE* that the

defendants and Mr. Cullinane had to enjoy a '*special relationship*' before the former could face liability for injuries or damage caused by the latter.

107. They then submit as follows:

> '*the Supreme Court's language in describing 'the very kind of thing' which a defendant was 'bound to expect and guard against' extends to the entire circumstances of the incident, and not only the mechanism of injury. While a push, a shove or an exchange of words might be anticipated, there was no basis upon which one might reasonably have expected a sucker punch of the kind delivered by Mr. Cullinane when Mr. O'Callaghan knocked the Plaintiff into Phoebe Hartnett*'

Third party intervention and the scope of the duty

108. The general principles within which that issue falls to be resolved are not controversial. The underlying test is that where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff it will not avail the defendant if '*what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place*' (*Hayes v. Harwood* [1935] 1 KB 146, 156 cited with approval in *Cunningham v. MacGrath Bros.* [1964] IR 209, 214 (per Kingsmill Moore J.). Moreover – and this brings me back to a point made earlier in this judgment – the critical starting point in determining issues of causation of this kind, at least in a case of an asserted obligation to protect a plaintiff from harm that might be inflicted by third parties, is the scope of the duty owed. If the duty of care owed by the defendant to the plaintiff encompasses an obligation to take reasonable steps to protect the plaintiff against a risk of harm at the hands of third parties, the defendant cannot rely upon a *novus actus interveniens* if that risk eventuates. In *Breslin v. Corcoran* (where it was held that the chain of causation from

one defendant's negligence in leaving a car unlocked and keys in the ignition to the injury caused by the collision of the vehicle when driven by a thief, was broken by its negligent use by the thief) Fennelly J. expressed these related principles, as follows:

> *'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.*

109. In *Cunningham v. McGrath Bros.* Kingsmill Moore J. directed the relevant question by reference to whether the intervention ought to have been anticipated as a '*a reasonable and probable consequence*' of the defendant's tortious conduct. Elsewhere in his judgment in *Breslin* Fennelly J. used similar language (see p. 215 '*there is nothing ... to suggest that the first defendant should have anticipated, as a reasonable probability ..*'). It seems to me that the issue is properly focussed on the reasonable probability of the intervention. The reference by Lord Reid in *Dorset Yacht* to the intervening event being '*very likely to happen*' ([1970] AC at 1030) upon which the defendants here placed some reliance in their submissions was not adopted by the other members of the court in that case, was not adopted by Fennelly J. in *Breslin*, is not the approach adopted earlier by the Supreme Court in *Cunningham* and seems not to be the law in England (see *Lamb v. Camden LBC* [1981] 1 QB 625).

110. The defendants' response to the proposition suggested by these statements is that they were not required to protect the plaintiff against an assault by Mr. Cullinane. He had not been on the premises at the time the plaintiff was escorted from it, and the plaintiff's removal from the shop had nothing to do with Mr. Cullinane. The plaintiff, the defendants say, crossed paths

with Mr. Cullinane, and suffered injury at his hands, because of a completely unforeseeable and remote fortuity – that upon being denied access to the shop the plaintiff collided with Ms. Hartnett, causing her to fall, thus prompting Mr. Cullinane to intervene.

111. This, in my view, is to both overspecify the legal principle and to understate the facts. When the cases speak in this context of the principle of *novus actus interveniens* being inoperative where it is the '*very thing*' the defendant was required to guard against, the focus in the authorities is not upon the *specific event* introduced by the intervening party, but upon the general category of action and damage suffered in consequence, and the relationship between that action, that damage and the particular duty that has been undertaken. The relationship between the scope of the duty and cause was explained by Lord Hoffmann in *Empress Car Co v NRA* [1998] 1 All ER 481, 488 as follows:

> '*one cannot give a commonsense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule. Does the rule impose a duty which requires one to guard against, or makes one responsible for, the deliberate acts of a third person ? If so, it will be correct to say, when loss is caused by the act of such a third person, that it was caused by the breach of duty*'.

112. The decision in *Cunningham v. McGrath Bros.* affords a good example of that principle. There, the defendant committed a nuisance when it left a ladder unattended on the public footpath. An unidentified third party moved the ladder from the street it was on, into an adjoining lane. It fell on the plaintiff as she passed along the lane. The Court held that the defendant ought to have known the ladder would be moved, and therefore the actions of the third party did not constitute a *novus actus interveniens.* However, no-one knew not merely who was going to move it, but where it would be put or the precise type of peril it would present

when placed there. Kingsmill Moore J. cited with approval the following statement from the decision of Greer LJ in *Hayes v. Harwood* at p. 156:

> '*It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if* ***the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act'.***
>
> (Emphasis added).

Application of causation principles

113. I have explained earlier in this judgment the scope of the duty of care assumed by the defendants to the plaintiff: they were required to take reasonable steps to protect the plaintiff against the risk of injury arising when they elected to eject him from the premises in a context where (a) he was the innocent party to an altercation in the premises and (b) those who had initiated that altercation were in pursuit of him. I have expressed that duty earlier as a duty to take reasonable steps to protect the plaintiff against a danger of any injury that might reasonably be foreseen to follow from his being assaulted by Mr. O'Callaghan and the O'Mahony sisters on the crowded footpath outside the store. That duty required the defendants to re-admit the plaintiff to the shop when he sought re-entry to it. The risk that arose from breaching that duty was that the plaintiff would be assaulted outside the store in the circumstances to which I have referred. Given that this was the risk against which the defendants were required to protect the plaintiff, they were liable to him when that risk eventuated – as it did.

114. It must immediately be acknowledged that there is an obvious counterpoint to this. The risk against which the defendants were required to protect the plaintiff, it might be said, was

the risk that he would be assaulted by Mr. O'Callaghan and the O'Mahony sisters. The defendants did not owe a general duty to the plaintiff to protect him against any threat to his person presenting itself outside the shop. Given that no-one could have foreseen, the argument would run, that the plaintiff would collide with Ms. Hartnett, that she would fall, and that her friend would be so incensed as to retaliate with extreme force, and given that the defendants were not under a general duty to protect the plaintiff against third party assaults outside the shop, the attack may be said to have both broken the chain of causation on ordinary principles and fallen outside the protective scope of the duty that might otherwise have qualified those principles of causation.

115. It is important to stress that this argument must acknowledge that had the blow causing the plaintiff to fall to the ground been struck by Mr. O'Callaghan and/or the O'Mahony sisters, the plaintiff would have been entitled to recover damages. The defendants, I hasten to add, did not concede this, but they did accept in oral argument that if the blow had been struck by these persons that this would be '*a different case*'. However, I cannot see that in this circumstance liability could have been avoided on the grounds of *novus actus interveniens.* If a duty of care of the kind I have suggested existed, that would clearly have captured an assault by any of these three persons. That, clearly, was the damage against which the defendants were obliged to protect the plaintiff.

116. If that is so, it means that this feature of the defendants' argument depends on the proposition that because the blow was instead struck by another person present in the same close space as the plaintiff's original assailants, no liability can be imposed. I think that once that is understood, the frailty in the argument becomes apparent. Putting to one side the fact that many might find it strange that civil liability for an assault within a crowded space and split second timing depended solely on the identity of the attacker, with the defendants liable

if one of a number of persons present in and around the store entrance effected an assault but not if another inflicted the same injury, in the specific context in which it occurred a rule to this effect would in my view bear little logical scrutiny.

117. In every sense, the plaintiff's three assailants were an integral part of the sequence of events that led to the plaintiff being struck by Mr. Cullinane and in every sense that assault was a result of the danger which the three assailants presented to him. It was their attack on him that caused him to be ejected from the store. It was their pursuit of him that caused him to seek re-entry. It was because he had been involved in a dispute with them that he was denied re-entry. It was because they were in pursuit of him that he sought re-entry in such a way that he was (as the trial Judge found) pushed by Mr. Pruchnicki. It was that push combined with an entanglement with Mr. O'Callaghan that caused the plaintiff to collide with Ms. Hartnett (as the trial Judge also found). All of this occurred in a period of seconds on a crowded footpath. It is simply not possible to detach the persons against whose assault the defendants were required to protect the plaintiff, from the particular event resulting in the assault that actually occurred. That is all the more so in a context where any assault by the original three assailants was inevitably going to present the type of commotion in which those standing nearby were liable to become embroiled. It is for that reason that I have earlier defined the duty owed by the defendants as extending beyond a duty to protect the plaintiff against these three persons and as embracing an obligation to protect him against the harm arising from disorder provoked by them, and directed against the plaintiff, on the public footpath. And if the defendants were required to protect the plaintiff against that eventuality, it mattered not who, specifically, his assailant was.

118. *O'Neill v. Dunnes Stores* shows why this is so and, specifically, makes clear that the focus is properly upon not whether the plaintiff would have suffered the specific injury by the

particular assailant in respect of which he complains, but instead upon whether the injury fell within the general categorisation of the type of risk from which the defendant was required to protect the plaintiff. There, the operative negligence identified by the Court arose from the failure of the defendants to have in place a proper system of security and, in particular, a system where a security guard ran into difficulty in the course of apprehending a person shoplifting on the premises. Because the defendant had negligently failed to have in place such a system it was liable to the plaintiff for injuries suffered by him not at the hands of the person he restrained as he assisted the security guard, but inflicted by another individual who arrived on the scene. The Court explained its conclusion in terms which meet the defendants' contentions here as to *novus actus interveniens* and foreseeability. O'Donnell J. said as follows (at para. 44):

> '*It was therefore entirely foreseeable that if a security guard was put in a situation requiring assistance and was obliged to seek assistance from a member of the public, and if that member of the public responded, then he may well have been injured in offering assistance. In this regard I think it irrelevant that the precise nature of the savage attack on the plaintiff may not have been foreseen;* ***it is enough that the type of damage – here physical injury caused by an attempt to restrain a wrongdoer – was readily foreseeable.'***
>
> (Emphasis added).

119. It appears to me that precisely the same considerations apply here with the only – and insignificant – point of distinction being that the duty was not to protect the plaintiff against the consequences of his restraint of a third party, but against a personal injury ultimately arising from the actions of Mr. O'Callaghan and the O'Mahony sisters. That is the exact eventuality that occurred in the way I have described earlier. Therefore, the fact that it arose from the

deliberate and unlawful act of another person does not operate to sever the injury from the wrong that caused it.

120. I should make one final point in this regard. It is tempting to seek to simplify this case by directing attention to the fact that Mr. Pruchnicki was found by the trial Judge to have pushed the plaintiff when he sought access to the premises. So, it would be said, given that the plaintiff was pushed, it was foreseeable in the circumstances that he would collide with another, and similarly foreseeable that this could provoke a retaliatory assault. I do not believe that this on its own would be a proper basis for imposing liability. If the defendants were entitled to exclude the plaintiff from the premises, they were entitled to repel him when he sought to enter. So, irrespective of the push, the critical question is whether it was a breach of duty in the circumstances to have excluded the plaintiff. If it was, it is hard to my mind to see that his being pushed adds much. If the duty of care extended to protect the plaintiff against the risk of injury arising from the commotion on the footpath resulting from his interaction with the three assailants, the push has but limited relevance. If the duty of care did not extend that far, the push might in itself have as its foreseeable consequence a further collision but not necessarily a dramatic intervention of the kind that occurred. If the defendants had no obligation to admit the plaintiff to the property, then, unless the 'push' were found to have involved disproportionate force in preventing a person from accessing the premises (and there was no such finding), it is not an actionable event.

121. However, the fact of the push does have relevance in a broader sense. It shows how *each link* in the chain of events – from the exclusion to the fatal blow –*was* linked to the risk of harm to the plaintiff arising from his altercation with his three assailants. It is not possible to disaggregate any of them – including the push - into separate incidents.

122. Because the defendants have failed in the appeal on the disposition of their *novus actus* argument in the substantive judgment, there is no basis on which they can prevail on the appeal against the refusal of a direction on this basis (see the decision in *O'Neill*).

Concurrent wrongdoers and identification: the issue

123. This leads to the final issue – that arising from the defendants' reliance on the provisions of the Civil Liability Act 1961, as amended. Here, the sequence of events is important. It will be recalled that the incident occurred on 31 October 2011. These proceedings were instituted in August 2013, and the case came for trial in February 2018. In the meantime, the plaintiff initiated two other legal actions. On 19 September 2017 he instituted proceedings against Mr. Cullinane seeking damages for assault and trespass to the person. He did not serve the summons immediately. On 10 October 2017, the plaintiff applied to the Personal Injuries Assessment Board seeking authorisation under its constituent statute to bring proceedings against, *inter alia* Messrs, Cullinane and O'Callaghan and Barbara and Sinead O'Mahony. The application described itself as one *'to add new Respondents'* and following a request for clarification from the Personal Injuries Assessment Board, the plaintiff's solicitors confirmed that the application was made pursuant to s. 46(3) of the Personal Injuries Assessment Board Act 2003 (which is concerned with the addition of new respondents to an extant claim). That authorisation was furnished on October 16 2017 - just under a month after the proceedings against Mr. Cullinane had issued. Nonetheless, the proceedings against Mr. Cullinane continued. The Summons was renewed in September 2018 and was eventually served in February 2019 with a Statement of Claim being delivered in January of the following year. No appearance having been entered, judgment was granted on February 24 2020. According to the plaintiff's submissions, Mr. Cullinane attended in Court on that date and having been

allowed some time by the Judge to consider his position, expressly consented to judgment being entered against him.

124. On October 19 2017, the plaintiff brought separate proceedings against Barbara O'Mahony, Sinead O'Mahony and Christopher O'Callaghan. This was after the plaintiff had obtained an authorisation from the Personal Injury Assessment Board to proceed with that claim. There, the plaintiff similarly sought damages for assault and trespass to the person. An appearance was entered to those proceedings in April 2019. The papers to this Court do not disclose any further activity in relation to that case since the entry of that appearance. In his reply to the defence in the within proceedings, the plaintiff has offered to assign the benefit of these proceedings to the defendants.

125. As I will explain, the precise issues before Cross J. and those argued in this Court arising from this sequence of events were somewhat different. Both, however, depended on the fact that the defendants to this action (were they ultimately found liable to the plaintiff) and Mr. Cullinane, Mr. O'Callaghan and Barbara and Sinead O'Mahony were concurrent wrongdoers within the meaning of s. 11(1) of the Civil Liability Act 1961, as amended, and upon the effect of the proceedings brought by the plaintiff against these four persons having regard to the provisions of s. 35(1)(i) of the Civil Liability Act 1961 as amended. It provides as follows:

> '*For the purposes of determining contributory negligence .....*
>
> *Where the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has become barred by the Statute of*

Limitations or any other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer'.

126. As recorded in the judgment of Cross J. the argument advanced by the defendants before the High Court appeared twofold: that the other wrongdoers ought to have been joined in these proceedings and that in order to preclude the operation of s. 35(1)(i), the plaintiff was required to institute what were described as '*personal injury proceedings*' against them. Because the time limit for such an action had passed, it was said, the plaintiff must be identified with the negligence and fault of Mr. Cullinane (in relation to whom the argument was specifically directed, although the same principle would apply to the other wrongdoers). The fact that proceedings had been brought against Mr. Cullinane, it was said, was not sufficient because this meant that he was not being regarded as a concurrent wrongdoer.

127. The defendant's arguments in this regard were rejected by the trial Judge. Focussing in particular on the latter contention, he found that the plaintiff did not have to frame his case against Mr. Cullinane as a personal injury action seeking damages for negligence in order to prevent s. 35 from operating. While an assault action did not necessarily involve proof of personal injuries it would, the trial Judge said, fly against reason to suggest that personal injuries would not be proved. Thus, the plaintiff had a '*live unbarred action for trespass to the person*' against Mr. Cullinane, and this was sufficient to preclude the operation of the provision. Cross J. explained:

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

128. The issue before this Court differs from that before the High Court in two respects. First, since the case was before the High Court, judgment has been obtained against Mr. Cullinane. Second, the attention of Cross J. was not drawn to the fact that the personal injury board had granted an authorisation in respect of proceeding against Mr. Cullinane, Mr. O'Callaghan, and the O'Mahonys in October 2017. Although on February 12 2018 the defendants delivered written legal submissions (following the conclusion of the evidence in the High Court) drawing attention to the absence of any such authorisation from the Personal Injuries Assessment Board, the plaintiff in its responding submissions of 15 February made no reference to the fact that, actually, such an authorisation had been sought and obtained. Indeed, the defendants appear to have been unaware that an authorisation was obtained until the final moments of the plaintiff's oral submissions in this Court, during which the authorisation was produced. The plaintiff says that the main focus of the case was the fight on the liability issue and the issue in relation to the authorisation first arose in the defendants' written submissions filed subsequent to the hearing. In the light of the revelation that such an authorisation had been obtained, the Court invited the parties to make further submissions as regards the authorisation produced during the plaintiff's reply.

129. As disclosed by their further submissions, the position now adopted by the defendants (which as explained in those submissions appears limited to the failure to bring proceedings seeking damages for personal injuries on foot of a due authorisation against Mr. Cullinane) is as follows:

(i) Because the High Court was approaching the matter without being aware that a personal injury board authorisation had been obtained, this Court should not entertain the existence of the authorisation in considering the appeal;

(ii) On that basis, the Cullinane case could not lawfully constitute a claim for damages for personal injuries, this being the damage alleged in the within proceedings. Therefore, the provisions of s.35(1)(i) operated;

(iii) If the Court does have regard to the personal injuries assessment board authorisation, the defendants note that this was obtained *after* the plaintiff had brought his action. They point out that s. 12(1) of the Personal Injuries Assessment Board Act 2015 prohibits the institution of personal injuries claims without such an authorisation, and say that it is not possible for such an authorisation to operate retrospectively;

(iv) From there, the defendants contend that the Court must approach s. 35(1)(i) as if the defendants to the assault claims had pleaded that the authorisation granted was invalid, thereby barring the claim. Thus – on this basis – there was no action taken against Mr. Cullinane and accordingly s. 35(1)(i) must operate to deem the plaintiff responsible for his wrongful acts.

(v) Emphasising that the authorisation was obtained under s.46(3)(b) of the Personal Injuries Assessment Board Act 2003, the defendants say that that authorisation was not valid and/or that that authorisation envisaged Mr. Cullinane, Mr. O'Callaghan and the O'Mahony sisters being joined to these proceedings.

Analysis of the concurrent wrongdoer issue

130. All of these contentions are, I think, best viewed in the first instance by reference to the underlying purpose of s .35(1)(i). As noted by O'Donnell J. in *Hickey v. McGowan*

[2017] IESC 6, [2017] 2 IR 196 at para. 63, the 1961 Act made provision for the allocation of liability and damages between defendants and other concurrent wrongdoers responsible for the damage suffered by the plaintiff. The failure of the plaintiff to sue one such wrongdoer meant that such a wrongdoer might not be available for a claim of contribution by other wrongdoers, and in consequence the legislature determined to impose upon the plaintiff the burden of the loss arising from the actions of that person. More importantly (see [2017] 2 IR at para. 64):

> '*If there was no provision for the identification of the plaintiff with the liability of a concurrent wrongdoer not sued by him or her, then the plaintiff might have less incentive to sue all potential concurrent wrongdoers and might be able to throw all the loss upon one defendant.*

131. In this case, the only concurrent wrongdoer now relevant is Mr. Cullinane. However, the plaintiff has not merely instituted proceedings against Mr. Cullinane but has recovered a judgment against him. While a plaintiff who fails to bring proceedings against one concurrent wrongdoer may well be said to have taken a decision to impose all the loss on one defendant, thereby justifying a rule whereby once the prospect of bringing such proceedings has been extinguished he must accept the burden of the losses attributable to that defendant, it is – to say the least – difficult to see how that rationale can be said to extend to the circumstances of a plaintiff who has not merely instituted proceedings, but has actually recovered judgment on foot of them. To understand why the contention advanced by the defendants that the provision can operate in this way is mistaken, it is necessary to begin by paring down the arguments advanced both in this Court and before the High Court into its constituent parts.

132. To begin with, the claim advanced in the High Court that the plaintiff was required to sue all wrongdoers in a single action is clearly misplaced. The section envisages that the identification it otherwise provides for can be avoided once proceedings are brought against the wrongdoer within the limitation period. That is all the plaintiff needs to do. There is no basis for implying a further requirement that the wrongdoers be tied in to the same claim.

133. The suggestion that the failure to institute '*personal injury proceedings*' against Mr. Cullinane immediately brought the plaintiff within the subsection can be disposed of with similar despatch. Section 35(1)(i) is governed by three terms relevant to this proposition – '*the plaintiff's damage*', '*concurrent wrongdoers*' and '*the plaintiff's claim against one wrongdoer*'. Given that '*concurrent wrongdoers*' are persons whose actions have caused the same damage, it is the case that the proceedings which must be brought against those wrongdoers if the section is not to apply must be proceedings which seek to recover in respect of that same damage, and this was obviously damage by way of personal injury. However, an action for assault resulting in personal injuries, while governed by a different limitation period to that operative for an action in negligence causing such damage, is nonetheless an action in which damages can be recovered for those personal injuries (*Devlin v. Roche* [2002] 2 IR 360). It is significant that this aspect of the defendants' argument continually refers to the failure of the plaintiff to institute what is referred to as a '*personal injuries action*' against Mr. Cullinane. They thus elide the difference between the identification of a relevant cause of action to govern a particular type of conduct, and a description of the type of damage suffered as a consequence of that conduct. The notion of *personal injury proceedings* is addressed to the latter, not the former (see *Clarke v. O'Gorman* [2014] 3 IR 340 at para. 29). It is entirely

permissible to claim damages to recover personal injuries in an action for assault, and indeed one would expect that this would comprise the bulk of the compensation sought in most such claims. As explained in *Clarke v. O'Gorman* (at para. 29):

> *'it is wrong to pose the question whether this was an action for trespass to the person and assault or a civil action for personal injuries as if these were mutually exclusive categorisations. They are not. A cause of action is something logically and legally different from the type of damage suffered as a result of the facts giving rise to the cause of action'.*

134. Given that proceedings against Mr. Cullinane *were* instituted within the relevant limitation period and thus cannot have '*become barred by the Statute of Limitations*', in order for the defendants to succeed in the case they make in this regard, they must establish that although an action against a concurrent wrongdoer is brought within the applicable limitation period, where there has been a failure to obtain a personal injury authorisation pursuant to the 2003 Act the Court can and should deem the action to be invalidly commenced, and thus conclude that not having initiated a valid claim, the plaintiff is statute barred.

135. The relevant provision of the Personal Injuries Assessment Board Act 2003 – s. 12(1) – is as follows:

> ***12.***—*(1) Unless and until an application is made to the Board under section 11 in relation to the relevant claim and then only when the bringing of those proceedings is authorised under section 14, 17, 32 or 36, rules under section 46(3) or section*

49 and subject to those sections or rules, no proceedings may be brought in respect of that claim.

136. As noted in *Clarke v. O'Gorman,* the language employed in this provision ('*no proceedings may be brought*') echoes the terms in which limitation statutes have historically been framed. This is important, as it is firmly established that such provisions operate to bar the plaintiff's remedy, not to extinguish its right. In *Clarke v. O'Gorman* it was decided that, in consequence, the failure to obtain a personal injuries assessment board authorisation in advance of initiating proceedings did not deprive the Court of jurisdiction over such proceedings, instead merely affording the defendant a right of defence based on that failure. This, it was held, had to be specifically pleaded by the defendant. If not pleaded, the failure did not preclude the plaintiff from seeking relief.

137. Here, Mr. Cullinane did not raise the absence of a personal injuries assessment board authorisation as a ground for defending the proceedings. Therefore, the Court had jurisdiction to hear the claim. That being so, the questions debated in this Court and before the High Court of whether (a) a personal injuries assessment board authorisation can operate retrospectively, (b) whether the Court has jurisdiction to enquire into the validity of such an authorisation where issued, (c) whether the Court should have regard at all to the authorisation given that it was not referred to by the plaintiff before the High Court, and (d) whether s. 35(1)(i) must be applied in a given case on the assumption that the concurrent wrongdoer who has not been sued within time would, if sued out of time, plead the Statute of Limitations, simply do not arise. Proceedings were commenced within the relevant limitation period and the only person in a position so to do has not raised by way of defence any issue around the failure to obtain an authorisation before

action. The matter of personal injuries board assessments, it must be restated, is one of defence not jurisdiction and therefore it is only the defendant to those proceedings who can raised that bar. Neither the 2003 Act nor the 1961 legislation can be interpreted as operating to broaden the pool of potential objectors to other concurrent wrongdoers. In those circumstances the defendants could only succeed in this aspect of their case if they established that the absence of such an authorisation would deprive the Court of jurisdiction to entertain the action. The decision in *Clarke v. O'Gorman* makes it clear that this is not the law.

Conclusions

138. My conclusions can be shortly stated. The owner of a convenience store has a duty of care to its customers to take reasonable steps to protect them against a foreseeable risk of harm *inter alia* at the hands of other customers. The contents of that duty will vary from case to case, being ultimately dependent upon the nature and location of the premises. Where, as here, the shop enjoys a city centre location in the vicinity of late night bars and night clubs and is open 24 hours, the duty of care must accommodate the prospect that the premises will at times be crowded with persons who have consumed alcohol and some of whom are likely to be intoxicated, and thus that customers will face a foreseeable risk of injury from such customers. At such times it must accordingly take reasonable steps to protect those customers against that harm.

139. That duty of care extends to taking reasonable steps to control access to the property and to ensure that there are persons on the premises in a position to intervene where altercations take place in the shop, to either diffuse such altercations or to eject some or all of those involved. The store owner is not usually obliged to police the public footpath

outside the premises, is not generally obliged to break up fights that occur on that footpath and where customers have been ejected and continue an altercation outside the premises, and is not normally obliged to intervene in such an altercation (although it may be required to call the police). When ejecting customers in these circumstances, the shop-owner is not obliged to determine who is the innocent party or who is the guilty party in connection with the altercation and is not therefore generally required to re-admit any of the persons so ejected from the property.

140. However, where (as happened here) the owner of the premises in fact knows that a person who was involved in an altercation and who has been ejected from the store in order to diffuse that dispute was the innocent party, and where it knows that those who attacked him in the store have followed him out of it with a view to continuing the altercation, the owner was under a duty to readmit him so as to protect him from the danger to which he had been, by reason of his ejectment, exposed.

141. As applied to the facts of this case, that duty of care required the defendants to take reasonable steps to protect the plaintiff against a danger of any injury that might reasonably be foreseen to follow from his being assaulted by Mr. O'Callaghan and the O'Mahony sisters on the crowded footpath outside the store. The injury inflicted by Mr. Cullinane arose because and only because of the altercation between the plaintiff, Mr. O'Callaghan and the O'Mahony sisters. It follows that the injury was of the type against which the defendant was required to protect the plaintiff and, accordingly, the fact that that injury was inflicted by a third party who had had no connection with the dispute inside the store did not constitute a *novus actus interveniens*.

142. In that I have concluded that the defendants are not entitled to rely upon s. 35(1)(i) of the Civil Liability Act 1961 so as to render the plaintiff responsible for the actions of Mr. Cullinane, the decision of the trial Judge should be affirmed.

143. It is my provisional view that the plaintiff having entirely succeeded on this appeal, is entitled to the costs thereof. If the defendants wish to dispute this provisional view, they should deliver a submission explaining why within ten days of the date hereof. In default of any such submission within that period, the Court will order accordingly. In the event that the defendants determine to deliver such a submission, the plaintiff shall have ten days to respond.

144. Costello J. and Power J. are in agreement with this judgment and the order I propose.