XV. Ireland

Eoin Quill

1. *Glencar Explorations Plc v Mayo County Council (No 2)*[1]

In this case, the two applicants (Glencar and another company – Andaman Resources plc) brought a judicial review application against the respondent Council in respect of the imposition of a mining ban. Included in the pleadings was a claim for damages, based on several grounds; the relevant aspect of the claim that made the case a landmark one was the claim in negligence. The applicants alleged that the unlawful mining ban caused them loss by bringing about the collapse of a joint venture between the applicants and a third company.[2] The Irish High Court (IEHC) found the mining ban to be *ultra vires* and granted a declaration to that effect. The subsequent damages hearing resulted in the rejection of the claim by the IEHC.[3] The appellants appealed to the IESC.

As the negligence claim was based on the exercise of a statutory power, it stood no prospect of success on established authority.[4] The power in question in this instance – planning policy in relation to mining in the county – was one exercised for the benefit of the public at large, not one for the protection of a limited class of persons of which the applicants were members; nor was there any other basis for close proximity between the parties. This is precisely the basis on which the IEHC found no duty of care arose.[5] However, in the IESC, Keane CJ conflated the

[1] [2001] Irish Supreme Court (IESC) 64, [2002] 1 Irish Reports (IR) 84, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2001 (2002) 554 ff; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2001 (2002) 293, nos 3–5; *M Peart*, Neighbourhood Watch [2001] 95(10) Law Society of Ireland Gazette (Gaz) 22.

[2] [1993] 2 IR 237, Blayney J.

[3] The IEHC judgment of Kelly J is included in [2002] 1 IR 84, 89 ff.

[4] *Ward v McMaster* [1988] IESC 3, [1988] IR 337, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1988 (1989) 407 ff. Interestingly, the IESC decision in *Sunderland v Louth County Council* [1990] Irish Law Reports Monthly (ILRM) 658, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1990 (1991) 545 ff, was not even cited in *Glencar*. The case had held that planning functions were not suited to the imposition of a duty of care in negligence.

[5] [2002] 1 IR 84, 103 f (Kelly J).

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discussion of negligent exercise of statutory powers with breach of statutory duty and commenced an extensive review of the general approach to be taken to the analysis of duty of care in negligence.[6] In essence, the Chief Justice adopted the three-stage approach to duty of care in *Caparo Industries plc v Dickman*,[7] in place of the two-step approach in *Anns v Merton LBC*,[8] which had been influential in Ireland in the two decades prior to *Glencar*.

While the *Caparo* decision had, at least initially, a significantly negative impact in English law on the development of novel duties and the reversal or narrowing of some duties developed in the 1960s, 1970s and 1980s, *Glencar* has not had quite the same impact in Ireland. In *Caparo*, the House of Lords not only reformed the general test for a duty of care, but also significantly narrowed the interpretation of the *Hedley Byrne* principles governing claims for negligent misrepresentation.[9] In *Wildgust v Bank of Ireland*,[10] the IESC acknowledged the link between the three-stage approach and the more focused principles in respect of negligent misrepresentation, but did not adopt the *Caparo* interpretation of the *Hedley Byrne* principles. The court expanded the duty under *Hedley Byrne* to a situation involving third party reliance on a statement about the plaintiff, causing economic loss to the plaintiff. The IESC did, however, later use the third stage of the three-stage approach (policy factors – whether

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[6] The conflation of statutory powers and duties is evident at [2002] 1 IR 84, 137; the discussion of negligence is at 131 ff. Fennelly J, at 153, agrees with the Chief Justice's analysis of negligence but provides a more focused discussion of the negligence issue in the present case, 153 ff. The other three members of the court agreed with both judgments (Denham, Murray & McGuinness JJ, at 143).

[7] [1990] 2 Law Reports, Appeal Cases (AC) 605; the Chief Justice was also influenced by the Judgment of Brennan J in High Court of Australia (HCA) decision in *Sutherland Shire Council v Heyman* (1985) Commonwealth Law Reports (CLR) 157, 424. The stages are proximity, reasonable foreseeability and whether it is fair, just and reasonable to impose a duty.

[8] [1978] AC 728. In this approach, proximity was subsumed within reasonable foreseeability, giving rise to a prima facie duty that could be negatived by policy considerations.

[9] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] United Kingdom House of Lords (UKHL) 4, [1964] AC 465.

[10] [2006] IESC 19; [2006] 1 IR 570, noted by *R Byrne/W Binchy,* Annual Review of Irish Law 2006 (2007) 547 ff; *E Quill*, Ireland in: H Koziol/BC Steininger (eds), ETL 2006 (2008) 281, nos 6–10; *R Ryan/D Ryan* (2006) 1(3) Quarterly Review of Tort Law (QRTL) 13. See also *P Fahy*, Liability of Pension Scheme Advisers – The Irish and Common Law Position (2007) 14 Commercial Law Practitioner (CLP) 121 and *M Austin*, Negligent Misstatement – Where Now Following *Patchett v Swimming Pool & Allied Trades Association*? (2010) 28 Irish Law Times (ILT) 122.

the imposition of a duty would be fair, just and reasonable) to allow defendants considerable latitude in the use of disclaimers to preclude a duty arising.[11]

Another area involving duties in respect of pure economic loss – defective buildings – had developed in Ireland in the 1980s.[12] In *Glencar*, the IESC hinted that these should not change, despite their virtual abolition in English law in *Murphy v Brentwood District Council*.[13] Duties in this area have been applied by the IESC as recently as 2017,[14] though the parties had agreed the applicable principles and it was only the limitation period that was disputed, so the case is slender authority for the continued application of the duties. Nonetheless, the fact that the parties were in agreement that duties still arise in this context suggests that the IESC in *Glencar* was effective in indicating the continuing validity of these duties in Ireland. An area of duty in respect of pure economic loss that is more susceptible to retraction is the field of relational loss – where a plaintiff suffers economic loss due to damage to a third party's property, eg damage to a utility such as electricity or gas, on which the plaintiff's business is dependent. Irish law traditionally excluded such claims but began to allow them in the 1990s in the wave of influence of *Anns v Merton*.[15] The IESC did not specifically refer to these in *Glencar* but did articulate a strong policy of excluding pure economic loss claims except in limited established pockets (such as negligent misrepresentation and defective buildings) or in truly exceptional cases. The issue has not subsequently been litigated in the Superior Courts, but one would anticipate the denial of duty in a routine relational loss situation.

Another area where *Glencar* has been used in the development of duties is assumption of responsibility: it was part of the reasoning in imposing an affirmative duty on the electrical infrastructure company, the Electricity Supply Board (ESB) in the management of dams at a hy-

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[11] *Walsh v Jones Lang Lasalle Ltd* [2017] IESC 38, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2017 (2018) 601 ff; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2017 (2018) 283, nos 17–20.

[12] *Ward v McMaster* (fn 4); earlier cases on the developments are discussed in that case.

[13] [1991] 1 AC 398, discussed in [2002] 1 IR 84, 142 f, Keane CJ; Fennelly J, 156.

[14] *Brandley v Deane* [2017] IESC 84, [2018] 2 IR 741, noted by *Byrne/Binchy* (fn 11) 440 ff.

[15] The traditional position can be seen in *Irish Paper Sacks Ltd v John Sisk & Son (Dublin) Ltd* Unreported IEHC, 18 May 1972, O'Keeffe P (damage to an electricity cable). The more expansive approach to duty can be seen in *McShane Wholesale Fruit & Vegetables Ltd v Johnston Haulage Ltd* [1996] IEHC 57, [1997] 1 ILRM 86, Flood J, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1996 (1997) 573 f.

droelectrical power station.[16] More recently, in *Barlow v The Minister for Communications, Marine & Natural Resources*,[17] Murray J engaged in an extensive review of authorities on duty of care, with a detailed examination of *Glencar*, to impose an affirmative duty on the minister in respect of the management of certain fisheries, having encouraged the plaintiffs to invest heavily in developing their capacity to exploit them.

One area in which *Glencar* has the potential for a more restrictive impact on the development of duty is psychiatric injury claims. The leading decision in the field, *Kelly v Hennessy*,[18] included the following as one of its criteria:

If a plaintiff wishes to recover damages for negligently inflicted nervous shock he must show that the defendant owed him or her a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock.[19]

It seemed clear on the face of the judgment that the criterion, as explained by the Chief Justice, was focused on the foreseeability of the particular form of injury – psychiatric illness, as opposed to injury in general. It was probably intended to exclude the decision reached earlier the same year by the House of Lords in *Page v Smith*,[20] though that case is not expressly cited. Despite this, the Irish courts have incorporated the

[16] *University College Cork v Electricity Supply Board* [2020] IESC 38, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2020 (2021) 724 ff; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2020 (2021) 302, nos 18–22; *D Ryan*, The Duty of Care in Negligence: *University College Cork v Electricity Supply Board* [2022] 4 Irish Supreme Court Review (ISCR) 185; *IB Harper*, Opening the Floodgates? (2020) 25 Bar Review (Bar Rev) 174. Control over the hazard was the principal reason for the imposition of the duty, but the discussion of this aspect of affirmative duty also alluded to the *Glencar* decision, particularly as interpreted in *Cromane Seafoods Ltd v Minister for Agriculture, Fisheries and Food* [2016] IESC 6, [2017] 1 IR 119, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2016 (2017) 606 ff.

[17] [2025] IESC 14; see also the imposition of a non-delegable duty by the IESC on the health service in respect of the cervical screening scheme in *Morrissey v HSE* [2020] IESC 6, [2024] 1 IR 103, noted by *Quill* (fn 16) no 3 ff; *W Binchy*, *Morrissey v Health Service Executive*: Professional Negligence, Damages and the Non-Delegable Duty of Care [2021] 3 ISCR 25; the discussion of the issue in part 13 of Clarke CJ's judgment does not cite *Glencar* specifically but does use the three elements of proximity, reasonable foresight and policy considerations.

[18] [1995] IESC 8, [1995] 3 IR 253, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1995 (1996) 520 ff.

[19] [1995] 3 IR 253, 259 (Hamilton CJ) citing Dean and Brennan JJ in *Jaensch v Coffey* (1984) 155 CLR 549.

[20] [1995] UKHL 7, [1996] 1 AC 155.

full three-stage test from *Glencar* into this criterion.[21] This runs the risk of cases being excluded by proximity considerations, other than those specifically addressed in *Kelly*. It also lacks sense, as it includes the full policy element of the three-stage test, even though the IESC in *Kelly* had cautioned against the use of policy constraints beyond those already in the criteria to restrict claims.[22]

2. *Hickey v McGowan*[23]

This was the first Irish case where a victim successfully established the vicarious liability of a member of a religious institution for sexual abuse committed by another member of that institution. The plaintiff was taught by the second defendant, a teacher and a member of the Marist Order of Brothers between 1969 and 1972, and he was sexually abused by the second defendant during this period. The first defendant was the Provincial of the Order at the time of the litigation. The claim succeeded before the IEHC;[24] the appeal to the IESC addressed three aspects of vicarious liability – the relationship between the tortfeasor and the person sought to be made vicariously liable (limb one); the behaviour that could be regarded as falling within that relationship (limb two); and whether two or more persons could be vicariously liable for the same tort.

On the first limb of vicarious liability, the IESC rejected the IEHC analysis, based on an English case,[25] applying quasi-corporate status to

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[21] *Harford v Electricity Supply Board* [2021] Irish Court of Appeal (IECA) 112, [2022] 2 IR 541, noted by *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2021 (2022) 283, nos 18–21; *Sheehan v Bus Éireann/Irish Bus* [2022] IECA 28, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2022 (2023) 535 ff; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2022 (2023) 307, nos 16–24. The plaintiff in *Sheehan* succeeded, despite the incorporation of the additional factors.

[22] [1995] 3 IR 253, 262 (Hamilton CJ) and 273 f (Denham J).

[23] [2017] IESC 6, [2017] 2 IR 19, noted by *Byrne/Binchy* (fn 11) 625 f; *Quill* (fn 11) no 4 ff; *J Gallen*, Vicarious Liability and Historical Abuse: A Critical Analysis of *Hickey v McGowan* (2017) 58 Irish Jurist (Ir Jur) 184; *L Beechinor/S Moorhead*, *Hickey v McGowan*: Recent Developments in Classroom Sexual Abuse Cases (2017) 22 Bar Rev 44; *C Fitzgibbon*, The Vicarious Liability of Religious Orders in Child Abuse Civil Actions (2017) 35 ILT 104.

[24] [2014] IEHC 19; noted in *R Byrne/ W Binchy*, Annual Review of Irish Law 2014 (2015) 680 ff; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2014 (2015) 263, nos 18–24.

[25] *Various Claimants v Catholic Child Welfare Society* (CCWS) [2012] United Kingdom Supreme Court (UKSC) 56, [2013] 2 AC 1, noted by *A Morris/K Oliphant*, England and Wales, in: K Oliphant/BC Steininger (eds), ETL 2012 (2013) 163, nos 46–56; *C McIvor* (2013) 29 Professional Negligence (PN) 62.

the Marist Order. The IESC affirmed established authority that the members of an unincorporated association could be vicariously liable for the torts of another member but such liability only applied to members at the time the tort took place.[26] The Provincial had failed to plead and prove that he was not a member at the time, so was found personally liable; he was not liable as the leader of the organisation or as a representative for the membership. In practice, this ruling presents significant challenges for plaintiffs in properly identifying appropriate defendants, particularly where membership is large and the tort is historic. The IESC also affirmed that a recipient of gratuitous services could be vicariously liable for torts committed by the provider of the service. There was slender authority for this proposition in Ireland, but it had been questioned as a distortion of vicarious liability, based on the fact that the recipient of the service was insured and the tortfeasor was not (ie, it was seen as a deep-pockets decision).[27] Without adopting in full the 'akin to employment' approach in English law, the IESC did accept that the exercise of control, enterprise risk and justice considerations (though not 'unbridled discretion') were relevant to determining a sufficient relationship between the tortfeasor and the defendant.[28] The IESC has subsequently affirmed that the approach to a sufficient relationship has broadened, but does not extend to applying vicarious liability for independent contractors.[29] This broadening should be of considerable benefit to persons injured by workers in non-traditional work relationships (eg, in the gig economy or volunteers).

The IESC decision also affirms the close connection test as the appropriate mechanism for determining whether the tort is sufficiently linked to the tortfeasor's work for the purposes of vicarious liability. There was

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[26] *Murphy v Roche* [1987] IR 656, noted by *R Burne/W Binchy*, Annual Review of Irish Law 1987 (1988) 336 ff.

[27] *Moynihan v Moynihan* [1975] IR 192. The HCA refused to follow this decision in *Scott v Davis* [2000] HCA 52; (2000) 204 CLR 333, noted by *P Handford* (2001) 9 Tort Law Review (Tort L Rev) 97. Hardiman J was also critical of it in *O'Keeffe v Hickey* [2008] IESC 72, [2009] 2 IR 302, [45] f; Fennelly J in *O'Keeffe* [248] expressly reserved his opinion on the correctness of the decision.

[28] See in, particular, O'Donnell J at [37] ff; the 'unbridled discretion' comment is at [38]. See also *D Ryan*, Vicarious Liability for Independent Contractors: Orthodox Principles "on the Move"? (2019) 16 Irish Employment Law Journal (IELJ) 4.

[29] *Morrissey v HSE* [2020] IESC 6, [2024] 1 IR 103. This is similar to the English position in *Barclays Bank Plc v Various Claimants* [2020] UKSC 13, [2020] AC 973. The IESC also examined business integration in determining the nature of the relationship, reminiscent of *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 Times Law Reports (TLR) 101, England and Wales Court of Appeal, Civil Division (EWCA Civ).

already significant judicial support for this approach,[30] but this was the first case to successfully apply the test to allow a plaintiff to succeed. The IESC was not specific on the precise details of which version of the close connection test should apply in Ireland, as the case itself was fairly clear-cut on any version of the test.[31] It remains to be seen how this test will develop in Ireland, but it does offer plaintiffs a broader range of circumstances in which vicarious liability can be used to obtain redress.

The case also introduced dual vicarious liability in Ireland (ie, two employers or persons in a sufficient relationship with the tortfeasor being vicariously liable for the same tort).[32] In this instance, the school manager, who had not been sued and was deceased at the time of the litigation, was also found to be vicariously liable. In this instance, the concept worked against the plaintiff, as he was allocated responsibility for the school manager's liability under a statutory provision on imputed contributory negligence.[33] The IESC unanimously indicated that instances of dual vicarious liability would be rare, as one employer or responsible person could usually be identified as being in control of the activity to the exclusion of the other; this unanimity is somewhat undermined by the fact that there was a four to one split on how to apply the concept on the facts – the majority applying dual vicarious liability. There will probably be cases where this concept is beneficial to plaintiffs, enabling them to get compensation from a solvent or insured entity, where another responsible

[30] *O'Keeffe v Hickey* [2008] IESC 72; [2009] 2 IR 302, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2008 (2009) 6225 ff; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2008 (2009) 364, nos 2–5; *C Feeny* (2009) 6(2) IELJ 43; *C Feeney* (2009) 14 Bar Rev 81. The majority, in obiter dicta, supported the development. Some doubt had arisen (at least in respect of adult victims) from the IESC decision in *Reilly v Devereux* [2009] IESC 22; [2009] 3 IR 660, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2009 (2010) 747 f; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2009 (2010) 313, nos 12–14.

[31] On the differences between Canadian, English and Australian versions of close connection and the lack of clarity on the Irish position, see *D Ryan*, Making Connections: New Approaches to Vicarious Liability in Comparative Perspective (2008) 15(1) Dublin University Law Journal (DULJ) 41; *D Ryan*, 'Close Connection' and 'Akin to Employment': Perspectives on 50 Years of Radical Developments in Vicarious Liability (2016) 56 Ir Jur 239, 241 ff; *D Ryan*, Connecting Cautiously: Vicarious Liability in Ireland in Comparative Perspective, in: P Giliker (ed), Vicarious Liability in the Common Law World (2022).

[32] Based on *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] Law Reports, Queen's Bench (QB) 510.

[33] Sec 35(1)(i) of the Civil Liability Act 1961. The majority noted that the effect of the imputed contributory negligence provision was harsh and that it may be suited to parliamentary scrutiny for legislative reform.

person is not a viable financial target. It will also be useful for defendants to offset a share of responsibility in some cases.

3. *GE v Commissioner of An Garda Síochána*[34]

The plaintiff was an applicant for subsidiary protection; while awaiting a decision on his application, he travelled to Northern Ireland; on his return to the Republic, he was arrested, detained and transferred to prison by the Garda Síochána (the Irish Police). His detention was deemed to be unlawful by the IESC and he was released; he was subsequently detained, following use of the correct procedures, as identified by the IESC.[35] The plaintiff brought a claim for false imprisonment in respect of his initial detention; the defendant asserted that only nominal damages should be awarded. The IEHC awarded € 7,500;[36] the IECA upheld the award;[37] the defendant appealed to the IESC, which upheld the IECA decision and reasoning.

While false imprisonment cases are rare, the case is important, as it engages in a discussion of high-level principle on the functions of damages awards and both the IECA and IESC diverged from the approach of the UKSC and the HCA.[38] Those courts used a 'but-for' analysis to determine that where a lawful detention would have happened if the unlawful detention had not occurred, then only nominal damages should be awarded. The factual scenario in the Irish case was that a lawful detention could

[34] [2022] IESC 51, [2022] 2 ILRM 393, noted by *Byrne/Binchy* (fn 21) 584 ff; *Quill*, ETL 2022 (fn 21) nos 8–11; *D Gilligan*, Damages and the 'Essence' of False Imprisonment (2024) 44 Legal Studies (LS) 560.

[35] *GE v Governor of Cloverhill Prison* [2011] IESC 41; this was a *habeas corpus* application. There was a further brief period of unlawful detention, based on a failure of timely release after the IESC ruling, *GE v Governor of Cloverhill Prison* [2011] IEHC 351.

[36] *GE v The Commissioner of An Garda Síochána* [2018] IEHC 293, Faherty J.

[37] *GE v Commissioner of An Garda Síochána* [2021] IECA 113, noted in *R Byrne/W Binchy*, Annual Review of Irish Law 2021 (2022) 495 f; *Quill*, ETL 2021 (fn 21) nos 22–26; *S Walsh*, *GE v Commissioner of An Garda Síochána & Others*: Sea Changes Rejected and an Age-Old Tort Reassessed (2022) 21 Hibernian Law Journal (Hibernian LJ) 140.

[38] *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, noted by *A Morris/K Oliphant*, England and Wales, in: K Oliphant/BC Steininger ETL 2011 (2012) 162, no 38 ff and *Lewis v Australian Capital Territory* [2020] HCA 26, (2020) 381 Australian Law Reports (ALR) 375, analysed by *SC Blashki*, What World are We Imagining?: Counterfactual Reasoning and the But For Test in Lewis v ACT (2021) University of New South Wales Law Journal Forum (UNSW Law Jl F) No 4.

have taken place, but that it was unlikely in practice as the police were unaware of the procedural deficiency in the original process until it was pointed out to them by the IESC – ie, it was a systemic misunderstanding and not an error by the individual officers conducting the arrest, detention and transfer. Rather than rely on this point of distinction, the courts proceeded to examine the issue as if the counterfactual could be satisfied and still drew the conclusion that nominal damages would not be appropriate. While the IESC focused on vindication of liberty as being important, independently of the consequences of the deprivation, they also endorsed the IECA decision, which had emphasised due process rights in addition to the issue of consequences on liberty. In a carefully reasoned note on the IESC decision, Gilligan observes that the IESC approach is dubious (perhaps simply wrong) if one focuses exclusively on the autonomy aspect of liberty – the freedom of choice aspect, as Gilligan puts it (generally conceived as freedom of movement). However, he rightfully points out that liberty has another element – freedom from subordination to the will of another – and only the following of proper procedures by the authorities can legitimise a subordination. Thus, a substantial award, taking cognisance of all the circumstances, including limiting the size of award based on the lack of substantial impact on autonomy and the plaintiff's underlying wrongful behaviour, is appropriate and he does not take issue with the quantum awarded in the case. On balance, Gilligan's analysis is clearer than that of either the IECA or the IESC, but both Courts were correct that due process and vindication of liberty are important even where the deprivation of liberty would otherwise have occurred and led to the same period and conditions of detention. Their approach also serves to ensure a level of accountability for state failure to follow procedures, which is welcome.

4. *Herrity v Associated Newspapers (Ireland) Ltd*[39]

The plaintiff and her husband were going through a marriage breakdown. The husband provided one of the defendant's newspapers with information on a relationship between the plaintiff and a priest. The paper ran a series of stories on the relationship, including photographs of the parties and transcripts of phone conversations, obtained by a private investigator acting for the plaintiff's husband. The plaintiff claimed damages for invasion of privacy against the media company that owned

[39] [2008] IEHC 249, [2009] 1 IR 316; noted by *Byrne/Binchy*, Annual Review 2008 (fn 30) 630 ff; *Quill*, ETL 2008 (fn 30) nos 9–13; *N Cox* (2008) 3(2) QRTL 18.

the newspaper that ran the stories. Dunne J upheld the claim and awarded the plaintiff € 60,000 in compensatory damages, including aggravated damages, and a further € 30,000 in exemplary damages. The case is significant, as it was the first reasoned superior court decision awarding damages to a plaintiff against a private entity for violation of the constitutional right to privacy.

Twenty years earlier, it was established that the state could be held liable for damages in respect of violation of an individual's constitutional right to privacy.[40] In the interim, there were a few decisions, mainly on interlocutory applications and evidential issues, indicating that the constitutional right was enforceable against private individuals.[41] There were some successful damages claims in the Irish Circuit Court (IECC) and one of these was upheld by the IEHC in a brief *ex tempore* decision.[42] Building on these earlier decisions, Dunne J identified some general principles in respect of claims for violation of privacy. First, she confirmed the existence of an action for enforcement of the constitutional privacy right against a private defendant. Secondly, she accepted that some information by its very nature is private and unsuitable for disclosure to third parties without consent, while other private information is susceptible to disclosure, based on a balancing of competing considerations. Thirdly, she noted that privacy may be violated either by the obtaining of private information or by its use. The case itself concerned the balancing of competing interests; the unlawfulness of the recording and its use tipped the balance in favour of the plaintiff.[43] Dunne J's judgment has been cited favourably in several subsequent cases developing the law on privacy claims in Ireland.[44]

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[40] *Kennedy v Ireland* [1987] I IR 587, noted by *Byrne/Binchy* (fn 26) 99 ff.

[41] *M v Drury* [1994] 2 IR 8, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1994 (1996) 120 ff; *Devoy v Dublin Corporation* Unreported IEHC, 18 October 1995, Irish Times Law Report, 22 January 1996 (a brief note); *Cogley v RTE* [2005] IEHC 180, [2005] 2 ILRM 529, *R Byrne/W Binchy*, Annual Review of Irish Law 2005 (2006) 721.

[42] *O'Connor v McKenna* Unreported IECC, Nov 2007, noted in the Irish Times 14 November 2007; *Sinnott v Carlow Nationalist* Unreported IECC, June 2006; Unreported IEHC, January 2007, noted by *Byrne/Binchy* (fn 10) 540.

[43] The recording of the phone conversations was a breach of sec 98 of the Postal and Telecommunications Services Act 1983, as the husband had no authority to give a valid permission for the recordings. The section also precludes disclosure of the information obtained.

[44] Cases include *Hickey v Sunday Newspapers Ltd* [2010] IEHC 349; [2011] 1 IR 228, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2010 (2011) 634 ff; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2010 (2011) 286, nos 19–22; *K (a mi-*

5. *Lavin v Dublin Airport Authority Plc*[45]

The plaintiff was injured when she fell on an escalator going from the floor with the check-in desks to the floor with the departure gates at the defendant's airport. The fall occurred when the plaintiff was adjusting her hand baggage, which was on the same step she was standing on, and she was not holding the handrail. The bulk of the pleadings focused on claims that the escalator was defective. However, during the trial, the focus shifted to a lack of sufficient signage on the availability of elevators as an alternative route up to departures. The escalator was found not to be defective, complying with accepted standards and functioning correctly.[46] The IEHC accepted that the case argued was sufficiently pleaded and found the defendant liable, with a one-third deduction for contributory negligence.[47] The IECA expressed significant doubts about the sufficiency of pleadings but, in any event, found that the defendant was not in breach of the duty of care. The three elevators were close to the escalator, prominently visible and there were several airport employees in pink high-visibility jackets nearby that the plaintiff could have asked about an alternative route to the departures floor. Additionally, the CCTV footage showed the plaintiff simply following her companions to the escalator, without any hesitation and without paying any obvious attention to signage. The case is significant as it was influential in a stream of subsequent cases rejecting claims on the basis of plaintiffs' self-responsibility.

By way of background, the Civil Liability Act 1961 abolished the common law defence of voluntary assumption of risk and narrower defences of waiver or a defence under a contractual provision were introduced.[48] Other cases where the common law defence would have applied were to be treated as contributory negligence, leading to an apportionment of damages between the parties. Despite this change, there remained a few situations outside the contractual or waiver defences where a defendant could be completely freed of liability based on the plaintiff's self-respon-

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nor) v Independent Star Ltd [2010] IEHC 500, noted by *Byrne/Binchy* (supra) 633 f; X *(an infant) v Sunday Newspapers Ltd (trading as 'The Sunday World')* [2014] IEHC 696; *Nolan v Sunday Newspapers Ltd (trading as Sunday World)* [2019] IECA 141, [2020] 2 IR 490; *Hyland v The Commissioner of An Garda Síochána* [2025] IESC 43.

[45] [2016] IECA 268, noted by *Byrne/Binchy* (fn 16) 618 ff.

[46] It conformed to the relevant British Standard; even the plaintiff's expert witness accepted that it was compliant and working properly.

[47] Unreported, 8 October 2013 (*ex tempore*) (not available online).

[48] Section 34(1)(b). On the interpretation of the contractual and waiver defences, see *O'Hanlon v ESB* [1969] IR 75, *McComiskey v McDermott* [1974] IR 75 and *Regan v RIAC* [1990] 1 IR 278.

sibility. One method is to find that the defendant does not owe a duty of care.[49] A second possibility is to find the plaintiff's behaviour as the sole legal cause of their injury.[50] A third possibility is to apportion 100 % liability to a plaintiff under contributory negligence.[51] The final possibility is to consider self-responsibility as a factor in the standard of care and use this factor to find there has been no breach of duty. This option is expressly provided for in the Occupiers' Liability Act 1995 and was used in *Lavin* to preclude any liability on the defendant's part. There was a prior example of this being used by the IESC but this initially had little impact on the case law.[52] Since *Lavin,* the use of self-responsibility within the standard of care has occurred in many cases.[53] While most of these are occupiers' liability cases, it can also be seen in other areas.[54] Despite this,

[49] *John C Doherty Timber Ltd v Drogheda Harbour Commissioners* [1993] 1 IR 315, noted by *R Byrne/ W Binchy*, Annual Review of Irish Law 1992 (1994) 554 f; *O'Carroll v Diamond* [2005] IESC 21, [2005] 4 IR 21, noted by *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2005 (2006) 348, nos 17–20, *PMcD v The Governor of X Prison* [2021] IESC 65, [2022] 1 IR 741, noted by *Byrne/Binchy* (fn 37) 480 f; *Quill*, ETL 2021 (fn 21) nos 3–8.

[50] Irish courts had generally shown a preference for apportionment prior to *Lavin*, see *Stakelum v Bank of Ireland* Unreported, IEHC, 27 April 1999 noted by *R Byrne/ W Binchy*, Annual Review of Irish Law 1999 (2000) 510 ff. Rare examples of a full denial of liability on causal grounds arose in a few cases – *O'Carroll v Diamond* (fn 49), solicitor failing to advise of certain risks in a proposed transaction; *O'Mahoney v Hanlon* [2018] IEHC 657, cyclist hit by a car; *Turner v The Curragh Racecourse* [2020] IEHC 76, plaintiff hit by a horse in an established horse training location.

[51] *McCord v Electricity Supply Board* [1980] ILRM 153; 100% apportionment was discussed but not applied in *GE v The Commissioner of An Garda Síochána*, case three above (citation in fn 34).

[52] *Weir-Rogers v The SF Trust* [2005] IESC 2; [2005] 1 IR 47, noted by *Byrne/Binchy*, Annual Review 2005 (fn 41) 685 ff; *E Quill*, ETL 2005 (fn 49) nos 14–16; *W Binchy* (2005) 1(1) QRTL; *R Ryan/D Ryan* (2005) 23 ILT 59. A non-occupiers' liability example is *Fitzpatrick v White* [2007] IESC 51, noted by *R Byrne/ W Binchy*, Annual Review of Irish Law 2007 (2008) 543 ff; *E Quill*, Ireland in: H Koziol/BC Steininger ETL 2007 (2008) 352, nos 15–17 (medical negligence).

[53] *Byrne v Ardenheath* [2017] IECA 293 did not actually cite *Lavin* but was decided in a similar fashion and could easily have been selected as the landmark case, as it is also often cited in the stream of cases on this issue. Another prominent example is *White v Doherty* [2019] IECA 295, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2019 (2020) 689 f; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2019 (2020) 289, no 34. A range of similar cases are noted by *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2018 (2019) 299, nos 37–40; *Quill*, ETL 2020 (fn 16) nos 34–36; *Quill* ETL 2021 (fn 21) nos 39–41; *E Quill*, Ireland, in: E Karner/ BC Steininger (eds), ETL 2024 (2025) 343, no 33.

[54] A pre-*Lavin* example is *Fitzpatrick v White* (fn 52); recent examples include *O'Connor v Wexford County Council* [2018] IEHC 232; *O'Grady v Abbott Ireland* [2019]

the IECA has emphasised that apportionment for contributory negligence is still an option in occupiers' liability cases.[55] Determining which is the appropriate choice is likely to be a matter of some difficulty. The recent cases denying liability give some encouragement to defendants to seek a total rejection of claims where plaintiffs are at fault to some significant degree and undermine the legislature's abolition of the voluntary assumption of risk defence in the Civil Liability Act 1961. The legislature, however, has reacted favourably to the exclusion of liability in the cases by reintroducing a voluntary assumption of risk defence for occupiers' liability cases in a recent amendment to the 1995 Act.[56]

A final worrying point of note in respect of the *Lavin* judgment is that the IECA considered the 1995 Act to be a codification of the existing common law and held that the plaintiff, as an invitee under the common law classification of entrants, was only owed a duty in respect of unusual dangers and that, in the case of usual dangers, no duty to exercise reasonable care arose.[57] As Byrne and Binchy rightly point out, the 1995 Act expressly abolished the common law provisions on occupiers' liability and new definitions were provided for the categories of entrant and the duties owed.[58] While the 1995 Act retained a limited number of specified aspects of the prior law, none of the retained aspects included invitees or unusual dangers.[59] Even in the revised list of criteria for the duties, set out by the

IEHC 79 (both workplace injuries); *Reilly v Mangan* [2019] IEHC 91; *Tumusabeyezu v Muresan* [2021] IECA 191 (both road traffic accidents).

55 *Carroll v Phelan* [2023] IECA 91, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2023 (2024) 590 ff.

56 Part 6 of the Courts and Civil Law (Miscellaneous Provisions) Act 2023, noted by *Byrne/Binchy* (fn 55) 192 ff; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2023 (2024) 333, nos 16–18. The new defence can be implied from the circumstances, unlike the waiver defence under the 1961 Act, which requires communication between the parties about the risk – *O'Hanlon v ESB* [1969] IR 75; *McComiskey v McDermott* [1974] IR 75.

57 Relying on the duty set out by Murnaghan J in *Long v Saorstát and Continental Steamship Company Ltd* [1959] 93 Irish Law Times Reports (ILTR) 137 (IESC).

58 *Byrne/Binchy*, Annual Review 2016 (fn 16) 619 f. They emphasise that, while there may be considerable overlap between the old standard of care and the statutory standard, they are not coextensive and the reasonable care standard under the Act is broader and allows for liability in circumstances not permitted under the standard set out in *Long*. Section 2 provides for the replacement of the old provisions with the provisions in the Act.

59 Section 8 provides for the retention of the common law on the defence of persons and property, some special categories of relationship (such as under contracts of carriage for payment or hire of vehicles, bailment contracts, employers and employees) and non-delegable duties.

legislature in the recent amending legislation, there is no mention of usual or unusual dangers; neither is there any reference to invitees as entrants. A judicial insertion of sub-categories of entrants within the statutory category of visitor and placing restrictions on the standard of care applicable to some visitors, but not others, is plainly at odds with the clear wording of the 1995 Act. There is nothing wrong with considering the nature of the danger as usual or unusual to be one relevant circumstance in evaluating compliance or breach of the standard of care to visitors, but there is no basis for making it determinative – ie, that there can only be a breach of the standard if the danger is unusual. The distinction between usual and unusual dangers has, nonetheless, been used in some subsequent cases.[60] One is reminded of a wise and pithy statement in the context of medical negligence that is generally applicable in respect of the standard of care across a range of circumstances – '[n]eglect of duty does not cease by repetition to be neglect of duty.'[61] In the occupiers' liability context, this could be used to argue that some dangers are usual because a wide range of occupiers do not take readily available precautions, but the failure to take precautions does not make the occupiers' behaviour reasonable.

[60] *White v Doherty* (fn 53); *Carroll v Phelan* (fn 55); *Scanlan v Michael McDonnell t/a The Woodlands Caravan and Camping Park* [2024] IEHC 324; *Kandaurova v Circle K Ireland Energy Group Ltd* [2025] IECA 13.

[61] *O'Donovan v Cork County Council* [1967] IR 173, 193 (Walsh J).