THE SUPREME COURT

Appeal No. 222/01
Record No. 9145/1999
Denham J.
Murray J.
Fennelly J.
BETWEEN

PATRICK BRESLIN

Plaintiff

v

NOEL CORCORAN

Defendant/Respondent

and

THE MOTOR INSURERS BUREAU OF IRELAND

Defendant/Appellant

JUDGMENT delivered on the 27th day of March, 2003 by FENNELLY J., [Nem Diss].

1. It is an act of folly to leave one's motor car in the public street, even for a short time, with the keys in the ignition. There are plenty of ill-intentioned persons around to take advantage. The consequences can be tragic. But what is the liability of the imprudent car owner to a person injured by the bad driving of the thief?

2. The agreed facts of the present case are that first-named defendant left his car outside the Tea Time Express Coffee Shop in Talbot Street in Dublin unlocked and with the keys in the ignition. He dropped into the shop to buy a sandwich. As he came out, he saw an unknown person jump into the car and drive it off at speed. The car turned from Talbot Street into Talbot Lane. The plaintiff was walking across Talbot Lane. The car ran into him and injured him. For simplicity, if not accuracy, I will refer to the person who took the car as "*the thief*." He may, of course, have been a joyrider or other temporary taker of the car.

3. The plaintiff brought an action in the High Court against Mr Corcoran, first-named defendant, alleging negligence in leaving the car unattended in the manner described. He joined MIBI, as second defendant, *"pursuant to the terms of an agreement dated the 21st day of December 1988 and made between the Minister for the Environment and the Second Named Defendant and in particular Clause 2(2) and 6 thereof."* The plaintiff succeeded before Butler J against MIBI only. The damages were agreed at £65,000. The learned High Court judge apportioned all the liability to the MIBI and gave a decree against it with costs.

4. The MIBI is sued directly in this way, not as representing or standing in for the thief, but because it has agreed to compensate victims of uninsured driving, subject to the terms of the agreement. The real issue before the Court is whether there was any negligence on the part of the first named defendant. If there was, the MIBI has no liability. If not, it is bound by the agreement. The form of the proceedings is unsatisfactory in one respect. The plaintiff had a clear case against whoever was responsible for the driving of the car. There were no pleadings between the defendants. Thus MIBI was left to argue the liability of the first named defendant, in order to escape its own. In particular, the extent, if any to which the regulations, made under the Road Traffic Acts were part of the argument is unclear.

5. Counsel for MIBI argued in the High Court that the first named defendant was negligent. In the circumstances, he said, it was probable that the car was going to be stolen and that it was reasonably foreseeable that the thief would injure someone. The concept of *novus actus interveniens* was central to the argument as were two cases, one Irish, a Circuit Court decision of McWilliam J (*Dockery v O'Brien* [1975] ILTR 127, "*Dockery"*) and one English (*Topp v London Country Bus (South West) Limited* [1993] 3 All ER 448, "*Topp*"). Reference was also made to the well-known Supreme Court decision in *Conole v Redbank Oyster Company* [1976] I.R. 191. Butler J had no doubt that the act of the thief amounted to a *novus actus interveniens,* which broke the chain of causation. He thought that, to impose any liability on the first named defendant, it would be necessary to have evidence that the car was left in an area where it should be known to the owner that people routinely stole cars for the purpose of driving them around in a reckless and dangerous fashion.

6. MIBI contest these views of learned High Court judge. In particular MIBI says that he was wrong not to find that the *"admitted negligence"* of the owner of the car was the cause of the plaintiff's injuries and that the chain of causation.

7. The contending positions may be expressed as follows. The appellant would say that the act of leaving a motor car, unattended and unguarded, for any length of time in a public street with the keys in the ignition is clearly an act of carelessness. There is an obvious and serious risk of the car being taken, whether by way of theft, in order to commit some crime or, merely for joyriding. The culprit must necessarily be a person who does not respect the law and who is likely to be a danger to others whether by reason of general irresponsibility or while trying to get away. The first defendant would say that the taking of the car is a *novus*

actus interveniens. It is an independent, illegal act of a third party. The car owner is not responsible for the manner of driving of the thief. He cannot control it. He should not be treated as if he had authorised the driving of the car. He is not vicariously liable.

Analysis

8. In order to resolve this dispute, it is necessary to consider both the scope of the duty of care in negligence and the cause of the damage. Specifically, does the person injured by a stolen motor car come within the range of persons who can complain? Once more, the case raises the sufficiency of the test of foreseeability and hence the range of damage for which the person performing a careless act is liable.

9. It is particularly helpful that Keane C.J. has, in his recent judgment in *Glencar Exploration plc v Mayo County Council* [2002] 1 I.R. 84, reviewed in a considered manner the very vexed question of the proper test for the imposition of a duty of care. In doing so, he went a long way to resolving the apparent divergence which had manifested itself from the mid nineteen eighties between the approaches of our courts and those of other common law jurisdictions, in particular those of England and Wales. The merely persuasive status of the decisions of other common law jurisdictions has not dissuaded our courts from taking its inspiration from contemporaneous new steps in the development of the common law. The decisions of the House of Lords in *Donoghue v Stephenson* [1932] A.C. 532 and *Hedley Byrne v Heller and partners* [1964] A.C. 465 are the best known examples.

10. The famous two stage test enunciated by Lord Wilberforce in what was once regarded as the landmark case of *Anns v London Borough of Merton* [1978] A.C. 728 at 751, was, however, open to being read as postulating foreseeability as the single governing test. In truth, it led to much confusion both here and in England. After a period of some doubt both in the English and Commonwealth courts, the House of Lords, taking its lead in part form the High Court of Australia, (*Council of the Shire of Sutherland v. Heyman* (1985) 157 C.L.R. 424), departed from *Anns* (*Murphy v Brentwood District Council* [1991] A.C. 391). Keane C.J., in *Glencar,* citing *Council of the Shire of Sutherland v. Heyman*, referred to the need to maintain the distinction between duties on the moral plane and those whose breach could be invoked in the law of negligence. He went on:

"It is precisely that distinction between the requirements of altruism on the one hand and the law of negligence on the other hand which is in grave danger of being eroded by the approach adopted in Anns v. Merton London Borough [1978] A.C. 728, as it has subsequently been

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

11. I consider that this passage represents the most authoritative statement of the general approach to be adopted by our courts when ruling on the existence of a duty of care. It seems to me that, in addition to the elements of foreseeability and proximity, it is natural to have regard to considerations of fairness, justice and reasonableness. Almost anything may be foreseeable. What is reasonably foreseeable is closely linked to the concept of proximity as explained in the cases. The judge of fact will naturally also consider whether it is fair and just to impose the liability. Put otherwise, it is necessary to have regard to all the relevant circumstances.

12. The present case is concerned with a narrower application of the question of to whom a duty of care is owed. It raises the circumstances in which it may be proper to fix a person with liability for an act of carelessness, where a third person's independent act has intervened between that act and has directly caused the damage. However, the general principles laid down by Keane C.J provide useful guidance.

13. I will refer, firstly, to the cases directly concerned with the taking of unattended motor vehicles.

14. There are two Irish Circuit decisions. The facts of *Dockery* are similar to the present case. An owner left his car in the street with the keys in the ignition. An intoxicated person took it and crashed into the plaintiff's parked car. McWilliam J said:

"With regard to a novus actus interveniens, Lord Reid, in the Dorset Yacht Co. case, said that, if what is relied on as a novus actus interveniens is the very thing which is likely to happen, if the want of

care which is alleged takes place, the principle involved in the maxim is no defence, and he added that, unfortunately, tortious or criminal action by a third party may be the very kind of thing which is likely to happen as a result of the wrongful or careless act of the defendant…this was the very kind of thing which a reasonable person should have foreseen."

15. In *Cahill v Kenneally (1955-1956)* Ir Jur Rep 127), a bus driver had driven some dart players to a competition. The driver allowed some of the players back onto the bus after the event and then left the bus unattended while he went off to look for some of the passengers. In fact, the persons who drove the bus away were themselves, passengers, who started it and crashed into a parked car. According to the very brief note, Judge Patrick Roe ruled: *"It was negligence on the part of the driver, when he obviously knows* [sic] *that the bus, if unattended, should be locked, so that it may be safe, and it was clearly dangerous to allow these men into the bus."*

16. The English courts took a strikingly different approach in *Topp*. In that case, a bus company had a system of leaving some of their buses parked in the public street with the keys in, to facilitate changeover of drivers. Normally, there would only be an eight-minute interval, but the accident happened on a day when one driver failed to attend for duty. The bus was left for over nine hours. It was driven away and crashed into a cyclist. May J carefully reviewed a number of authorities, not only concerning the misfortunes flowing from the taking of motor vehicles, but touching on the general issue of liability where an intervening person has done the damage. His conclusion, so far as relevant, was as follows:

"…It would not be fair just and reasonable to recognise the duty of care contended for here….

…any affirmative duty to prevent deliberate wrongdoing by third parties, if recognised in English law, is likely to be strictly limited.

It is in my view, clear that the law should not impose such a duty on what may compendiously be called the private motorist. There could be very many different circumstances in which a private car, standing unlocked and with its ignition key in the switch, might be stolen, and then driven negligently so as to cause injury or damage. The motorist may or may not have been careless for his own property, but he should not be held for the wrongdoing of criminal hijackers.

…….…..

…problems would arise with the length of time during which the vehicle was left unattended and the place where and the circumstances in which this occurs. Is it material or crucial if the vehicle is left outside a public

house? And what if the car is left for several weeks in an airport long-term car park?
I do not consider that the likelihood of an unlocked and unattended minibus with its keys in the ignition being both stolen and so negligently driven as to cause injury is sufficiently strong to compel the law to impose a duty of care on the owners of the minibus."
17. The Court of Appeal approved the decision of May J. Dillon LJ held that the case was ruled by an earlier unreported case of *Denton,* where a bus had been taken from the private property of the bus company. Neither he nor May J thought that it made any difference whether the vehicle had been left on private property or the public road. Nonetheless, it does not appear that the Court of Appeal entirely closed the door to liability in circumstances of this sort.
18. The Court of Appeal in *Topp* said that May J had not *"laid down too rigid a line.."* The judge was deciding the case before him. An appeal court should be slow to interfere with the determination of a trial judge.
19. It is of some importance, however, that May J had referred to the House of Lords decision in *Smith v. Littlewoods Organisation Ltd* [1987]AC 241. In that case, in turn, the law lords referred to the more celebrated case of *Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004*. As noted above, McWilliam J has also found that case helpful.
20. In *Littlewoods*, the defenders had bought a disused cinema in Dunfermline. They left it vacant pending its conversion into a supermarket. It was set on fire by some teenagers. The fire spread to neighbouring buildings, whose owners sued for damages. The claim against the defenders was that they, as owners and occupiers of a disused cinema, owed a duty to the owners of neighbouring property to take reasonable care against vandals gaining entry and setting fire in the old cinema. On the other hand, there was nothing inherently dangerous stored in the premises; the owners were not on notice of any dangerous activity by trespassers, in particular that there had been any attempts to start fires; it was common case that only twenty four hour guard would have been likely to have prevented the fire from taking.
21. It must be said at once that the *Littlewoods* case and the present one are quite substantially different on their facts. The pursuers' case implied a heavy duty of care, inspection and supervision of their premise on the defenders, whereas the only complaint against the first named defendant, in this case, is that he failed to take the simple step of locking his car. Moreover, the issue, in *Littlewoods*,turned largely on the absence of specific knowledge, on the part of the defenders, concerning the

activities of trespassers and vandals on their property. In this case, by contrast, the issue is as to the level of knowledge of the nature and extent of risk that should be imputed to the owner of a motor car who fails to take that step.

22. Lord Mackay of Clashfern, firstly, stated succinctly that, since the question was whether there was a duty of care to prevent fire from spreading so as to damage adjoining premises *"unless Littlewoods were bound reasonably to anticipate and guard against this danger they had no duty of care, relevant to the case…,"* the pursuers could not succeed. He stated, in general terms, that:

"It is plain from the authorities that the fact that the damage, upon which a claim is founded, was caused by a human agent quite independent of the person against whom a claim in negligence is made does not, of itself, preclude success of the claim, since breach of duty on the part of the person against whom the claim is made may also have played a part in causing the damage."

23. He summarised the legal position, as he saw it, of a defender facing a claim to fix him with liability for damage caused by third parties:

"In summary I conclude that what the reasonable man is bound to foresee in a case involving injury or damage by independent human agency, just as in cases where such agency plays no part, is the probable consequences of his own act or omission, but that, in such a case, a clear basis will be required on which to assert that the injury or damage is more than a mere possibility. To illustrate, it is not necessary to go further than the decision of this House in Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004 *where I consider that all the members of the majority found such a possible basis in the facts that the respondent's yacht was situated very close to the island on which the Borstal boys escaped from their custodians, that the only effective means of avoiding recapture was to escape by the use of some nearby vessel, and that the only means of providing themselves with the means to continue their journey was likely to be theft from such nearby vessels. These considerations so limited the options open to the escaping boys that it became highly probable that the boys would."*

24. The pursuers lost their case essentially because there was no evidence that the defenders had knowledge of the fact that the vandalising trespassers in the disused cinema were in the habit of starting fires. The House of Lords decision turned on the absence of any evidence to bring the activities of these persons within the knowledge or

control of the defenders and the fact that the only remedy would have been a twenty-four hour guard.

25. The *Littlewoods* case provides a useful point of reference for this case. In the first instance, it is interesting that the arguments and the speeches in the House of Lords were concerned principally with the foreseeability test and the issue of *novus actus interveniens* or the breaking of the chain of causation played little direct part in the reasoning.

26. Having regard to its special facts, it was natural that *Dorset Yacht Co. Ltd. v. Home Office* should figure largely in the speeches in *Littlewoods.* The assumed facts (the case came before the House of Lords as a preliminary issue of law) were that seven Borstal boys, who were working as trainees on an island under the control and supervision of three officers of the Home Office, escaped from the island at night. They boarded, cast adrift and damaged the plaintiffs' yacht which was moored offshore. The officers were assumed to have gone to bed, in breach of their instructions, leaving the trainees to their own devices. The plaintiffs, owners of the damaged yacht, in their action against the Home Office, alleged negligence consisting in the officers' failure, knowing, as they did of the boys' criminal records and records of previous escapes from Borstal institutions, to exercise any effective control or supervision over them and knowing that craft such as the plaintiffs' yacht were moored offshore.

27. Lord Reid said (page 1028 of the report) that it had never been the law that the intervention of some independent human action *"always prevents the ultimate damage from being regarded as having been caused by the original carelessness."* He then asked what was the *"dividing line."* He went on: *"Is it foreseeability or is it such a degree of probability as warrants the conclusion that the intervening human conduct was the natural and probable cause of what preceded it?"* Lord Reid's considered answer, following a review of the authorities was: *"These cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think that it can matter whether that action was innocent or tortious or criminal. Unfortunately, tortious or criminal action by a third*

party is often the "very kind of thing" which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case, on the facts which we must assume at this stage, I think that the taking of a boat by the escaping trainees and their unskillful navigation leading to damage to another vessel were the very kind of thing that these Borstal officers ought to have seen to be likely."

28. Where Lord Reid spoke of whether the thing to be guarded against, the escape, was *"very likely to happen,"* Lord Morris of Borth-y-Gest spoke in terms of *"a manifest and obvious risk,"*and Lord Diplock, though also speaking of likelihood was more concerned to confine the right to recover to persons *"who had property situate in the immediate vicinity."* An important element in the assessment by the House of Lords in the *Dorset Yacht* case of what is reasonably foreseeable is whether the event in question is the "*very kind of thing*" against which precautions must be taken. The reason is the probability of the thing happening. Lord Reid's analysis, based as it was, on the insufficiency of mere foreseeability and the need for compliance with the additional test of reasonable probability is the most helpful for the present case.

29. This Court had already adopted that approach in *Cunningham v McGrath Bros.* [1964] I.R. 209. The defendants had left a ladder in a street leaning against their premises, after the completion of work. An unknown person moved the ladder to another nearby street where it later fell upon and injured the plaintiff. Kingsmill Moore J, in a unanimous judgment responded (at page 214 of the judgment) to an argument based on the breaking of the chain of causation:

"It is not every 'novus actus' which breaks the chain of causation. '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, the principle embodied in the maxim is no defence. The whole question is whether or not, to use the words of the leading case, Hadley v. Baxendale (1) the accident can be said to be 'the natural and probable result' of the breach of duty. If it is the very thing which ought to be anticipated . . . or one of the things likely to arise as a consequence of his wrongful act, it is no defence; it is only a step in the way of proving that the damage is the result of the wrongful act . . ."

He stated the test as follows (at page 215):

"I am of opinion that the test to be applied is whether the person responsible for creating the nuisance should anticipate as a reasonable and probable consequence that some person in pursuance of his rights would attempt to abate the nuisance and in so doing would create a danger."

30. From all these cases, I draw the following conclusion. A person is not normally liable, if he has committed an act 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.

31. Before turning to the scope of the duty of care in the present case, I need to refer to a
matter raised in the submissions of the MIBI, but which was not referred to in the High Court judgment. The Road Traffic (Construction, Use and Equipment of Vehicle) Regulations (S.I. 190) of 1963, Regulation 87 provide, in relevant part:

"87. *(1) Where a vehicle as allowed to remain stationary on a public road, the driver shall not, subject to sub-article (2) of this article, leave the vehicle unattended unless—*

(a) the engine of the vehicle is not running,

(b) where the engine is contained in a separate portion of the vehicle capable of being closed, such portion is closed, and

(c) where the vehicle is fitted under article 31 of these Regulations with a door or doors capable of being locked or with a device for preventing unauthorised driving, such door, doors or device is or are locked so as to prevent the vehicle being driven, and, where appropriate, the key of the door, doors or device is removed from the vehicle."

32. No claim based on breach of statutory duty was made against the first named Defendant. This is not to exclude the relevance of the Regulation. In my view, this Court can have regard to it when considering the scope of the duty of care of the first named defendant.

Conclusion

33. The test then is not merely that of reasonable foreseeability. It is, in addition, necessary to ask whether it was probable that the unattended car, if taken, would be driven do carelessly as to cause damage to others. It seems to me beyond argument, and it is not really disputed, that it was reasonably foreseeable that the car would be stolen.

34. It cannot be seriously disputed, that it was reasonably foreseeable as well as likely that the unattended car, with its keys in the ignition, would be stolen. I think it is obvious that to do all these things in a busy city street, without any mitigating circumstances, is an act of gross carelessness.

35. In modern circumstances, it is obvious that failure to exercise proper control and supervision over motor cars involves a serious risk of

damage and worse to innocent people. It is equally clear that it was reasonably foreseeable that any goods, which might have been left in the car, would be stolen. Thus, if the motor car owner had been carrying goods commercially and, perhaps even looking after them gratuitously, for others, he would probably have been liable to the owners for their loss; similarly, if he had borrowed or rented the car, in respect of any damage to the vehicle. In each of these cases, it seems to me that the test of proximity would have been satisfied. Theft of the car or its contents could be regarded as "*the very thing*" against the custodian of the car should guard. They are directly related to the act of theft.

36. The nub of the case is, of course, the possible liability of the first named defendant for injuries caused by the negligent driving of the thief. Even if the owner of the car, or the driver, if not the owner, should be held liable to the owner of contents or of the car itself for damage to either of these items of property, it is not easy to articulate the basis for his automatic liability to the victim of negligent driving of the car.

37. It is the negligent driving, not the taking of the car, which has caused the damage. It would have to be shown that the owner should have foreseen not merely the taking but also the negligent driving. There would have to be some basis in the evidence, such as that suggested by the learned trial judge, for a finding that the car, if stolen, was likely to be driven in such a way as to endanger others. Cars may be stolen for reasons which do not carry such implications. Some of these, though criminal, do not necessarily imply dangerous driving. The line would, on any view, have to be drawn somewhere. If a car were stolen for resale, the owner could scarcely be responsible for the driving of the purchaser, whether that person were honest or not.

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

39. I would dismiss the appeal.