



**COURT OF APPEAL  
CIVIL**

**UNAPPROVED**

**NO REDACTION NEEDED**

**Court of Appeal Record Number: 2022/10**

**High Court Record Number: 2016/781P**

**Neutral Citation Number [2023] IECA 39**

**Costello J.**

**Noonan J.**

**Ní Raifeartaigh J.**

**BETWEEN/**

**DAMIEN DAVEY**

**PLAINTIFF**

**-AND-**

**SLIGO COUNTY COUNCIL, MDS DISTRIBUTON LIMITED**

**AND VLASTIMIL ZACHAR**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 23<sup>rd</sup> day of February, 2023**

1. I agree with the conclusions of Noonan J. and gratefully adopt his description of the evidence and his summary of the submissions of the parties. I wish in this judgment to add some further words as to how the case, in my view, sits within the framework of legal principles identified in the authorities on negligence, duty of care and causation, particularly having regard to the relatively recent decision of this Court in *McCarthy v. Kavanagh*<sup>1</sup> and that of the Supreme Court in *O'Neill v. Dunnes Stores*<sup>2</sup>.

2. In this judgment, I will use the term “causation” to mean what the textbooks describe as “legal causation”<sup>3</sup>, unless otherwise indicated.

### *Parameters of the case*

3. The parameters of the problem posed in this case may be summarised as follows. A lorry veered off a road and collided with a convoy of Council workers as they were working on the hard shoulder of the road. The lorry weighed 15 tons; the driver had fallen asleep at the wheel; and he had left the lorry in cruise control at 88kmh, which was in excess of the speed limit of 80kmh. MDS was the employer of the lorry driver and there is no doubt that MDS is liable for the injuries to the plaintiff by reason of its vicarious liability for its employee. The proximate cause of the injuries to the plaintiff was the collision caused by the lorry driver. That the driving amounted to criminal conduct is clear because the driver was subsequently convicted of careless driving causing death and serious bodily injury. The issue presenting for the Court is whether the Council is also liable at least to some degree for the injuries caused to the plaintiff

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<sup>1</sup> [2020] IECA 344

<sup>2</sup> [2011] 1 IR 325

<sup>3</sup> See paras 2.07-2.24 of McMahon & Binchy, *Law of Torts*, (Bloomsbury, 4<sup>th</sup> edition, 2013) on the distinction between factual and legal causation.

by the collision in question. The Council undoubtedly owed a duty of care to its employees to take reasonable precautions for their safety while they were carrying out work on the road. This is therefore not a case where any question arises as to *whether* the Council owed any duty of care to the plaintiff; the Council (whose liability is in issue) clearly owed a duty of care towards its workers, of whom the plaintiff was one. The precise scope of that duty is another matter, to which I return below.

4. The issue in the case was framed by the parties in terms of causation, namely, whether any negligent omission(s) or failure(s) by the Council caused the plaintiff's injuries, in the sense that it or they constituted a subsisting legal cause at the time of the collision. The trial judge drew on the *novus actus interveniens* maxim in his analysis of the issue, an approach to which the appellant has raised an objection on fair procedures grounds. Leaving the latter objection to one side for the moment, my view is that the problem in the case can be framed both in terms of the precise scope of the Council's *duty of care* towards its employees and *causation* because, as Murray J. said in *McCarthy* (para 45), in a case such as this, "*the rules of causation are necessarily determined by the scope of the duty*". I will also return to this point below.

5. The alleged negligent omissions or failures on the part of the Council may be broadly classified as four-fold: (1) allowing the workers to carry out the works on a particularly busy day in terms of the volume of traffic i.e. failing to postpone the works to another day when the traffic would be less busy: (2) a failure to implement a lateral safety zone of 1.2m, whereby the workers and machines would, while working on the hard shoulder, always be at least 1.2 m in from the live traffic on the carriageway (this would have involved a partial cordoning off of the road); (3) a failure to have adequate warning systems for drivers on the road such as traffic

cones, speed mitigation measures, and/or a stop and go system; and (4) a failure to have a buffer vehicle of sufficient size and strength behind the working convoy which might have absorbed the impact. As an aside, it may be noted that these alleged specific failures therefore be characterised as a more generalised allegation of failure on the part of the Council to regulate its employees' working environment so as to prevent or minimise the harm inflicted by a third party.

***Framing the issue: duty of care and/or causation?***

6. As noted above, it seems to me that the question arising in this case can be posed in different ways, using different terminology or concepts from the tort of negligence. For example, using the concept of *causation*, one could pose the following question: Did the Council's negligence cause the accident? This was how the parties framed the issue before the High Court. However, in my view, following the analysis of Murray J. in *McCarthy*, one could equally validly frame the issues by placing focus on the alleged *negligence/breach of duty of care* of the Council. One could ask: What was the scope of the duty of care of the Council in the particular circumstances of the case? Did its duty of care encompass foreseeing what actually happened and taking reasonable precautions to prevent that eventuality? Did it fail to take reasonable precautions?

7. It seems to me that the answer to the overall question of whether the Council is liable is, and should be, the same no matter how one frames the question. As Murray J pointed out in *McCarthy*, whether one defines the problem as one concerning the scope of the duty of care or one concerning causation, the same problem is essentially being addressed (para 45). At para 108, he elaborated further on the relationship between the causation and the duty of care issues:

“...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”.

8. Further, I do not think it makes, or should make, any difference to the outcome of the case whether, within the concept of causation, one poses the question in terms of whether the Council caused the accident or whether the lorry driver broke the chain of causation, at least at the level of theory (again, leaving aside the appellant’s objection on fair procedures ground for the moment). These are merely different ways of posing the essential question, which is whether the Council’s failure(s) in the matter of taking reasonable precautions was a continuing, uninterrupted legal cause of events which continued to subsist at the time of the collision. However, the terminology of *novus actus interveniens* comes more readily to mind when, in a case of two potential contributors to injury or damage, the conduct of the first actor is so clearly negligent and potentially causative of the injury or damage (or perhaps injury or damage of that type) that it is sensible or helpful to speak of a subsequent interruption or rupture of the chain of causation by the second actor. That language or frame of analysis comes less readily to mind when the conduct of the first actor (here the Council) is less obviously described as negligent or less obviously connected with the manner in which the injury or damage was sustained. I will return to this point again at a later point in this judgment but for the moment, I note that one of the appellant’s complaints was that the concept of *novus actus interveniens* had never been raised by the parties and was (they say, unfairly) introduced by the trial judge without notice and will return to that specific objection later.

### *The principles emerging from the authorities*

9. The type of question raised in this case is not novel. There have been numerous cases in which third party conduct (sometimes amounting to criminal conduct) was the proximate cause of injury or damage, and the question arose as to whether some prior conduct (usually a failure or omission of some kind) on the part of a defendant rendered it liable.

10. For example, in the leading case of *Home Office v. Dorset Yacht*<sup>4</sup>, the proximate cause of the damage to the plaintiffs' property was the criminal conduct of Borstal escapees; and the prior conduct under scrutiny was that of the Borstal officers who were in charge of the prisoners prior to their escape. In *Vicar of Writtle v. Essex County Council*<sup>5</sup> and *Ennis v. HSE and Egan*<sup>6</sup>, the proximate cause of damage to property was that a young person set fire to property, and the issue was the liability of the State authority responsible for the care or placement of the young person in question. Another "fire" case is *Smith v. Littlewoods Organisation Ltd*<sup>7</sup> (considered in *Breslin v. Corcoran*<sup>8</sup>). In "prison" cases such as *Bates v. Minister for Justice*<sup>9</sup>, and *Casey v. Governor of Midland Prison*<sup>10</sup>, and *Creighton v. Ireland (No. 1)*<sup>11</sup>, the proximate cause of the injuries was the behaviour of a fellow prisoner, and the issue was whether the State authorities were liable by reason of their control of the plaintiff's environment. In *Conole v Redbank Oyster Company*<sup>12</sup>, the proximate cause of the death of the plaintiff's daughter was the action of the second defendant in taking a group of people out in his vessel when he clearly knew that it was dangerously unseaworthy; what was under scrutiny was the position of the manufacturer

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<sup>4</sup> [1970] AC 1004

<sup>5</sup> (1979) 1 WLUK 444

<sup>6</sup> [2014] IEHC 440

<sup>7</sup> [1987] AC 241

<sup>8</sup> [2003] 2 IR 203

<sup>9</sup> [1998] 2 IR 81

<sup>10</sup> [2009] IEHC 466

<sup>11</sup> [2010] IESC 50

<sup>12</sup> [1976] IR 191

in building a defective vessel in the first place. In *O'Neill v. Dunnes Stores* and *McCarthy v. Kavanagh*, the proximate cause of the injury to the plaintiff in each case was a third-party assault, and what was in issue was the liability of a shop which, in the latter case had shortly beforehand ejected the plaintiff from its premises, and in the former case, had (it was found) failed to put in place adequate security arrangements.

**11.** Many more factual examples abound in the authorities: workers placing ladders in locations from which they are removed by well-meaning third parties, but which ultimately cause accidents; cars and premises being left unsecured, following which thieves or burglars carry out criminal acts; and so on. The present case is merely one more case in a long line of cases where the question has arisen as to whether a person or body other than the actor who was the immediate or proximate cause of the injury or damage is also liable by reason of its (or his or her) prior acts or omissions. The following represents some of the leading judicial pronouncements of the applicable principles in such a situation.

**12.** In *Cunningham v. McGrath Bros*<sup>13</sup>, where the defendant left a ladder unattended on the public footpath such that it constituted a nuisance, and a third party moved it to a different location where it fell on the plaintiff, Kingsmill Moore J quoted from *Haynes v. Harwood*<sup>14</sup> (per Greer LJ, at 156) to the effect that:

“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”.

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<sup>13</sup> [1964] IR 209

<sup>14</sup> [1935] 1 KB 146

13. In *Dorset Yacht*, perhaps the most celebrated of this type of case, Lord Reid also quoted from *Haynes v. Harwood*, to the effect that:

“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...”

14. It may be noted that Murray J, commenting later on the *Dorset Yacht* decision, said:

“The reference by Lord Reid in *Dorset Yacht* to the intervening event being ‘very likely to happen’ ([1970] AC at 1030) ... 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).”

15. Thus, while the ‘very kind of thing that is likely to happen’ formulation has been accepted in Irish law, the test is not one of whether the event was ‘very likely’ to happen. Reasonable foreseeability or (mere) likelihood seems to be required, if I am correctly understanding the difference between ‘the very kind of thing that is *likely* to happen’ and ‘*very likely*’.

16. In *Dockery v. O’Brien*<sup>15</sup>, His Honour Judge McWilliam (as he then was) adopted what was said by Lord Reid in *Dorset Yacht*. In *Breslin v. Corcoran*<sup>16</sup>, we find Fennelly J. again using the “very kind of thing” formulation:

“*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,*

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<sup>15</sup> (1975) 109 ILTR 127

<sup>16</sup> [2003] 2 IR 203



*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”.*

Fennelly J. also (p.215) said “*there is nothing...to suggest that the first defendant should have anticipated, as a reasonable probability...”.*

**17.** In *O’Neill v. Dunnes Stores*, the defendant was held liable where the plaintiff was injured after having gone to the assistance of the store’s security guard. The guard was chasing one of two youths who had stolen bottles of wine from the store and had asked the cleaner to seek assistance; the cleaner made the request to the plaintiff, a member of the public, who went to the aid of the guard. Ultimately, the youth’s companion re-appeared on the scene with a motor cycle chain and inflicted injuries on the plaintiff; this was at a time when others, including the Gardaí, had arrived on the scene. The High Court found *inter alia* that the defendant was negligent in having only one security guard on duty at the time, and for failing to have a two-way-radio system; in short, that the security arrangements were negligent. The Supreme Court dismissed the appeal. O’Donnell J. characterised the case as one at the intersection between the so-called “rescue” cases and the third-party intervention cases.

**18.** The defendant had argued that, even assuming default on its part, it was not liable because the injuries were caused by the criminal acts of a third party, and that the actual assault had “*come out of the blue*” at a time when the Gardaí had arrived on the scene. This argument appears to make reference both to the nature of the third party’s act<sup>17</sup> and its foreseeability.

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<sup>17</sup> One of two factors reference by McMahon and Binchy in their 2013 (4<sup>th</sup>) edition of Law of Torts as being relevant in the analysis; see para 2.79 of the 4<sup>th</sup> edition.

19. O'Donnell J., having referred to the test in *Dorset Yacht*, and that it had been approved in *Dockery v. O'Brien* and *Breslin v. Corcoran*, applied that test to the facts before him. He observed that there was a “*strong connection*” between the negligence of the defendant and what occurred, and that it was “*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*”.

20. He added: “*In this regard I think it is 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*”. He said that this applied in the context of what was, in effect, a “rescuer” case, saying there was “*no logical or conceptual difficulty in permitting recovery by a rescuer in circumstances where the defendant is or would be liable for the foreseeable wrongful acts of a third party*”.

21. It may be noted that Fennelly J. dissented. He disagreed with the conclusion that there was negligence on the part of the defendant by failing to have more than one security guard on duty (and also a two-way-radio, which followed logically from that point). It followed, he said, that liability for the creation of a situation of danger could not on any view be laid at the door of the defendant: “*Liability in rescue cases is predicated on some act of want of care on the part of the defendant leading to the creation of the risk which prompted the voluntary act of rescue. Thus, the necessary precondition does not exist*”.

22. We come then to *McCarthy v. Kavanagh*, a recent decision of this Court. In his detailed analysis of the scope of the shop owner's duty of care to an ejected customer, where the injuries were caused by a third-party intervention outside the shop from which the plaintiff had been recently ejected, Murray J said at para 108:

*“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 (Haynes v. Harwood [1935] 1 KB 146, 156, cited with approval in Cunningham v. McGrath Bros [1964] IR 209, 213 per Kingsmill Moore J”.*

23. In response to the defendant's argument that what occurred in the *McCarthy* case itself was “a completely unforeseeable and remote fortuity”, Murray J responded (para 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....”*

24. The judgment of Murray J. engages in a careful analysis of the contents of duty of care of a convenience store owner to take reasonable steps to protect them against a foreseeable risk of harm *inter alia* at the hands of other customers, observing that the contents of that duty will

vary from case to case, depending on the nature, location and other circumstances concerning the premises. He ultimately concluded that the store owner was liable to the plaintiff in the particular circumstances of the case;

*“...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 (sic) 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 ejection, exposed.”*

Even though the injury was inflicted by a person other than the original aggressor (and unconnected to him or the dispute inside the store), the injury was *“of the type against which the defendant was required to protect the plaintiff”* and therefore the third party’s action did not constitute a *novus actus interveniens*.

#### ***Application to facts of the present case***

**25.** Seeking to apply the principles identified in *Dunnes Stores, McCarthy*, and the earlier authorities, my analysis is as follows. First, coming at the matter from the point of view of the scope of the Council’s duty of care, it is not in dispute that the Council owed a duty of care towards the plaintiff, one of its employees, whose work environment the Council controlled, at least to some degree; the difficulty lies in identifying the precise *scope* of that duty. It is certainly the case that the Council, in foreseeing risks to its employees when carrying out work at the roadside, should (and clearly did) envisage that the behaviour of drivers of cars and other vehicles on the road could pose certain risks to the workers. Hence the precautionary steps that were rightly taken by the Council: erecting warning signs for cars at staggered distances on the approach to the convoy, and the presence of a pick-up truck with a large illuminated sign on the back with flashing lights and an arrow. The question is, what kind of damage from passing

traffic ought it to have foreseen and what reasonable precautions were necessary in light of the answer to that question?

**26.** Was the accident which in fact took place “*the very thing*” that could reasonably have been foreseen or, to put it another way, was it within the general category of damage that the Council was required to guard against? The appellant submits that the answer must be in the affirmative because the authorities establish that what is required is not foresight of the specific mechanism of the incident or accident which in fact occurred but instead whether it falls into a “*category*” or “*type*” of incident or accident that was foreseeable. It submits further that the collision which occurred was within this category, namely a collision caused by a third-party vehicle veering off the roadway onto the hard shoulder and in particular, a driver falling asleep at the wheel leading to such an outcome.

**27.** This argument has some superficial attraction. Certainly, the emphasis in the authorities on whether what occurred was within a *category* or *type* of foreseeable incident gives one pause for thought. However, even that principle must have its limit. Let us take the facts of the *Dunnes Stores* or *McCarthy* cases and vary the facts to produce a (rather far-fetched) hypothetical example to illustrate the point. Suppose the (third party), instead of assaulting the plaintiff with his hands or fists, or even with a motor cycle chain, had produced a bomb and detonated it, causing injuries to the plaintiff. In those circumstances, would this have been considered to fall within the range of foreseeability such that the shop owner would be found liable? I think not. Whatever precautions a store owner might be expected to take, it would hardly be reasonable to expect it to take precautions against the highly unusual (but not unprecedented) event of a third party introducing a bomb into the situation. The duty of care and the range of precautions required are not infinitely elastic; a line must be drawn somewhere. The Council is not an

insurer of its employees. Indeed, it may be that the decision in *McCarthy* was at, or close to, the outer limit of where the line might be drawn.

**28.** On which side of the line does the present case fall? I agree that the Council should have foreseen some of what we might call ‘ordinary’ or more usual risks, such as risks caused by busy traffic, speeding drivers, or inattentive drivers. It is indeed arguable (although not necessary here to decide) that the Council should have taken specific precautions in respect of the possibility of a driver nodding off at the wheel as this risk is known to occur. However, what happened here was an unusual combination of circumstances creating a somewhat unique risk: (a) a professional driver subject to mandatory legal resting obligations who was not conscious at the time of the accident (having fallen asleep); (b) had set the cruise control at a speed (88kmh) which was above the speed limit (80kmh) and (c) was driving a 15-ton lorry. Even allowing that traffic accidents can occur in a wide range of circumstances and may include drivers who nod off at the wheel, it seems to me that the particular combination of circumstances in this case was sufficiently unusual as to fall outside the range of reasonably foreseeable events. It was not an “inevitable” or entirely obvious type of accident. The combination of events that occurred here could not be described as more than a remote possibility. It could not therefore be described as approaching the standard of the “*very kind of thing*” the Council was bound to expect and guard against, even allowing for the gloss on that formulation which references a general *category* or *type* of incident. Therefore, in my view, if one approaches the problem in this case from the point of view of the duty of care, the answer is that the Council is not liable.

**29.** I reach the above conclusion on the basis of my characterisation of the foreseeability of this particular accident as no more than a possibility, but my conclusion would arguably be

strengthened if it is also appropriate to consider, as McMahon & Binchy had suggested it is, the nature of the third party's conduct, which, as we know, was of a criminal nature in the present case<sup>18</sup>.

**30.** One can also approach the matter, alternatively, from the angle of causation and explore the connection (if any) between the alleged negligent failures of the Council and the accident that took place. There is a peculiar disconnect between at least some of the alleged failures of the Council (said to constitute negligence causative of the plaintiff's injuries) and the collision which took place.

**31.** For example, pointing to the extra volume of traffic on the road in question by reason of the Fleadh, MDS argues that one of the alleged negligent failures of the Council was that it failed to postpone the works until another day when there would be less traffic. Incidentally, this formulation presents the allegedly negligent conduct as a negligent omission, but it could equally be formulated as the Council's allegedly negligent positive act in putting the workers into a risky situation by reason of the unusually high volume of traffic on the road.

**32.** The appellant at one point in the argument submitted that the Council should be held 100% liable for the accident, simply because the works were taking place on an unusually busy day, because the accident would not have happened if the workers had not been there. However, there was no evidence that the collision was in any way connected with the volume of traffic on the road. The evidence established that the lorry was the sole vehicle on that side of the road at the material time. Therefore the 'failure' of the Council to withhold or postpone the works

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<sup>18</sup> Although the position is perhaps complicated by the fact that the criminal offence of which the driver of the lorry was convicted was careless driving, and not one requiring intention or recklessness; the offence of careless driving is one of the rare criminal offences for which negligence is sufficient.

until some day when the Fleadh was over and the traffic less busy was not in any way connected with the accident, except in the very limited sense that “but for” the workers being present on the road, the accident would not have happened. This amounts to no more than “factual” causation and is some considerable distance from establishing legal causation in circumstances where the volume of traffic on the road had no connection whatsoever with the mechanics or anatomy of the accident which actually took place.

**33.** The second alleged negligent failure of the Council, according to MDS, was its failure to implement further measures such as traffic cones, speed mitigation measures, a stop and go system, and more signage. Again, I fail to see any connection between those potential measures and the accident which actually occurred. This particular driver was asleep at the crucial time and in any event had his vehicle in cruise control at a speed above the prescribed legal limit. In those circumstances, it is difficult to see how the failure to take the various suggested measures could be said to constitute a cause of the collision in the legal sense.

**34.** To take a more extreme hypothetical example to illustrate the point, if an employer of construction workers fails to provide the workers with hard hats and they go to work bare-headed, that would not be a basis for holding the employer liable for injuries caused by one worker throwing a cup of boiling water at the body of another, causing burns to his arms.

**35.** I will turn next to the issue of the alleged negligent failure of the Council to have at the scene a buffer vehicle of sufficient size and material, such as a lorry mounted crash cushion (LMCC). One of the appellant’s arguments is that while the presence of such a vehicle would not have prevented the collision from taking place, it might have reduced the force of the impact and therefore reduced or eliminated the injuries sustained by the plaintiff in the accident.



Noonan J. says there was no evidence to suggest that such a buffer vehicle would in fact have been capable of absorbing a direct impact from a 15-ton lorry travelling at 88kmh to a degree sufficient to prevent or mitigate the accident which in fact occurred. I agree. From a causation point of view, if it has not been shown on the balance of probabilities that the precaution in question would have made any difference, legal causation cannot be established.

**36.** The separate question of whether this type of buffer vehicle is usually deployed (or recommended to be deployed) on this type of road goes perhaps more to the question of the reasonableness of the precautions required of the Council: the duty is, as I have said, not infinite nor a duty to take all possible precautions against foreseeable risks, but rather to take reasonable precautions in respect of reasonably foreseeable risks. It is worth noting that the evidence established that the advice of the Guideline authors did not recommend their use on works on single carriageways.

**37.** Finally, there is the alleged failure to ensure that a lateral safety zone of 1.2m was implemented as between the convoy and the side of the road which, although it would not have prevented the driver veering off the road, may have prevented the collision happening in the precise manner that it did. As Noonan J. has explained, on the facts of this case, given the measurements involved, there was only one possible way of implementing a 1.2 lateral safety zone and this was by extending the zone out into road, using some kind of cordoning, such as cones. Given the fact that the driver was asleep at the wheel, it is highly unlikely that this would have made any difference to the driver's trajectory and therefore to the accident as it actually happened, particularly when one considers that Coffey J. found that the collision with a pickup truck did not cause the driver to wake up. The causal link between the alleged failure and the accident which took place has not been established.

**38.** Noonan J. points out a further difficulty with the appellant's argument about the 1.2 m zone, namely that even if the accident would not have happened in the same way had the lateral safety zone been implemented, that outcome would have been the result of pure chance. He says that if a precaution is designed to prevent X (workers straying on to the road) but would by chance have prevented Y (cars veering on to the hard shoulder) (but this was not reasonably foreseeable), the defendant is not liable for having failed to take that precaution, if Y occurs.

**39.** I agree with that conclusion. Let us vary the hypothetical example I suggested above, involving the employer who fails to supply hard hats to its construction workers. Let us suppose that instead of throwing a cup of boiling water at his co-worker, the rogue worker hits his colleague on the head with a crowbar in the course of a dispute. Perhaps if the injured man had been wearing a hard hat, this would have prevented or minimised the injuries inflicted, but this would have been by pure chance because a precaution designed to prevent injuries caused by an entirely different kind of risk (such as being hit on the head by falling timber or concrete blocks) might incidentally have prevented or minimised injury from an entirely different source (a deliberate blow to the head from a crowbar). This appears relevant to the issue of foreseeability; I cannot see how an employer can be held liable, not for failure to take a reasonable precaution which would guard against a reasonably foreseeable risk, but for failure to take a precaution which *only by chance* might reduce or eliminate a reasonably foreseeable risk.

*Novus Actus Interveniens*

**40.** On the issue of whether and how the principle flagged by the shorthand of *novus actus interveniens* is relevant to the analysis, it may be helpful to start by recalling the correct description of the principle for which the three-word version is merely a shorthand:

*“In so far as the three Latin words novus actus interveniens are intended to describe the circumstances when it will provide the original wrongdoer with a full defence, it should more meaningfully translate as an intervening act which is of such a kind that it attracts sole liability for the plaintiff’s injury or is of such a kind that it...becomes the sole legal cause of the plaintiff’s injuries.” (per Judge McMahon, as he then was, in Murray v. Miller and Brady (14 November 2001))<sup>19</sup>.*

**41.** The words “original wrongdoer” in the above quotation may be noted. I would suggest that it is normally apt to frame or approach the issue in terms of a *novus actus interveniens* of a third party only where there it is manifestly clear, or it has been established upon analysis, that there was a wrongful act or omission on the part of the defendant in the first place i.e. negligent conduct which set in motion a legal chain of causation between the defendant’s conduct and the injuries or damage caused. A chain of causation having been set in motion by the defendant’s established wrongful act, the question then becomes whether or not the third party’s subsequent conduct (whether act or omission) has ruptured the chain so as to excuse the defendant from liability with which he would otherwise be fixed and deem the third party’s conduct the sole legal cause of the injury or damage. A classic example of such a situation is provided by the *Conole* case: the boat’s manufacturer was clearly negligent in building an unseaworthy boat and the chain of causation was thereby set in motion; the intervening act was that of the boat’s captain in setting to sea when he was on full recent notice of the dangers

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<sup>19</sup> Cited in McMahon & Binchy, *Law of Torts*, 4th edition 2013 at para 2.46

posed by the vessel's defects. However, it seems less helpful to proceed directly to the concept of *novus actus interveniens* in cases where the acts or omissions of the defendant are less obviously wrongful and one of the problematic issues is precisely whether the defendant is responsible for starting any legal chain of causation in the first place. Logically, in order to speak of something intervening and disrupting a (legal) chain of causation, there must be a chain of (legal) causation already in existence. In a case such as the present one, this begs too many questions to be helpful.

**42.** In the present case, therefore, I do not think the principle alluded to in the concept of *novus actus interveniens* is particularly helpful when analysing at least some of the Council's alleged failures and to this extent I do not agree with the approach of the trial judge. However, as is clear from my discussion above, I agree with Noonan J. in his conclusion that, no matter which way one approaches the causation analysis, the Council cannot be said to have been a legal cause of the collision and the plaintiff's injuries. Therefore, even if the trial judge took the appellants by surprise by relying upon a different framing of the issue than that which had been debated by the parties, I cannot see how applying the original framework of analysis would make any difference at all to the outcome.

### ***Conclusion***

**43.** For the reasons set out, I therefore also agree that the appeal should be dismissed.

**44.** Costello J. has asked me to record her agreement with this judgment.