

An Chúirt Uachtarach**The Supreme Court**

Clarke CJ
O'Donnell J
MacMenamin J
Dunne J
Charleton J

Supreme Court appeal number: S:AP:IE:2020:000094
[2020] IESC 000
Court of Appeal Record Number: 2019/ 120 PP
[2019] IECA 00
High Court record number 2017/146 JR
[2020] IEHC 178

Between

**P McD
Plaintiff/Appellant**

- and -

**The Governor of the X Prison
Defendant/Respondent**

Judgment of Mr Justice Peter Charleton delivered on Friday 17 September 2021

1. Prior to *Donoghue v Stevenson* [1932] AC 562 and the evolution of the separate tort of negligence, the various wrongs sounding in civil damages were separate and distinct, as well as having precise definitions. While capable of being perpetrated with other torts, these wrongs were contained within describable and often mutually-exclusive boundaries. The rule in *Rylands v Fletcher* (1868) LR 3 HL 330 depended upon the definite action of bringing onto, or keeping on land, a dangerous or noxious substance or thing for which the landowner would be liable should damage be caused through its escape. Nuisance depended upon provable economic loss due to disturbance or such disturbance as would be unacceptable to a person of reasonable fortitude within the neighbourhood of the type, quiet residential or heavy industrial, where it occurred, now capable of being changed with democratic consultation through planning re-zoning; see *Lannigan v Barry* [2008] IEHC 29, reversed on different grounds at [2016] IESC 46. Trespass strictly prohibited unlawful personal touching or entry on land but was subject to a defence of ordinary social

interaction, statutory intervention for countryside walkers, and the rule that the law provides no remedies to trifles. Conversion and detinue were as precisely defined as by statutory prescription; generally see Heuston, *Salmond on the Law of Torts* (17th edition, 1977).

2. Since its inception as a separate tort, derived from trespass, negligence has been defined, redefined, applied, held back and limited through judicial decisions. As early as 1883, the statement of Brett MR in *Heaven v Pender* 11 QBD 503, 507 came to generate the overarching principle that "actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property." This reflects the amorphous character of this tort: it has a tendency to burst through the boundaries of the situations as to which it is already applied and into new areas; it has applied a duty of care to downstream occupants in the control of dams for generating electricity exemplified in *UCC v ESB* [2020] IESC 66; and in giving advice resulting in a wrong where the plaintiff and the defendant advising that plaintiff are in a special relationship, exemplified by the arrest of a plaintiff in a dependant relationship of technical advice in *Bates v Minister for Agriculture, Fisheries and Food* [2018] IESC 5. Negligence is a separate wrong sounding in damages that is not to be used to swamp the elements of other clearly defined civil wrongs, exemplified in the denial of a remedy in negligence where the correct tort is the closely defined and circumscribed wrong of misfeasance in public office in *Cromane Seafoods v Minister for Agriculture, Fisheries and Food* [2016] IESC 6. Even contract cases are often pleaded as a parallel in negligence, but many carefully drafted written agreements "preclude a special relationship that otherwise might be argued to give rise to a duty of care"; *Mero-Schmidlin (UK) Plc v Michael McNamara and Company* [2011] IEHC 490.

3. In colloquial speech, negligence means failing to do, or carelessly doing, some action and usually with a harmful result to another. The fundamental principle in law differs little. Accidents, or events causing harm to a plaintiff, are not the responsibility of another person unless a plaintiff is in a position to prove that but for the negligent action or inaction of that other, the accident would have been avoided. Legally, negligence is defined as "conduct falling below the standard demanded for the protection of others against unreasonable risk of harm" where harm has been caused to a plaintiff in circumstances where the law imposes a duty to take care, and does not remove that duty by reason of it being unjust and unreasonable to bind the conduct of the parties through that duty in the circumstances; C Sappideen and P Vines (Eds), *Fleming's The Law of Torts*, (10th edn, Sydney, 2011) 7.10. Fundamentally, this is based on what is reasonable: when there should or should not be a duty is essentially a decision of policy, but one informed by common sense. What level of care should be taken is based on community standards and policy again seems to intervene as to whether a necessary causative line exists as between the alleged wrong and the damage claimed. This requires examining what can be considered an unreasonable risk of harm, what the relevant standard in guarding against that risk is and where that standard is demanded. There is a duty not to injure one's neighbour. As set out in *Donoghue v Stevenson* at 580, a neighbour may be described, negligence being hard to circumscribe by definitions, as those "persons who are so closely and directly affected by" the actions in question that the defendant "ought reasonably to have them in contemplation as being so affected when" the defendant was directing his mind "to the acts or omissions which are called in question." There can be no proper legal analysis without a primary consideration of whether a duty of care is owed by a particular defendant towards the plaintiff who takes an action based on that defendant's alleged lack of care;

Glencar Explorations Limited v Mayo County Council (No 2) [2002] 1 IR 84 at 154-155 in the judgment of Fennelly J. Without a legally imposed duty of care, the actions of a defendant which cause harm to a plaintiff are not actionable. Until the existence of a duty of care is established, an examination of the relevant and reasonable care standard is impossible. Where defined, the duty that the defendant is required to meet is based on reasonable care in the circumstances, whether professional or otherwise, and a failure in which establishes liability towards the plaintiff. No duty of care exists in the abstract. It is particular to the circumstances proven by a plaintiff; it is particular to the type of harm suffered by the plaintiff. Thus, whether by action or inaction, once a duty of care is established as applicable, those alleged to have acted below accepted standards will be liable where the legal requirement to have others in mind results in a wrong to the plaintiff.

4. No generalisation can be adumbrated which “can solve the problem upon what basis the courts will hold that a duty of care exists.” While there is agreement that “a duty must arise out of some ‘relation’, some ‘proximity’, between the parties” there remains the problem that “what that relation is no one has ever succeeded in capturing in any precise formula”; *Fleming’s The Law of Torts*, 8.20. The original concept in *Donoghue v Stevenson* required more close description. Hence in *Anns v Merton London Borough Council* [1978] AC 728 at 751-752, it was set out that to establish a duty of care, firstly, proximity in the relationship between the plaintiff and the defendant had to be established, so that carelessness on the part of the latter would be reasonably foreseeable to cause damage to the former, and, secondly, to ask “whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom” that duty was owed. This was followed in *Ward v McMaster* [1988] IR 337, 349 with the analysis centring on the duty of care as arising from the proximity of the parties, the foreseeability of damage and the absence of any compelling exemption based on public policy. Since then, a series of decisions have cast doubt on the *Anns* test; see *Yuen Kun Yeu v Att-Gen of Hong Kong* [1988] AC 175 PC at 190-192. In turn, *Glencar*, followed *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 618, requiring the situation in which the duty of care should be imposed as being “one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other”. As formulated by Keane CJ at 139, the authoritative *Glencar* test is thus:

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

5. Here it is claimed that the embarkation on and continuation of a hunger strike was foreseeable. Bad situations can be foreseen and should be avoided, by law, through the exercise of reasonable care but only in situations where there is a duty of care can there be legal liability. Here, it is claimed that there is proximity, and a prisoner in jail is certainly proximate to his or her jailers, but is that enough? Hardly, since the starting point has to be how that proximity generates a duty of care and how what may be foreseeable can inform that concept. As Fleming remarks at 8.330, there is “no simple formula that

determines duty; simplicity though desirable is not to be trusted ... A matrix of policy and principle will always need to be considered in the light of the particular circumstances.”

6. No ‘but for’ test can properly limit and define liability. Intervening causes can break a chain of causation or, in the first instance, the plaintiff may have brought the harm onto his or her own realm. The defence of voluntary assumption of risk is available only if the plaintiff had a real or practical choice, and the law leans against the bargaining away by a plaintiff of a duty of care at the behest of a defendant as undermining the genuine nature of the defence of voluntariness in embarking on risk; Fleming 12.329. As defined in that text, as a complete defence, and not just an aspect of contributory negligence, leaving out footnotes at 12.270:

It is a defence to proceedings in negligence for the defendant to prove that the plaintiff fully comprehended the risk of injury that materialised and freely chose to accept it. This defence of “voluntary assumption of risk” corresponds to the plea of “consent” in actions for intended harm. Both are expressions of the same philosophy of individualism, that no wrong is done to one who consents: *volenti non fit injuria*. Obviously this defence bears much resemblance to contributory negligence. Frequently, the defences are raised in conjunction. But like intersecting circles, the facts of a case may enliven one defence without the other. To assume a risk may in some circumstances be perfectly reasonable but not in others.

Background

7. The plaintiff has had a challenging background and suffered from psychiatric problems, no doubt aggravated by being put under the control of a prison. He became a prisoner following conviction for burglary and assault on a woman householder approaching her 100th year, for which he received a 12-year sentence from the Circuit Criminal Court. He became concerned in his own mind, and this is subjective, by two things: that someone was poisoning his food biologically by spitting on it while it was being brought to him, his circumstances of custody not permitting the use of the ordinary prison canteen; and that while taking exercise any liquid that might fall on him in the yard, or be thrown on him, consisted of human waste. There followed a hunger strike that brought him close to death’s door and from which he was only talked down by expert and skilled counselling that does credit to those working in the prison.

Liability

8. In personal injury litigation, plaintiffs may assert that but for a certain situation, harm would not have occurred to them. Inventiveness on behalf of plaintiffs cannot be criticised. The task of the courts, however, is to apply the law; distortions of the law do not accord with the principle of legal certainty, and the application of the law to applicable situations.

9. In any liability analysis, there are always two aspects: that seen from the person at the receiving end of injury through the negligent wrong of another; and the corresponding side of the coin which requires a close analysis of how that plaintiff acted. This is a case where that second aspect comes particularly into view. As a prisoner, the plaintiff was confined and was in the care of the prison governor, but as a prisoner he was also under a duty to the institution and to the State to conform with the conditions of imprisonment and to serve his sentence. One obvious aspect of that duty is that he simply could not leave, prison break, whether through force or violence or not, being a criminal offence.

But the nature of imprisonment is not the only circumstance giving rise to a duty of care. Prisoners must submit to prison discipline; *Foy v Governor of Cloverhill Prison* [2012] 1 IR 37. Otherwise, a prison is a place of chaos and conflict. To that duty to submit, of course, the entitlement to dignity and the only-necessary deprivation of constitutional rights in support of the nature of the punishment limit the scope of control.

10. While the nature of any limitation on the treatment of prisoners must await a definitive interpretation in an appropriate appeal, the existing decisions emphasise the requirement for a humane approach; *Holland v Governor of Portlaoise Prison* [2004] 2 IR 573. Nonetheless, subject to what follows, it is not normally for the courts to attempt what would be a false substitution into the role of prison governor; *Foy*. In *Holland*, multiple complaints were made by a prisoner but these were resolved by the application of principles requiring reason in the limitations imposed and that these be necessary and proportionate to the situation. In *Gilligan v Governor of Portlaoise Prison* [2011] IEHC 72, McKechnie J at [21] identified as general principles that on conviction a prisoner differs from a person merely arrested, for instance for investigation, or someone “untouched by the legal process” and that, as such a convict must accept prison discipline and engage in the necessary accommodation to prison life as part of the form of punishment available to the State for criminal infringements, including loss of liberty and the diminution or interference with other rights arising out of the “exigencies of the institutional environment in which that person is detained.” In the situations which might arise, there will be a continuum from what is simply an aspect of having one’s life controlled due to imprisonment to the necessary regimentation of existence that enables a prison to function; McDermott *Prison Law* (Dublin, 2000) Chapter 1. Proportionality may come into any consideration of when and how deliberate flouting of rules may be responded to. While the Prison Rules 2007, SI 252/2007, made under the Prison Act 2007, enable a hearing and the loss of some days of remission, ordinarily one quarter of the given sentence of the court, responding to a deliberate hunger strike with hospitalisation, restraint, intubation and close confinement has not been a feature of a modern response to this problem. The lawfulness of that as an answer does not now arise for decision; see *Kelly: The Irish Constitution* (5th edn, Dublin, 2018) 7.4.47.

11. Here, the inventive argument mounted, and accepted to some small degree by the High Court, is that had a proper complaints procedure been in place, the prisoner would have earlier foregone his fast and thus avoided some days of suffering. Where public institutions attempt to put together improvements in their service to the State by searching for and attempting to implement certain policies, that of itself cannot be a foundation for establishing a duty of care or a basis for asserting that what is complained of falls below the standard of reasonable care. The emphasis in law is on what is reasonable, what might ordinarily be expected, what sound sense would suggest in the context in which the State or any person attempts to provide a service for another.

12. Part of that analysis must include any parallel or alternative route which a potential plaintiff might follow. Simply because of imprisonment, a prisoner is not deprived of access to the courts; *State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 82. That access is, as a matter of fact, enhanced. Since *Woods v Attorney General* (Unreported, High Court, December 20, 1974), and probably before, every prisoner has an entitlement to write to the High Court to assert that some aspect of his or her detention is unlawful. Kenny J stated: “letters written by convicts to the High Court, or any judge of it or any official of it should not be confiscated under any circumstances but should be forwarded immediately”, p.9; see 4-29 of McDermott’s *Prison Law*. Were there anything wrong with

the complaints procedure, which of itself is not the establishment of liability in negligence or necessarily a ground for interference, the plaintiff could simply have written to the High Court. In that process, there is no fixed procedure. Mirroring Article 40.4.2° of the Constitution, a prisoner, or someone of their behalf, may write and on receipt by the registrar, the judge of the High Court assigned will cause investigations to be made. The seriousness with which this procedure is taken is demonstrated that any ruling should be in writing, transmitted to the prisoner and enunciated in open court. There are many such rulings dealing with a range of matters from access to reading or writing materials to dental and medical care. Some such applications are relatively trivial and it is only where a deprivation of rights deliberately and seriously violates a constitutional right so that detention becomes inhuman or degrading that release is warranted because thereby a detention is rendered unlawful; *The State (Boyle) v Governor of the Curragh Military Detention Barracks* [1980] ILRM 242, *Richardson*.

13. More fundamentally, however, where a prisoner deliberately embarks on a slow degradation of his or her own health, this is a voluntary action and one where a duty of care cannot be called in aid to claim that the prison authorities are responsible, absent situations of mental or physical torture that might evoke such a desperate and long drawn out response. Because of the *Woods* jurisdiction, access to the High Court would surely correct the course of any such unlikely event in our system. Embarking on a hunger strike is a conscious undermining of the human instinct for self-preservation and unlike sudden suicide due to despair at an upsetting change of circumstances, such as arrest or initial imprisonment, is a continuing action where the loss of a day's food will be uncomfortable and with each successive day and meal a deliberate and voluntary choice is made to bring about the demise of the protestor. That action, occurring over days or weeks, is of the essence of what is a deliberate and continuing choice and in so far as any duty of response arises, it is in humanity and one of persuasion but not one which can establish legal liability.

14. In contrast, upon arrest experience has recognised that sudden confinement, perhaps for the first time and perhaps in the context of a shattering loss of reputation or self-esteem, a suicide risk can arise. Hence, authorities in England establish the lawfulness of depriving such arrestees of implements of self-harm; *Lindley v Rutter* (1981) 72 Cr App R 1 where it was held that a directive which required a female prisoner's bra to be removed was unlawful and that this should only be done to protect the prisoner themselves from harm or prevent harm to others or escape; and see *Funk v Clapp* (1986) 68 DLR (4th) 229. Not in any way commenting on such authorities, what they demonstrate is thinking: since arrest is stressful, might this person spontaneously harm themselves? In that context, the decision in *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, a case taken in the wake of the suicide of Martin Lynch by his domestic partner as plaintiff, may be considered as the application of, rather than development of, an existing duty of care. When someone is confined, becoming totally under the control of a system of minute regulation, it is beyond doubt that a duty of care arises to take reasonable steps to support the arrestee in a difficult situation. A duty of care was admitted but because of the voluntary nature of the act of killing himself, it was claimed that Mr Lynch was 100% responsible. In *Reeves*, the response of the prisoner was to hang himself in circumstances where better checks could have avoided the tragedy. Suicide, while a voluntary act, is and was a recognised risk and apart from volition, prediction, upset, depression and disorientation, set the background of the duty of care established in this case to take reasonable steps in prevention within a context of total control by authorities over a prisoner. As Lord Hoffman stated at 366:

The police and prison service have long been aware that prisoners are more than usually likely to attempt suicide or self-injury. In 1994 the Director of Prisons issued an Instruction to Governors (IG 1/1994) which said: "The care of prisoners who are at risk of suicide and self-harm is one of the Prison Service's most vital tasks." The risk of suicide is particularly high among prisoners on remand facing a new environment and an uncertain future. Between 1972 and 1982, 45 per cent. of suicides in prisons were remand prisoners, although they made up only 10-15 per cent. of the prison population: Report by Helen Grindrod Q.C. and Gabriel Black, "Suicides at Leeds Prison: An enquiry into the deaths of five teenagers during 1988/89" (1989), p.5. As long ago as 1968 the Home Office sent a circular to Chief Constables drawing attention to the need to ensure that fittings in cells should not provide an opportunity for the prisoner to do himself injury. Paragraph 4 said:

"where cell doors are fitted with a drop-down service hatch, the hatch should not be left open when the cell is occupied by a prisoner. With the hatch open it would be possible for a person inside the cell to secure a ligature on the handle of the hatch."

Mr. Lynch did not use the handle. He fastened his shirt through the spyhole above the hatch. But he was able to do so because the hatch had been left open.

15. The finding ultimately in the House of Lords was for equal responsibility. Lord Hoffman differentiated the nature of Mr Lynch's actions from a continuing self-destruction through hunger strike, at 369:

Autonomy means that every individual is sovereign over himself and cannot be denied the right to certain kinds of behaviour, even if intended to cause his own death. On this principle, if Mr. Lynch had decided to go on hunger strike, the police would not have been entitled to administer forcible feeding. But autonomy does not mean that he would have been entitled to demand to be given poison, or that the police would not have been entitled to control his environment in non-invasive ways calculated to make suicide more difficult. If this would not infringe the principle of autonomy, it cannot be infringed by the police being under a duty to take such steps. In any case, this argument really goes to the existence of the duty which the Commissioner admits rather than to the question of causation.

16. While any liability in negligence from long-term self-destructive patterns arising from human autonomy are not now for decision, it may simply be noted that in other jurisdictions cases on gambling, an activity continuing from day to day but capable of self-ruination financially over a remarkably rapid timescale, do not result in liability on a bookie save perhaps in circumstances where notice of the problematic tendency might give rise to a duty of care; see *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43, *Forourghi v Star City Pty Ltd* [2007] FCA 1503, *Kakavas v Crown Ltd* [2007] VSC 526, *Burrell v Metropolitan Entertainment* [2011] NSCA 108 and *Graham Calvert v William Hill Credit Limited* [2008] EWHC 454. In the latter case, Lord Hoffman in *Reeves*, at 368, was cited in support of the voluntary nature of risk being assumed disestablishing liability to this effect:

[2] ... there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves. It reflects the individualist philosophy of the common law. People of full age and sound understanding must look after themselves and take

responsibility for their actions. This philosophy expresses itself in the fact that duties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed.

17. Similarly, in *AMP General Insurance Ltd v Roads & Traffic Authority of NSW* [2001] NSWCA 186, Spigelman CJ was of the view that the deliberate self-infliction of harm should generally be seen to break the causal link; at [27] applying *Reeves*. Thus, at [30], “actions involving the deliberate infliction of self-harm should generally be regarded as ‘independent and unreasonable’ and as a break in the sequence of events that may otherwise constitute a causal chain for the purpose of attributing legal responsibility. Issues of foreseeability may arise.” Exceptional circumstances may give rise to a duty, as where in *Kirkland-Veenstra and Another v Stuart and Another* [2009] 254 ALR 432, two police officers, came across a parked car, with an obvious tube coming from the exhaust into the car. That can only have one purpose. However, the police opined that the driver showed no sign of mental illness and allowed him to leave the car park. He killed himself the next day using exhaust fumes. The general head of tort liability is defined by Gummow and Hayne JJ in the leading case of *Oysters Pty Ltd v Ryan* [2002] HCA 54 at [31] as involving:

An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial. It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute.

18. In *Kirkland-Veenstra*, the High Court of Australia narrowed the question to whether the police officers owed Mr Veenstra a duty to exercise a statutory power. The appeal was allowed on the basis that the Court of Appeal of Victoria had erred in finding a duty of care:

[88] Personal autonomy is a value that informs much of the common law. It is a value that is reflected in the law of negligence. The co-existence of a knowledge of a risk of harm and power to avert or minimise that harm does not, without more, give rise to a duty of care at common law. As Dixon J said in *Smith v Leurs*, “[t]he general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third”. It is, therefore, “exceptional to find in the law a duty to control another's actions to prevent harm to strangers”. And there is no general duty to rescue. In this respect, the common law differs sharply from civil law. The common law has been described as “individualistic”, the civil law as “more socially impregnated”[88].

On the topic of a duty owed by prison authorities to a prisoner, the joint judgment of Gummow, Hayne and Hayne JJ noted:

[90] When a duty to control the actions of another is found it will usually be because the person to be controlled is not autonomous. Thus, the duty of care which a gaoler owes a prisoner is owed because the prisoner is deprived of personal

liberty and the gaoler has assumed control of the prisoner's person. The prisoner does not have autonomy.

19. It is not being denied in this judgment that prison authorities owe a prisoner a duty of care to the extent outlined in *Reeves* and *Kirkland-Veenstra*. But did they owe Mr McD a duty to protect him from harming himself through self-starvation? The answer is no: the actions of this plaintiff were continuing, autonomous and did not give rise to a chain of causation in liability much less a duty of care in law. Furthermore, a reading of the papers demonstrates the humanity and diligence of the prison's response to a situation that was impossible to manage.

Declaration

20. In such circumstances the equitable remedy of a declaration is singularly inappropriate. As with the classic equitable remedies, this is discretionary. Writing extra-judicially, Lord Bingham also traced declaratory relief to a common law origin; [1991] PL 64. Whatever, the origin, a declaration is not an arbitrary exercise by a court but a legal event with consequences and thus only to be properly made the subject of an order indicating in a final way the nature of the rights of contending parties. What would be declared and about what? While a court may make a binding declaration even in the absence of consequential relief, equitable remedies depend on a conscientious searching of both the legal and the moral position of the parties to determine if a solemn statement of rights, for instance of ownership, or liabilities, extremely rare outside a contract or tort action contest, is appropriate. The point of a declaration is, having heard the contending parties as to an issue that impacts substantively on them, to make a binding legal statement as to a right. There is no right in a plaintiff to seek to have publicly declared that a policy might be different, or that a change in approach might yield better results. That is not what courts about. Declarations as to policy, classically, fall into the kind of analysis of a range of disparate circumstances and results requiring wide research which is outside the scope of the approach of courts to minute analysis of individual facts. Furthermore, a declaration results in a finding by a court that a defendant could have done better, not a ground for legal liability or even liability necessarily for breach of trust, and is inappropriate even leaving out of account the entitlement of those involved to their good name under Article 40.3 of the Constitution. So, a declaration is made that a policy could be better or that a person or body might have done something differently: in what way is that appropriate or how might that be within the realm of what a court does? Solemnly, a court would be embarking on the condemnation of an individual, or the approach of a body, and it thereby becomes inescapable that what is being declared is that such a party fell down, not in a legal duty, but as to their conduct in a way outside what has traditionally been regarded as a justiciable controversy. More generally, the discretion to refuse is not fettered when it comes to granting a declaration but, as Lord Bingham stated at [1991] PL 64, courts are guided as to conduct and efficacy:

The court has exercised its discretion to refuse declarations which will serve no useful purpose, [*Att.-Gen. v. Scott* [1905] 2 K.B. 160, 169; *Eastham v. Newcastle United Football Club Ltd.* [1964] Ch. 413, 449.] or to refuse relief where the applicant has achieved the substantial result which he seeks without any order, [*R. v. Commissioner of Police of the Metropolis, ex p. Blackburn* [1968] 2 Q.B. 118.] or where a public body has shown that it is doing all it honestly can to comply with its statutory duty, [*R. v. Bristol Corporation, ex p. Hendy* [1974] 1 W.L.R. 498.] or where an error has been substantially cured. [*R. v. Secretary of State for Social*

Services, ex p. Association of Metropolitan Authorities [1986] 1 W.L.R. 1.] This seems to me a beneficial rule. If the court is satisfied that a public body will readily perform its duty once the court tells it what its duty is, I see no reason why it should be the subject of a coercive order. The rules that the court will not compel a party to do the impossible and will not make futile or unnecessary orders seem hard to challenge.

21. As Walsh J acknowledged in *Transport Salaried Staff Association v CIÉ* [1965] IR 1, while the circumstances in which a court of equity may grant a declaration have become less strict, over the century up to the date of that judgment, such a jurisdiction is exercised with “circumspection”. MacMenamin J in his separate judgment rightly cites *Omega v. Barry* [2012] IEHC 23, where Clarke J identified four essential factors: that there be good reason for a declaration; that there must be a more than theoretical, rather real and substantial, issue; that the contending party for such relief must have sufficient interest to raise that question; and, finally, that there must be a proper contradictor. It must be born in mind that what is before the court is a matter which touches the immediate rights and liabilities of parties and that in consequence of a declaration, the parties are considered bound by what has been declared and, in many if not all instances, are expected to act according to the legal position which the court has not only clarified but taken the step of publicly setting out in solemn form. Such has to relate to an issue touching them both and has to be one within the scope of the judicial exercise of power. Consequential orders may follow, should a declaration be ignored or sought to be rendered inoperative through inaction, but one result that must be born in mind in embarking on this jurisdiction will be that having contended for that result, and having overcome opposition, costs will follow the event. This is a real burden. Coming to court is an undertaking for the settling of legal rights and liabilities. Just as in Article 45 of the Constitution, matters of policy therein are not “cognisable by any Court” there should be a real appraisal as to whether the issue on which a declaration is sought is in the realm of the articulation of policy or is the settling by a court of a legal declaration suitable within the sphere of litigation upon which an award of costs may be based. Order 99 of the Rules of the Superior Courts is now replaced by s 168 of the Legal Services Regulation Act 2015. This makes clear that litigation has consequences and that the ordinary result of losing a case will be that the defeated party will be enjoined to compensating the winning party for the costs of litigation. This is worth quoting for two reasons: because it demonstrates how discretion is guided even in legislation; and because that is what a party seeking or facing a claim for declaratory relief will ultimately have to meet:

(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

- (a) conduct before and during the proceedings,
- (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
- (c) the manner in which the parties conducted all or any part of their cases,
- (d) whether a successful party exaggerated his or her claim,
- (e) whether a party made a payment into court and the date of that payment,
- (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.

(3) Where a party succeeds against one or more than one of the parties to civil proceedings but not against all of them, the court may order, to the extent that the court considers that it is proper to do so in all the circumstances, that—

(a) the successful party pay any or all of the costs of the party against whom he or she has not succeeded, or

(b) the party or more than one of the parties against whom the successful party has succeeded pay not only the costs of the successful party but also any or all of the costs that the successful party is liable to pay under paragraph (a).

(4) Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment.

22. In the *Transport Salaried Staff Association* case there was a real issue: whether statute barred CIÉ from hiring outside the terms of a collective agreement. A declaration as to rights was appropriate in that case because those already in employment would have been joined by university graduates at clerical grade and outside the terms of a statutorily mandated collective bargain already made. The Court of Chancery (Ireland) Act, 1867, s 155, sets out the right of the Court to make declaratory orders without granting other or consequential relief. But this is based on an ancient equitable jurisdiction to right wrongs according to the jurisdiction to state the true position of the parties. Walsh J is not to be taken as extending the jurisdiction of declaratory relief into areas outside of a real dispute affecting the status and conditions of employment, based on contract and on statute. There is no comment in any of the judgments as to the desirability of improving the educational level of the affected grades and nor is the proposal to grant a declaration in the realm of policy. Rather, in quoting Walsh J at 18, the articulation is of legal rights based on statute; the proper function of a court:

The words of the section were repeated in Or 25 r 5, of the Rules of 1905 and now appear in Or 19, r 29, of the 1963 Rules. In modern times the virtues of the declaratory action are more fully recognised than they formerly were and English decisions and *dicta* in recent years have indicated a departure from the conservative approach to the question of judicial discretion in awarding declarations. A discretion which was formerly exercised “sparingly” and “with great care and jealousy” and “with extreme caution” can now, in the words of Lord Denning in the *Pyx Granite Co Ltd Case* ⁽¹⁾, be exercised “if there is good reason for so doing,” provided, of course, that there is a substantial question which one person has a real

interest to raise and the other to oppose In *Vine v The National Dock Labour Board*⁽²⁾, Viscount Kilmuir LC at p 112, cites with approval the Scottish tests set out by Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd*⁽¹⁾, who said, at p 448:—“The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.” It is also to be observed that the fact that the declaration is needed for a present interest has always been a consideration of great weight.

23. That approach accords with the understanding of a court of equity as to when a declaration might be granted. According to Halsbury (4th edn, 2006) volume 37.253 and eschewing footnotes:

A declaration will not be granted against a person who has asserted no right against the plaintiff nor formulated any specific claim nor where there is no breach and no threat of intention to commit a breach of agreement, nor as to the powers of a statutory body where no particular exercise of power is contemplated, nor to enable the plaintiff to utilise it in a foreign action, nor as to the copyright in a class of documents where no infringement as regards existing documents is alleged or probable...

The relief claimed by way of declaratory judgment must be relief in the fullest sense of the term, and it must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which the court exercises its jurisdiction, but, subject to this limitation, there is nothing to fetter the court’s discretion to grant a declaratory judgment.

24. This, for the reasons given, is not a case for any declaration. All kinds of authorities formulate policy, review policy, see whether matters might be better handled, try to predict the future, attempt to stave off wrongs that might happen. This is the opposite of negligence, it is the antithesis of what is wrong. Nothing in such conduct could approach the situation where a declaration might be appropriate.

Result

25. In the result, there is no basis for any order in favour of the plaintiff.