THE SUPREME COURT

[Record No. 70/18]

Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.

Between/

University College Cork – National University of Ireland

Plaintiff/Appellant

and

The Electricity Supply Board

Defendant/Respondent

Joint judgment of Mr. Justice Clarke, Chief Justice, and Mr. Justice MacMenamin delivered the 13th July, 2020.

1. Introduction

1.1 Cork City suffered very severe flooding on 19 and 20 November 2009. A principal cause was that the River Lee broke its banks, thus subjecting many nearby properties to significant damage. Amongst those who suffered was the plaintiff/ appellant, University College Cork ("UCC"), where the campus was severely damaged.

1.2 UCC has claimed that the defendant/respondent, the Electricity Supply Board ("the ESB"), was negligent or guilty of nuisance in the way in which it handled its up-river dams at Inniscarra and Carrigadrohid, thus causing or contributing to at least a significant part of the flooding concerned. On that basis, UCC commenced these proceedings alleging negligence and nuisance against the ESB. The ESB denied that it was guilty of either negligence or nuisance, but pleaded, in addition, that if it were liable, UCC should be found guilty of contributory negligence and thus have its damages reduced.

1.3 In the High Court, UCC succeeded in part, in that the trial judge (Barrett J.), for the reasons set out in a written judgment dated 5 October 2017 (*University College Cork – National University of Ireland v. Electricity Supply Board* [2015] IEHC 598) concluded that the ESB were liable but also held UCC to be guilty of contributory negligence, which he measured at 40%.

1.4 Both sides appealed to the Court of Appeal. In a judgment of that Court delivered by Ryan P. (*University College Cork – National University of Ireland v. Electricity Supply Board* [2018] IECA 82), the appeal of the ESB in respect of the finding of liability made against it was allowed and thus the judgment of the High Court against the ESB and in UCC's favour was set aside. The Court of Appeal went

on to consider whether UCC could properly have been found guilty of contributory negligence, for there remained the possibility of an appeal to this Court in which the question of contributory negligence could again become relevant if this Court were to take a different view on the initial liability of the ESB. The Court of Appeal came to the view that UCC should not have been found guilty of contributory negligence.

1.5 Thereafter, both sides successfully sought leave to appeal to this Court in terms to which it will be necessary to turn. Thus, both the question of the primary liability of the ESB and the potential liability of UCC for contributory negligence are before this Court. However, in the course of case management, it was decided that the Court would initially consider the question of whether the ESB could properly be found to be liable. Clearly, so far as a court of final appeal is concerned, there is no need to go on to consider the question of contributory negligence in the event that there is no sustainable finding of primary liability in the first place. Thereafter, a hearing followed on the question of the liability of the ESB. The question of whether any contributory liability can be attached to UCC has been left over until that issue has been determined and, obviously, will not need to be determined in the event that no liability attaches to the ESB.

1.6 Put at its very simplest, therefore, the issue on this appeal is as to whether the High Court was correct to find that the ESB was liable in negligence and/or nuisance or whether the Court of Appeal was correct to find that it was not. However, behind the broad issue expressed in those simple terms, there are potentially a range of issues which can contribute to a final determination as to whether the ESB is liable.

1.7 In order to understand the issues in a little more detail, it is necessary to at least start with a brief overview of the facts.

2. The Facts – An Overview

(a) General Background

2.1 It is proposed to deal with detailed aspects of the facts relevant to the issues which arise on this appeal in the context of the specific issues as they arise. For present purposes, it is sufficient to give an outline of the background facts so as to place those legal issues within their general context.

2.2 The River Lee flows through Cork City, which was built on its floodplain. The city is susceptible to both fluvial and tidal flooding. In 1949, the Lee Hydroelectric Scheme ("the Lee Scheme"), for the generation of electricity by means of hydraulic power, was approved for construction by the Minister for Industry and Commerce, under the Electricity (Supply) (Amendment) Act 1945 ("the 1945 Act"). The scheme as approved was built between 1952 and 1957.

2.3 The Lee Scheme comprises of two dams ("the Lee Dams"), each impounding a reservoir of water. The power station, dam and reservoir at Inniscarra ("the Inniscarra Dam") are located approximately 14km upstream of Cork City. Approximately 13km further upstream, there is a second power station, dam and reservoir located at Carrigadrohid ("the Carrigadrohid Dam"). The Lee Dams work together for the most part and outflow from the Carrigadrohid Dam is discharged directly into the Inniscarra Dam system. The Hydro Control Centre in Wicklow is responsible for the normal operation of the Lee Stations. However, management of water levels and flood management are dealt with from the control room at Inniscarra Power Station under the Hydrometric Officer's instruction.

2.4 The operational rules of the Lee Scheme are contained in the Lee Regulations ("the Regulations") which is an internal ESB document the first version of which was published in 1969. The Regulations have been subject to a number of subsequent revisions and, it should be noted, do not have statutory standing. The Regulations contemplate, amongst other things, the operation, management and control of the Lee Dams both in normal conditions and in flood events and also contain rules, procedures and guidelines to be applied in respect of the water levels of the reservoirs, the management of water discharges and flood management.

2.5 The Lee Dams are classed as "Category A" dams, meaning that a breach of such a dam would endanger the lives of a downstream community. Dam integrity requirements are therefore fundamental to the Lee Regulations.

2.6 The Lee Regulations outline three separate levels against which the water in the reservoirs can be measured. The first of these is the "Maximum Normal Operating Level", referred to as "MaxNOL", which is defined as meaning "the highest level allowable in the operation of the reservoir under normal operating conditions". It can only be exceeded under special flood instructions. Once MaxNOL is reached, water must be discharged in accordance with the Lee Regulations, for to ordinarily allow reservoir storage above MaxNOL is considered an unacceptable risk to dam safety, as the danger exists of dam failure resulting from spilling of large quantities over the top of the barrier. The Target Top Operating Level ("TTOL") for both Lee Dams are also prescribed in the Lee Regulations. This level is defined as the "top operating level which the station shall endeavour to maintain during non-flood conditions" and, while it varies during the year to accommodate seasonal weather conditions, it is always

lower than MaxNOL. The "Minimum Normal Operating Level", referred to as "MinNOL", is the lowest level at which the normal operation of the plant is possible.

2.7 The Regulations prescribe how discharges are to be managed during floods, in order that the Lee Dams are capable of dealing safely with floods, by providing that specified amounts should be discharged at specified reservoir levels. In order to understand the appropriate procedures, it is necessary to start by saying a little about the concept of "spilling". Essentially, all water entering into the system of either dam passes to the downstream side of the dam concerned either by passing through the turbines and thus generating electricity or by being "spilled", that is permitted to pass through gates designed to allow for the release of water beyond that which passes through the turbines.

2.8 A "flood period" begins when, in the judgment of the Hydrometric Officer, conditions and all available information indicate that spilling may be necessary. During a flood period, the Regulations provide that "the top priority is the proper management of the flood to avoid any risk to dam safety". General hydroelectric generation practice requires that dam integrity be ensured by following a mandatory discharge regime at specified levels. Discharges are generally made through the turbines, as part of normal station operations, although in advance of a potential flood, water may also be "spilled".

2.9 Based on operational experience, a discharge of up to 150 m^3/s from the Inniscarra Dam is considered by the ESB to be that which will remain "*in-bank*" (that is within the banks of the river) and thus flooding should not result. Discharges greater than 150 m^3/s are likely to breach the river-channel capacity and cause flooding. For that reason, the Regulations require that discharge should not exceed peak in-flow.

Thus, the assumption behind the Regulations is that it is permissible when required in the appropriate circumstances to discharge more water than is coming into the system but only where that discharge will be not more than 150 m^3/s. In that context, it is worth noting that the normal flow through the turbines when they are operating to their full capacity is somewhere between 80-85 m^3/s. Thus, it is possible to discharge an additional 65-70 m^3/s without exceeding the 150 m^3/s threshold. While it is undoubtedly the case that a discharge above the level of inflow has an effect downstream by increasing the flow of water, experience has shown that increasing the outflow in a way which does not exceed the 150 m^3/s threshold is most unlikely to cause flooding as such.

(b) November 2009

2.10 The events of November 2009 are central to the issues before this Court. That month was a time of very wet and windy weather in Ireland. The storm in the area of Cork, and the resulting rainfall in the Lee catchment area leading up to and on 19 and 20 November, was the worst in the history of the Lee Dams. As the water levels rose in the Lee Dams, ESB controllers allowed the flow of the river through the system to increase by degrees, but ultimately very substantially, in accordance with the protocols for such situations. Ultimately discharge at more than 500 m^3/s occurred until the storm abated and water levels fell. This resulted in severe flooding downstream, causing significant damage to the properties of UCC and others. It does not appear that the outflow through the system at critical times on November 19 and 20 exceeded the inflow. However, in simple terms, the principal contention put forward on behalf of UCC is that, in the days and weeks leading up to the critical events of that time, the ESB negligently left less scope or capacity in their reservoir system for water than

should have been the case. On that basis, it is argued that at least the worst problems of the flooding could have been prevented or alleviated had the reservoir system been capable of absorbing a greater volume of water on the occasion in question.

2.11 On a separate question, the ESB operates an 'opt-in' warning scheme that notifies residents downstream of the Inniscarra Dam that discharges additional to normal turbine operation will occur. As the situation developed during 19 November 2009, the ESB activated its notification system by alerting people on its contact list that water discharges from Inniscarra were being increased in response to the increased in-flow and the risk of flooding. As the situation deteriorated, the warnings became more urgent and were broadcast widely in the region.

2.12 In due course, UCC sought to recover from the ESB the substantial cost of repairs and losses arising from the flooding of its campus buildings. In January 2012, UCC issued proceedings against the ESB claiming damages in, amongst other things, negligence and nuisance.

2.13 In the light of that overview, it is appropriate first to record the conclusions of fact reached by the High Court and to identify the legal basis on which the High Court considered that the ESB was liable.

3. The High Court Judgment

3.1 The hearing in the High Court lasted 104 days and resulted in the handing down of a written judgment of over 500 pages by the trial judge. The case made by UCC was that the ESB owed a duty of care to UCC and other downstream occupiers to avoid what was described as unnecessary flooding. Accordingly, it was said that the ESB should have anticipated the heavy inflow of water that the storm would bring and

should have endeavoured to ensure that it had sufficient space in the reservoirs to accommodate the flood waters when they arrived. On that basis, it was said that a substantial part of the damage which UCC suffered would have been prevented.

3.2 The ESB acknowledged that it had a duty of care to downstream occupiers, but only in respect of the risk of dam failure and in respect of the risk of flooding caused by the discharge of water in greater quantities than that which entered the dam systems. ESB's case was that its statutory function was to generate electricity and that, while it endeavoured to reduce flooding in a manner consistent with this primary obligation, it was not legally bound to do so. On that basis the ESB argued that it did not owe a duty of care to avoid unnecessary flooding. Further, the ESB maintained that the Lee Scheme did not add to the flooding but, in fact, reduced it.

3.3 The trial judge held that the ESB was liable in negligence and nuisance in regard both to flooding and warnings. In particular, it was concluded that the ESB should have kept water levels in its reservoirs lower at TTOL in order to create more storage space. In the course of the judgment, Barrett J. set out a chronology of events which took place between 16 and 20 of November 2009, setting out the details of the evidence provided in relation to the flood event which took place in Cork City on 19 and 20 November 2009. The trial judge also noted the decisions made in relation to the operation of the Lee Dams and the spilling of water therefrom in the days preceding the flood event. The trial judge also answered no less than 261 "Key Questions of Fact" which were submitted by the parties. While the relevant findings of the High Court will be considered in more detail shortly, it should be noted that a number of issues canvassed before that Court do not remain alive before this Court.

3.4 The ESB drew attention to the fact that the powers conferred on it by s. 34 of the 1945 Act, which allowed it to control, alter or affect the water levels of the Lee Dams, required it to exercise those powers "in such manner as the Board shall consider necessary for or incidental to the operation of those works". On that basis the ESB contended that these powers were conferred only to assist in hydroelectric-generation and that, while flood alleviation is generally incidental to this pursuit, the obligation to alleviate flooding cannot be implied into the legislative scheme where it is inconsistent with the ESB's statutory mandate to generate electricity. There is, of course, a distinction between a statutory power and a duty of care. In rejecting ESB's argument, Barrett J. considered that it was undermined by a number of factors. Those were that the ESB had, in fact, performed a flood alleviation role for decades. The trial judge adverted to the provisions in the Regulations which were directed toward facilitating flood alleviation and allowing for advance discharges in order to create more storage for incoming floods and to reduce peak discharge. Barrett J. also laid weight on the fact that he considered that over the years the ESB had made public representations to the effect that public safety was its utmost priority. He held this voluntary assumption of responsibility was sufficient in itself to create a duty of care.

3.5 The trial judge also considered that there could "be no serious dispute" but that UCC had reasonably relied on this duty of care, derived from the assumption of responsibility, based on the ESB's "various utterances to the world at large as regards flood attenuation over the years" and based on the inclusion of UCC on the opt-in warning list. Further, the High Court provided a number of reasons why it considered that the objectives of flood alleviation and the ESB's statutory "mandate" of hydro-generation were compatible. The Court noted, amongst other things, evidence to the effect stated that these aims were not mutually incompatible and that the Lee Scheme

was capable of fulfilling both functions and also that this was permissible under the statutory framework. The Court also found that, while the Lee Dams were not multi-purpose dams, they were in fact operated with objectives which included flooding alleviation, holding at para. 109 that the ESB "tries, where possible, to reduce downstream flooding in a manner that does not detract from its hydro-electric purpose… By operating to TTOL, ESB combines optimal usage with substantial flood alleviation".

3.6 The High Court considered that TTOL offers a level at which the generating potential at the Lee Dams can be optimised while ensuring that water levels are generally kept lower. The trial judge considered that, on the evidence before him, the obligation contained in the Lee Regulations was to endeavour to reach TTOL.

3.7 Having held that a duty of care was owed on the part of the ESB to owners or occupiers of downstream property, which required the ESB in its management and operation of the Lee Scheme not to cause unnecessary flooding, the trial judge considered that the practical expression of this duty of care was such as to give rise to a legal duty to maintain water levels at TTOL. "Unnecessary flooding" was held to be that which "occurs after ESB crosses the point of optimisation that it has itself identified as its top operating level". The Court rejected the ESB's submission that its duty is confined to not releasing more water downstream than that which is received into the Lee Dams, an iteration of the "do not worsen nature" rule which has been adopted in a number of US cases regarding the liability of dam operators. It will be necessary to return to those US authorities in due course.

3.8 The High Court accepted UCC's contention that 'nature' in this case has been fundamentally altered by the construction of the dams and that the Lee Scheme represented a "new *status quo*". The Court held the concept of "pre-existing nature"

did not represent the expectation or understanding of downstream residents, in circumstances where it was considered that the Lee Scheme intermediated between 'nature' further upstream and their property. Distinguishing the other US dam cases cited to the Court, the trial judge followed *People v. City of Los Angeles* 34 Cal.2d 695; 214 P.2d 1 (1950), as judicial recognition of "changed nature" as the new condition to which regard must be had when considering the state of nature.

3.9 The trial judge went on to consider the nature of the 'do not worsen nature rule'. The Court held that this represented a rule that derived from the building and ownership of a dam and the Court considered that it does not attempt to address the additional and distinct responsibility attaching to the harnessing of the river flow for industrial purposes. Barrett J. continued, at para. 1029:-

> "It is a rule that does not reflect the development of the duty of care in the 20th century, or the rightful expectations of modern society. Moreover, it is not simply the case, as ESB claims, that during the flood of 2009 it merely allowed water to pass through the Lee Dams…To succeed in its 'do not worsen nature' argument, ESB must present itself as a 'passive agent' and nature as an 'active agent'. This is a distortion of the truth."

3.10 In relation to the duty of care established, the Court then proceeded to find that foreseeability of the harm had been established as it was "common case" that high discharges created a risk to life and property of persons downstream. In addition, and from the particularised knowledge available to the ESB, the trial judge held that it was beyond dispute that the ESB was aware of that risk. A sufficient relationship of proximity between the parties was also found for UCC, as owner and occupier of land by the river, "fell clearly within the class of persons who would be directly affected by high discharges from the Lee Scheme".

3.11 The High Court then proceeded to make several findings in respect of the evidence as to causation, holding first that, had water levels been maintained at TTOL, the peak flow of discharges on 19 November 2009 would have been reduced, resulting in benefits downstream. Further, it was held that, if advance discharges had taken place, peak discharge on 19 November would have been reduced appreciably. The trial judge also found that more effective use of storage at Carrigadrohid would also have reduced downstream flooding. Finally, the Court held that timely and effective warnings on the morning of 19 November would have meant that less damage would have been caused. Further, the Court dismissed the ESB's contention that the flood was caused by nature, and not by the ESB as it did nothing to worsen the natural conditions that existed, on the basis that the scope of the duty of care should not be determined by reference to causation

3.12 The High Court then proceeded to outline a number of findings of breach of duty of care on the part of the ESB. The trial judge found, amongst other things, that water levels at flood-start in November 2009 were at a level that created an obvious risk of serious flooding downstream and were unreasonably maintained at such a level, given the time of year, the pattern of unsettled rainfall, the risk of heavy rainfall, the catchment saturation and advance discharge limitations. The Court also held that the ESB failed to react appropriately to the weather forecasts received and that, given the high levels of water and the extreme weather which had been forecast, the ESB ought to have discharged water earlier and in greater quantities in the days preceding 19 November. In addition, the ESB should reasonably have maintained lower water levels than it did by operating consistently to TTOL. The trial judge considered that the start water levels in a flood situation had a critical impact on ultimate discharges, thereby determining empty space and thus determining required discharge-levels. At

para. 1075, the Court found that the ESB was negligent in keeping water levels as high as it did, placing the ESB in a position where its capacity to handle a large, reasonably foreseeable flood event was severely limited.

3.13 At para. 1078, the Court found that maintaining water levels at TTOL was consistent with maximising hydro-generation and that profit maximisation was "little enough reason" for keeping water-levels high. The trial judge then referred to the evidence of Mr. Matt Brown, an energy consultant called as a witness by UCC, which indicated that the value of the additional revenue earned by the ESB by operating above TTOL during November 2009 was between €100,000 and €130,000.

3.14 The High Court further found that the ESB was liable in nuisance, where it had consistently accumulated water in excess of TTOL and, as a result of this continued behaviour, the storage capacity in the Lee Dams had been significantly reduced. It had, therefore, become necessary to release water over a prolonged period at a rate that caused flooding downstream, thereby interfering with UCC's use and enjoyment of its property.

3.15 Under a separate heading, the Court also found that ESB had a so-called "measured duty of care" as an occupier to remove or reduce the hazard which existed to neighbours, as established in *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485. The 'hazard' which the trial judge considered to exist was that of water levels maintained in excess of TTOL. Following the decision of the Privy Council in *Goldman v. Hargrave* [1967] 1 A.C. 645, the trial judge held that the duty's existence was based on knowledge of the hazard, the ability to foresee the consequences of not checking or removing it and the ability to abate or reduce the hazard. The Court went on to hold that the standard required of the occupier ought to be that which is reasonable to expect of him in his individual circumstances. The ESB

was held to have failed to do what it reasonably could and should have done to mitigate the nuisance. By deliberately releasing water, it had caused damage which could have been avoided or been significantly reduced by heeding weather reports and spilling earlier or, indeed, by operating consistently to TTOL. Maintaining water levels at TTOL was considered to be a reasonable action to minimise the known risk of flood damage to UCC from heightened discharges.

3.16 Under the measured duty of care concept, the Court held that generally it was necessary to be able to formulate as an injunction that which the plaintiff asserts the defendant was obliged to do. The trial judge defined this as follows at para. 953:

> "ESB must never exceed TTOL and if, inadvertently, it does so, it must immediately take steps to reduce water-levels to TTOL. Or, a possible alternative mandatory form: ESB must treat TTOL as though it were MaxNOL."

3.17 The High Court dismissed the contention that the ESB did not create the flood. Following *Bybrook Barn Garden Centre Ltd. v. Kent County Council* [2001] L.G.R. 329, the Court held that, in certain circumstances, a defendant can be liable for a nuisance that he does not directly create. In response to the ESB's contention that nature caused flood-damage to UCC rather than ESB's own want of care, the Court observed at para. 955 that questions of causation should not be conflated with the question of the duty of care, which should be assessed by reference to foreseeability, proximity, and considerations of what is just and reasonable.

3.18 In relation to the flood warnings which were issued by the ESB, the trial judge considered that the ESB had a duty of care to warn persons downstream, that there was "a heightened duty on the ESB to warn" those on the warning list and that the warnings

which were provided to UCC were neither timely nor meaningful. At para. 269, the High Court set out the features which cast this heightened duty to warn on the ESB:-

> "First, ESB assumed the responsibility of giving warnings to those on its warning list; the corollary of such an assumed responsibility is a heightened obligation towards those to whom that obligation is assumed. Second, ESB was the only entity capable of providing information on discharges. Third, ESB stood possessed of its knowledge of various flood studies."

3.19 The Court then went on, at para. 276 of the judgment, to outline what it considered to be a number of deficiencies in warnings issued by the ESB on 19 November 2009. It was held that the warnings in question were not sufficiently differentiated from those provided on previous occasions involving less serious flooding risks. In addition, it was considered that there was no indication of the severity of the flood risk arising and that the warnings contained no significant indication of the likely impact of the increased discharges of water to property downstream in general and, specifically, in relation to the buildings of UCC. The trial judge held that it would have been "relatively easy for ESB to provide more effective warnings" and convey the full risk arising from the increased discharges. These observations led the Court to conclude that the ESB had a duty to provide "timely and adequate warnings" to a person to whom it had assumed a responsibility to so warn and that it had failed to discharge this duty. Having considered the evidence of UCC staff members, the Court held that, had they known what the discharges were to entail, there was more those staff members could have, and would have, done to limit the damage caused.

3.20 As already noted, Barrett J. also found UCC guilty of contributory negligence which he measured at 40%. However, as that aspect of the proceedings is not currently before this Court, it is not necessary to set out the findings of the High Court on that question at this stage.

3.21 It is next necessary to consider the reasons why the Court of Appeal came to the opposite view to that of the High Court.

4 The Judgment of the Court of Appeal

4.1 Having appealed the primary finding of Barrett J., the ESB were successful in the Court of Appeal in overturning the judgment of the High Court on the question of its liability. The Court of Appeal considered that the conclusions reached by the trial judge in imposing liability on the ESB in respect both of floodings and warnings were erroneous and that the appeal should be allowed. At para. 14 of his judgment, Ryan P. continued:-

> "The High Court judgment if permitted to stand would represent a significant alteration of the existing law of negligence and nuisance, would be contrary to the statutory mandate of ESB in respect of electricity generation and would not be consistent with reason and justice."

4.2 The Court of Appeal first considered the trial judge's conclusions in relation to TTOL which, it stated, formed "a central pillar" of the judgment, being crucial to the reasoned process underlying the finding of the High Court relating to a duty of care to avoid unnecessary flooding. Ryan P. noted that the judgment specified TTOL as representing the precise standard of care to which the ESB must adhere as a result of that duty. At para. 117, the Court of Appeal held that the trial judge's analysis of TTOL was erroneous. In the view of the President, TTOL was a guideline, expressed

as a target, and did not enjoy any particular binding status on the ESB. The Court found that the ESB was required to operate the dams safely, but that a breach of its internal rules alone was not sufficient to establish negligence and, conversely, the fact of compliance with TTOL would not in itself be an answer to a claim in negligence.

4.3 The Court accepted the ESB's case to the effect that a number of problems existed regarding the theory and practice of implementing the proposed rule of compliance with TTOL. These included issues concerning the ascertainment of when it was appropriate to allow the reservoir to fill beyond TTOL, the ability of the ESB to alter the provisions of the Lee Regulations and the TTOL standard. Fixing the level which the ESB was obliged to maintain in its reservoirs as TTOL was held to represent "a highly invasive and prescriptive approach to the management of the Lee Scheme", which was incapable of general application and therefore the trial judge was held to have erred in making such a finding.

4.4 The Court of Appeal then proceeded to consider the compatibility of the statutory provisions governing the Lee Scheme with the duty to avoid unnecessary flooding identified by the High Court. Under s. 34 of the 1945 Act, the ESB had the power to alter the water level as it considered necessary in connection with the operation of the works. The Court of Appeal held that it followed from s. 10(1) of the 1945 Act that the purpose of the works was the generation of electricity. While flood alleviation was not prohibited by the 1945 Act, the Court held that such measures were only permissible to the extent that they did not impair the exercise of the mandatory functions of the ESB. The Court then held that, conversely, it would be impermissible under the Act to prioritise flood protection as a policy imperative over electricity generation as this would be contrary to the statutory scheme. Ryan P. concluded that, if

the duty to avoid unnecessary flooding in practice meant maintaining extra storing space and mandating adherence to TTOL, this should properly be construed as an impermissible inhibition of the ESB's capacity to carry out its statutory mandate.

4.5 Turning to consider whether there existed a duty to avoid or prevent unnecessary flooding at common law, the Court of Appeal first considered the existing case law concerning dam-operators and found that it did not support the duty claimed by UCC and imposed by the High Court, whether defined in general terms or in the specific form of an order to keep to TTOL. The Court considered persuasive the rule set out in *Iodice v. State of New York* 247 App. Div. 647 (1951), and other subsequent US dam cases, which held that the only duty imposed on a defendant dam-operator in respect of single purpose dams (like the Lee Dams) was to avoid making the flooding worse than it would be under natural conditions. The Court rejected the finding of the trial judge that the "do not worsen nature" rule was not applicable in circumstances of long-standing constructions that had permanently changed nature and held that, if that were the case, no development of any kind could make the defence that it was not adding to the existing situation.

4.6 The Court of Appeal then addressed the question as to whether the evidence before the courts meant that the ESB had accepted responsibility for carrying out flood alleviation so as to afford legal redress to parties downstream in the event that the ESB fails to carry out such a duty. At para. 179, it was concluded that the documents established in evidence did not disclose a basis for a conclusion that ESB, through its publications and statements, had accepted responsibility for a legally enforceable duty to operate the reservoirs in a manner that is specifically directed to alleviate downstream flooding. At paras. 184 and 185, Ryan P. held that no legally enforceable

obligation to carry out flood alleviation arose by reason of the ESB's previous conduct in operating the dams, which had had the effect of reducing flooding. The fact that a person or body had engaged in an act which was of assistance to another did not, without more, create a legal liability and, while its procedures and operating rules did envisage flood risk reduction, the Court held that it did not follow that the ESB had assumed legal liability to prevent some or all flooding to a specific standard.

4.7 The Court of Appeal disagreed with the trial judge's conclusion that, in common law, a duty of care existed not to cause unnecessary flooding. Ryan P. considered such a formulation of the scope of the duty would create difficulties in principle and in practice. He held that the asserted duty to avoid unnecessary flooding was impermissibly vague and impractical. The Court held that it was unclear where the distinction lay between "necessary" and "unnecessary" flooding and that the obligation contended for by UCC amounted to "an affirmative duty to prevent nature from injuring others" which, in the Court's view, was unsupported by existing case law. Ryan P. concluded at para. 197 that such a duty was wholly unspecific and unknowable in advance, yet also one which was difficult to measure in retrospect.

4.8 The Court of Appeal then proceeded to consider the claim in nuisance, or on foot of a measured duty of care under the *Leakey* jurisprudence, in circumstances where the negligence claim had failed. In the absence of any finding that the ESB was not in breach of any obligation that was owed to UCC under a duty of care, Ryan P. considered that it would seem to follow that the use of its land in connection with its function of electricity generation should be excused of fault. Whilst accepting that some lawful activity carried out on land in a non-negligent manner may give rise to interference with neighbouring land, the Court of Appeal considered that what was

alleged in this case was not something arising incidentally from the operation of the business of the ESB but rather the *modus operandi* of the business itself. The Court considered that the nature of the case, the reasoning of the trial judge and the structure and emphasis of the judgment "all point to the centrality of negligence and the peripheral and essentially theoretical nature of the debate on nuisance".

4.9 The Court considered that the essence of the liability under the *Leakey* duty was that a harm had come from the defendant's land and had gone on to, or was in danger of going on to, the plaintiff's land. The Court found that the central feature missing in the High Court's analysis was that the ESB had done nothing to affect the state of the river that was passing in its channel through its land and that of UCC. Ryan P. concluded that there was no hazard on the ESB's lands that could be identified for the purpose of being corrected or removed and that the river was common to the lands of both parties. The Court of Appeal held that the Lee Dams were not, from the perspective of UCC, a danger, but rather gave rise to an improvement on conditions as they would have been if the dams had been absent. The water levels in the river had not been increased by ESB, nor had the ESB caused flooding and the flooding of UCC property could not be said to have emanated from the ESB. Rather, in the Court's view, the flooding derived from the naturally occurring flood on the River Lee and consequently there was no basis in law for finding liability in nuisance. Thus, the Court of Appeal held that the determination of the High Court to the contrary effect ought to be set aside.

4.10 The Court of Appeal added that, as riparian owners, the parties are in a legal relationship with mutual obligations and rights. Under the principles of riparian law, a "lower" riparian proprietor such as UCC was obliged to accept the natural flow of the

river and that this was consistent with the ESB discharging a duty to downstream occupiers and owners not to worsen nature. Ryan P. considered that it was unnecessary to look outside that scheme of riparian law for rules governing their conduct as riparian owners. On that basis it was also held that the High Court had erroneously imposed liability.

4.11 Finally, in considering the adequacy of the warnings issued by the ESB, the Court of Appeal considered in turn whether there had been an assumed responsibility to warn on the part of the ESB and whether there existed a common law duty to warn. The Court concluded in respect of the first question that, in light of its practice and conduct over the preceding years, once discharges from Inniscarra exceeded 150m3/s, the ESB had assumed the responsibility to give a general public warning through the relevant authorities and the media and had also undertaken to warn those on the opt-in warning list.

4.12 However, the Court then noted that there was nothing in the Regulations and no evidence before the Court of past conduct from which it could be inferred that the ESB had accepted responsibility to provide the type of information and warnings which the trial judge said were required to meet the obligations it had assumed. On that basis the Court concluded that warnings concerning the anticipated volume of discharges, where such discharges would likely end up, or the possible effect of any such discharges, were not required. The responsibility assumed by the ESB was held to be "no more than to forewarn those on its list that something out of the ordinary was about to occur and about which they needed to be concerned".

4.13 The Court concluded that the fact of the ESB's control of the dams and its knowledge of the potential consequences arising from discharges made had no effect

on the extent of this assumed responsibility and that the High Court erred in concluding that there was an assumed responsibility on the part of the ESB to provide different and more detailed warnings based upon such factors. The Court was further satisfied that, in the absence of such a responsibility to provide individuated warnings concerning the likely impact of the discharges on certain properties, the ESB complied with its assumed responsibilities in providing two warnings to UCC on 19 November 2009 and that there was no basis in fact or law for the conclusion of the trial judge that the ESB had failed to comply with those obligations.

4.14 The Court of Appeal then turned to the question of whether the trial judge erred in law in concluding that the ESB owed a common law duty of care to the public at large to provide flood warnings and that the ESB owed a "heightened duty of care" in common law to those on its opt in warning list, including UCC. The Court was not satisfied that the ESB was under any duty at common law to provide a warning to all members of the public who were at risk of flooding from its dams, such that its failure to do so would give rise to an award of damages for those who did not receive such a warning. The ESB was dealing with the consequences of nature and was not doing anything to worsen the flooding. The fact that the ESB might anticipate a risk of potential flooding which could cause damage to downstream residents was held not to be sufficient to create positive duties or obligations. Therefore, the Court was satisfied that there was no legal basis for any broader duty of care than that which arose on foot of the ESB's assumption of responsibility to provide certain limited warnings to those on its opt-in warning list.

4.15 As noted earlier, the Court of Appeal also held that Barrett J. was incorrect to hold UCC liable for contributory negligence. However, as that issue is not before this

Court at present it is unnecessary to set out the reasoning of Ryan P. in that regard at this stage.

4.16 As also noted earlier, both sides sought leave to appeal to this Court, which leave, of course, forms the scope of the appeal to which this judgment is related. It is appropriate next, therefore, to turn to the grant of leave to appeal.

5 Leave to Appeal

5.1 In the determination of this Court (*University College Cork – National University of Ireland v. Electricity Supply Board* [2018] IESCDET 140), it was considered that the case raised novel issues of law which were of general public importance. It was further noted that UCC's claim was one of almost 400 proceedings commenced against the ESB in respect of the flooding incident in Cork in November 2009. In granting UCC leave to appeal the decision of the Court of Appeal, the Court observed that:-

> "The case addresses a number of issues including the liability of a dam operator in respect of persons or property downstream, the law relating to the existence of duty of care, the definition of any such duty and the liability of statutory undertakings both generally, and in the law of nuisance."

5.2 Leave was also granted in respect of the cross-appeal lodged by the ESB against the decision of the Court of Appeal on contributory negligence but, as mentioned above, in the course of case management it was determined that the matter of contributory negligence was to be left over pending a determination of primary liability. Thus, it is only the main appeal against the finding of the Court of Appeal to

the effect that the ESB was not liable in negligence or nuisance which is currently under consideration.

5.3 Against that background, it is appropriate first to set out in general terms the issues which arise on this appeal having regard to the judgments of both the High Court and the Court of Appeal.

6. The Issues – A General Approach and Three Areas of Contention

6.1 It seems to us that it is appropriate to group the issues into three main areas of contention.

(a) The Duty of Care

6.2 The first area relates to the claim in negligence. While a significant number of subsidiary issues potentially arise, it would appear that the central area of dispute between the parties concerns the extent, or scope, of any duty of care which the ESB could be said to owe to UCC or, indeed, other downstream owners and occupiers. It is perhaps appropriate at this stage to explain why the extent of the duty of care is so central to the issue of negligence in the circumstances of this case. There is annexed to this judgment a graphic which provides a useful synopsis of the water levels in the Inniscarra reservoir during the relevant period. While the matter is somewhat complicated by the interaction between that reservoir and the Carrigadrohid reservoir, it is sufficient for present purposes to concentrate on the Inniscarra reservoir which was, after all, the reservoir furthest downstream and which, in conjunction with the Inniscarra dam, provided the final barrier to water descending further towards Cork city. As the analysis which follows is designed purely for illustrative purposes, it is unnecessary, for the present at least, to consider any additional complications which

might arise from the interaction between the two systems. The graphic is taken from the evidence and contains some commentary from the parties. However, it is the underlying data on which we comment.

6.3 From the Inniscarra graphic, it is clear that the water levels on 10 October 2009 were at a level which was somewhat below TTOL. It is also clear that there was little or no generation of electricity at that time, so that the water level was able to rise to TTOL by approximately 16 October and remain there until generation commenced around 19 or 20 October. It is then clear that the water level was able to remain at TTOL as a result of the use of water for generation purposes between 20 and 26 October and that the level further remained at TTOL until the end of October, during part of which period there was little or no electricity generation although, during the latter days of the period in question, generation did occur.

6.4 It is then clear that a very large quantity of water came into the system between the very end of October and approximately 2 or 3 November, leading to a very significant increase in water levels so that same ultimately exceeded MaxNOL. As noted earlier, the Regulations required spillage once MaxNOL had been exceeded, such that, for a period of some three or four days in early November, spillage occurred which had the effect of reducing the level of water slightly below MaxNOL. There then followed a fairly critical period between 6 November and approximately 14 November. During that period, there was more or less full generation of electricity, such that the 80-85 m^3/s volume of water required for that purpose was being utilised. However, there was no spillage. Having regard to the amount of water coming into the system, the effect of the operation of the dam in that way was that the level of water remained at or close to MaxNOL for all of that period, meaning that, when a weather

warning was issued on 16 November, the starting position was that the level of water was more or less at MaxNOL.

6.5 As a consequence, the system had no capacity to absorb more water than it could discharge, for to do so would have led to the water levels exceeding MaxNOL, with all the danger to the integrity of the dam which that entailed. Obviously, in those circumstances, an inflow of up to 150 m^3/s could have been dealt with by a combination of electricity generation and spillage without the risk of flooding. However, the inflow greatly exceeded that amount, such that the spillage in turn was required to greatly exceed the amount which could be accommodated within the channel of the river downstream. In those circumstances, it was inevitable that flooding would occur.

6.6 Without addressing for the moment the key question as to whether any legal obligation lay on the ESB to anticipate and alleviate such a situation as it developed, it seems clear on the facts that, had the ESB spilled up to a combined generation and spillage usage of 150 m^3/s between 5 November and 16 November (or at least done so in a quantity sufficient to bring the level down towards or to TTOL), the systems of the Lee Dams would have had a much greater capacity to absorb the huge inflow of rainwater which occurred on 19 and 20 November.

6.7 On the other hand, it is equally clear that at no stage was the outflow from the Lee Dams in excess of the inflow, except during a period when the combined generation and spillage quantities were nonetheless below the 150 m^3/s threshold for flooding. The fact that there were some periods where a greater volume exited the system than had entered it can be seen from the fact that the overall level did drop on certain occasions due to the use of spillage. But during those periods when the outflow exceeded the inflow, it is clear that the total outflow did not exceed 150 m^3/s.

6.8 It therefore also seems to be clear that, if the duty of care which the ESB might be said to owe towards owners and occupiers downstream from the Lee Dams did not extend beyond a situation whereby they would not, as it were, worsen nature (or at least would not do so to the extent that it might cause flooding by discharging water of a quantity beyond the 150 m^3/s threshold), then it is hard to see how the ESB could be said to be in breach of any such duty of care.

6.9 Put simply, that analysis leads to two conclusions. If the ESB had a duty of care to engage in some form of proactive discharge, having regard to all of the circumstances of the case, then it is almost certain that the ESB was in breach of that duty of care. However, it can equally be said that, if the duty of care of the ESB did not extend beyond a "not worsen nature" obligation, except where additional outflows over the inflow would not cause flooding, then it is also clear that it would be very difficult to see how the ESB was in breach of that duty of care.

6.10 For those reasons, it was hardly surprising that a great deal of the debate between the parties, both in the written submissions filed and at the oral hearing, centred very much on the extent of any duty of care which the ESB might be held to owe to downstream owners and occupiers, for the resolution of that issue was bound to go a very long way indeed towards resolving the question of whether there was negligence.

6.11 The first area of contention, therefore, concerned UCC's argument relating to the scope of the duty of care which rested on the ESB. If UCC's argument in that regard is accepted, then the latter company was almost certainly in breach of such duty and thus negligent. On the basis of the ESB's contended for duty of care, the ESB was almost certainly not in breach and thus not negligent.

(b) Nuisance

6.12 The second area of contention concerned the potential liability of the ESB in nuisance, or under the *Leakey* jurisprudence. As will become clear when it is necessary to discuss in detail the jurisprudence in relation to the duty of care in a case such as this, a significant distinction is made in the law of negligence between acts of commission or acts of omission. In the most recent case law, the distinction is made between acts which do harm, as opposed to a situation where there is a failure to do good.

6.13 However, under the *Leakey* jurisprudence, it is possible in some circumstances that liability will arise, even in cases where there is no positive action taken by the defendant which could be said to have caused harm. Thus, the issues which arise under this heading only really become relevant in circumstances where a court declines to fix a defendant with a duty of care on the basis that no positive obligation to do good exists in the context of the duty of care asserted. In that sense, the nuisance/*Leakey* issues are more properly to be considered as part of a fall-back position, only coming into play in the event that the duty of care issue is resolved in favour of the ESB.

(b) <u>The Warnings</u>

6.14 Similarly, but for somewhat different reasons, the third area of contention, being the warning issue, also represents a fall-back position. It would seem that the obligations which UCC contend lay on the ESB, either under the contended for duty of care or under the law of nuisance and the *Leakey* jurisprudence, appear to be the same in the circumstances of this case. Liability under either heading would appear to be likely to give rise to the same damage. However, the same is not at all true if the only head of liability established concerned the absence of warnings. There was evidence given on behalf of UCC to the effect that certain measures could have been taken which would have alleviated the flood damage, had the sort of warnings which UCC

contended were required actually been given. However, it seems clear that the extent to which those measures could have alleviated the damage to UCC would have fallen a long way short of the extent to which damage might have been prevented by the sort of measures which UCC assert were required in order to meet the duty of care allegedly borne by the ESB, or might have resulted from the contended for failure of the ESB in respect of nuisance and the *Leakey* jurisprudence. If the case were to succeed on either of those latter bases, then the damage for which compensation would require to be ordered would inevitably include all of the damage which would be attributable to a finding of a negligent failure to give warnings but also much more damage besides.

6.15 In the light of all of that analysis, it seems to us that the most appropriate starting point must be to analyse the arguments put forward by both parties on the issue of the duty of care and to determine the scope of any duty of care which UCC owed in all of the circumstances of this case. We turn to that question.

7. The Duty of Care – the arguments

7.1 At its simplest, it is UCC's case, as described above, that the ESB had a duty to exercise reasonable care in the operation of the Lee Dams in order to avoid unnecessary flooding taking place downstream. UCC submits that the ESB is engaged in an industrial activity and that the Lee Dams are explicitly designed to interfere with the river's natural flow in order to enable hydrogeneration. It is said that the ESB had exclusive access to extensive information about rainfall, inflows and the predicted effects of discharges during flood events and that, on this basis, it was uniquely positioned to make decisions in relation to flood management in November 2009 and to correctly anticipate and alleviate the flooding which was to take place. It is said that the ESB did not carry out a risk assessment analysis of scenarios other than the so-

called “design flood”, which analysis solely related to scenarios connected with the possible collapse of the dam. UCC contends that the duty of care arose in the particular circumstances of the flood of November 2009, where the surrounding catchment area was saturated and where heavy rainfalls were predicted. On this basis, it is said that the ESB could have foreseen that advance discharges would be required and should not have found themselves in a situation where the water levels were as high as they were at the time that the flood-event commenced. Had water levels been lowered, UCC contends that, on the evidence, significant flooding would have been avoided.

7.2 The ESB contends that the “primary and inescapable fact of this case” is that the flooding suffered by UCC in November 2009 was considerably reduced by the operation of the Lee Dams and was significantly less than it would have been in the absence of the dams which, it is said, had reduced the flow of the river downstream. The ESB accepts a duty of care to persons downstream in respect of flooding which is caused when the outflow of the Inniscarra Dam exceeds the inflow to the reservoirs. It further accepts a duty of care to persons downstream to maintain the integrity of the Lee Dams. However, the ESB argues that their actions in pursuing hydrogeneration did not cause flooding and the risk of flooding was not attributable to the ESB because, it is said, the source of the flooding downstream was nature. In that context, no duty of care to alleviate such flooding is said to arise.

7.3 Within those broad parameters a number of specific issues arose for debate between the parties. The starting point for any consideration of the extent of the duty of care in the law of negligence in this jurisdiction must be the decision of this Court in *Glencar Exploration plc v. Mayo County Council (No 2)* [2002] 1 I.R. 84. The basis for establishing a duty of care requires that damage be suffered which was both

foreseeable and not unduly remote from the acts causing it. In addition, it is suggested in *Glencar* that it is necessary that it be considered just and equitable that a duty of care be extended in all the circumstances of the case. To a very great extent there was no dispute between the parties as to the principles identified in *Glencar* although there were very significant differences indeed as to how those principles should apply in the circumstances of this case. Insofar as there may have been a slight difference of emphasis between the parties at the level of general principle, the ESB relied on what it contended was the approach of the courts in the United Kingdom to the effect that, where it is sought to extend a duty of care into an area which has not been the subject of detailed judicial examination, it is appropriate first to consider whether a duty of care should be held to exist (and if so to what extent) by analogy with other areas which have been the subject of more detailed judicial consideration. Put another way, it is argued that the question of whether it is just and equitable to impose a duty of care in a particular circumstance should be approached by considering whether a duty of care has been identified in analogous circumstances. This is the first issue to which it will be necessary to return.

7.4 On the question of foreseeability, UCC argues that it was foreseeable that any failure of the part of the ESB to manage the Lee dams in a way designed to minimise downstream flooding could lead to there being more flooding than might otherwise have arisen. In those circumstances it was said that the foreseeability test was met. In like manner it was said that downstream flooding was sufficiently proximate to any failure to manage the Lee Dams in a manner designed to minimise downstream flooding so that the proximity leg of the test was also met.

7.5 However, in response, the ESB sought to place reliance on the fact that, at no relevant time, was the down-flow of rainwater beyond the Lee dams greater than the

in-flow. In those circumstances it was argued that, in reality, neither foreseeability nor proximity really arose at all, because any allegation of wrongdoing amounted to what was said to be an omission on the part of the ESB to take positive action to prevent flooding rather than the commission by the ESB of a wrongful act which caused that flooding.

7.6 This dispute gave rise to a second major issue before the Court being as to the proper characterisation of the duty of care said to be owed by the ESB to UCC. While it will be necessary to turn to a more detailed consideration of the law in that regard in due course, we have already noted that there is a well-established aspect of the law concerning the duty of care in negligence which distinguishes between acts of commission and acts of omission. While it is accepted on all sides that there are exceptions to the general proposition, it nonetheless is clearly the case that the imposition of a duty of care which imposes a positive obligation to act to prevent damage arises in significantly more limited circumstances than those which impose a duty of care to refrain from acting in a way which may foreseeably cause proximate damage.

7.7 In one sense that question, as many in law, came down to one of characterisation. The way in which the Lee dams operate, as a matter of practise, was not in significant dispute. UCC sought to argue that the ESB could not be equated to the bystander who simply fails to act to prevent harm being done to a third party. In that regard UCC sought to place reliance on the fact that the ESB carries out activities which have, as their inevitable consequence, an interference with the flow of water downstream. The argument in this area centred on whether that activity on the part of the ESB was sufficient to take it out of the category of a party who could successfully

argue that what was being asserted against it was an alleged duty of care to take positive action.

7.8 UCC submitted that, as the ESB maintains the Lee Dams as part of an industrial process in which the control of water levels and discharges of water comprise of positive actions taken by the dam operator, the ESB cannot properly be characterised as a simple third party. The law on omissions is said to involve strangers to the chain of events, who have no involvement in the relevant activity, whereas here the ESB is said to have failed to take reasonable care while acting in the course of an activity which is of the utmost relevance to the subsequent events. UCC submits that, if the Court does, however, regard this as an omissions case, the ESB is liable on the basis of the exceptions to the general principle on omissions which, it is argued, were correctly set out by the United Kingdom Supreme Court in *Robinson v. Chief Constable of West Yorkshire Police* [2018] AC 736, at para. 34 in the following terms:-

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

7.9 Here, it is submitted by UCC that the ESB has met three of these categories, having assumed a responsibility to protect downstream property-owners from the risk of flooding, having a special level of control over the source of the danger, which is the river, and having a status which creates an obligation to protect downstream property owners from danger.

7.10 It was submitted by the ESB that its actions in November 2009 should be properly characterised as a "failure to confer a benefit" rather than being assessed as either an act or an omission. Thus, ESB argues that UCC's case should properly be considered as the proposal of a duty to improve the situation for those downstream, or to "confer a benefit" to downstream property-owners, by alleviating flooding. The ESB relies on the distinction drawn in the recent judgment of the Supreme Court of the United Kingdom in *Poole Borough Council v. GN* [2019] UKSC 25, between cases where the defendant has caused harm to the plaintiff, on the one hand, and those where the defendant has failed to improve matters for the plaintiff, on the other. The ESB submits that the law of negligence generally imposes a duty not to cause harm rather than a duty to provide other persons with a benefit.

7.11 In response to the exceptions to the law on omissions, as set out in *Robinson*, which do give rise to a duty to improve matters or to protect against harm caused by a third party, the ESB suggested that the concept of a "special level of control" arises from being the source of the relevant risk and having a consequent obligation to arrest such a risk. UCC, on the other hand, submitted that the concept of "control" is not confined to circumstances in which the hazard is created by the defendant, or where the hazard is brought onto relevant land, particularly where the ESB obtains the benefit of that control.

7.12 As regards the assumption of the proposed duty of care, it is UCC's case that ESB voluntarily assumed responsibility to alleviate flooding and that, therefore, it is "… unnecessary to undertake any further inquiry into whether it would be fair, just and reasonable to impose liability", as stated at para. 35 of *Commissioners of Customs and Excise v Barclays Bank* [2007] 1 AC 181. UCC relies on the findings of the High Court in respect of the representations made by the ESB regarding flood alleviation and in

respect of the reliance placed by those downstream on these representations. It submits that the Court of Appeal did not engage with these issues. UCC further submits that a court does not require evidence of specific reliance and can instead establish a general reliance, as set out in the judgment of Lord Hoffmann in *Stovin v. Wise* [1996] AC 923, following the decision of Mason J. in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424. This doctrine refers to general expectations in the community, which the individual may or may not have shared, that a statutory power will be exercised with due care. The management of the Lee Dams in order to minimise flooding was said to be both uniform and routine and, therefore, it was argued, the expectation downstream was that the River Lee would not flood beyond a certain level.

7.13 In response, the ESB argued that the approach of the Court of Appeal in relation to the assumption of responsibility was correct. It was submitted that there was no acceptance of responsibility for flood alleviation in the sense contended for by UCC. It was also argued that the conduct of the ESB was such that it could be said to have tried to do what could be done to alleviate flooding without impairing the legitimate prioritisation of its hydroelectric function. ESB also contended that there cannot be any voluntary assumption of responsibility giving rise to the imposition of liability without reliance. It was said that there was no evidence of reliance in that UCC never sought any information from the ESB about the dams and never saw many of the documents which it now relies on, all of which documents reiterated that the Lee Dams did not protect against all flooding risks. Reliance was placed in that regard on the statement of Lord Hoffmann in *Stovin v. Wise* to the effect that, in order for the doctrine of general reliance to be applied, it must be possible to "describe exactly what the public authority was supposed to do". The ESB submitted that there is a lack of

such specificity in relation to any obligation in respect of flood alleviation in the obligation which UCC urged on this Court.

7.14 Turning to consider the effect of the 1945 Act, UCC submitted that, if the decision of the Court of Appeal is correct, the statute mandates the production of electricity at maximum profit, even if that is at the expense of the safety of persons downstream. UCC contended that the statute would have to be explicit if production of electricity was to override safety considerations and that, in accordance with the principles advanced by Clarke C.J. in his minority judgment in *Cromane Seafoods Ltd. v. Minister for Agriculture, Fisheries and Food* [2017] 1 I.R. 119, the mere fact that this case involves a statutory body does not prevent the Court from ascertaining whether a duty of care should be imposed in the circumstances of the case. This was said not to be a situation where exposure to liability for damages would have a prejudicial impact on the public interest. UCC argued that it does not seek to impose a greater liability here than that which would be imposed on a private individual in the conduct of industrial activities.

7.15 That the ESB "shall generate" electricity, as required by s. 10 of the 1945 Act, could not, it was said, be read as conferring a duty to exclusively pursue hydrogeneration for commercial gain or to generate continuously. In that context a number of findings of the High Court were relied on being those to the effect that the proposed duty of care to alleviate flooding is not inconsistent with generation and that the ESB has in the past actively compromised its hydroelectric function to some extent so as to provide flood alleviation. Further, it was said that the ESB never undertook a proper risk assessment of any scenario other than the design flood in order to assess whether generation had to be supressed in a manner which was inconsistent with the statutory duty.

7.16 UCC further relied on Condition 19 of the ESB's generation licence, which has statutory force, to the effect that its statutory duties do not translate to an obligation to generate electricity in all circumstances, or in priority to all other considerations.

7.17 The ESB relied on the High Court's rejection of the contention that the Lee Dams were multi-purpose dams to suggest that their sole statutory purpose is hydrogeneration and to support the Court of Appeal's finding that the proposed duty would require the ESB to engage in a type of flood alleviation in direct conflict with hydrogeneration. It was submitted that the law as set out in *Poole Borough Council* is clear to the effect that the existence of a discretion under s. 34 of the 1945 Act to alter water levels in order to alleviate flooding and, in doing so, to confer a benefit to persons downstream, does not mean that a common law duty to exercise the power for their benefit arises.

7.18 While some flood alleviation is possible without compromising the statutory objective of hydrogeneration, should the proposed duty of care be imposed on the ESB, it was submitted this would create a fundamental tension between its statutory function and the duty to engage in flood alleviation, which would be exacerbated by what was said to be the lack of clarity on UCC's case surrounding the appropriate level of available capacity and the standard of care to which the ESB should be held. On this basis, it was suggested that the discharge of both duties is incompatible.

7.19 Charged with the complaint that the proposed duty of care suffers from vagueness, UCC maintained that there would be no difficulty in imposing liability for only that flooding which could have been avoided by the exercise of reasonable care (being flooding which is therefore considered "unnecessary"). It was submitted that the ESB is in a position to manage its water levels and discharges with reasonable care,

thereby avoiding entirely or minimising flooding and the risk to life and property downstream.

7.20 Further, UCC contested the Court of Appeal's characterisation of its case as turning on TTOL. Rather, it submitted that, on the facts of this case, water levels were too high in the prevailing conditions and ought to have been lower. TTOL was used as a benchmark to establish a breach of the duty of care and was merely demonstrative of causative effect. It was said that, had water levels been kept to TTOL, significant flooding would have been avoided. UCC argued that the ESB should manage water levels according to the "as low as reasonably possible" principle, by predicting the frequency and magnitude of the risk of flooding, by means of risk assessment models. The actions which the ESB takes in the generation process and in safeguarding the integrity of the dam ought also to have been taken in the broader context of other safety risks. If the risk is unlikely, there is nothing to prevent the ESB from conducting operations in the normal way. UCC suggested that the Court is not asked to fix a standard which applies to all cases but merely to assess whether the ESB has acted reasonably in all the circumstances of the case.

7.21 In contrast the ESB submitted that a number of issues arise in attempting to impose a standard of action that is "necessary" or "reasonable" where the ESB does not create the source of the risk of flooding. The decision as to what flooding is "necessary" and "unnecessary" is said to affect a number of persons downstream and the lack of certainty over the standard of care required of the ESB was argued to raise a number of questions as to the practical operation of the proposed duty of care. It was reiterated that the conception of TTOL as an "optimal" level is plainly wrong and that to maintain water levels at or below TTOL would have been costly to the ESB. Further, the ESB argued that to a finding that water levels were too high must be made

by reference to some standard. The relevant obligations cannot, it was said, be entirely divorced from any metric of assessment.

7.22 A further aspect of the debate on this aspect of the case centred on the argument put forward by the ESB to the effect that its only obligation could be to "not worsen nature". ESB suggested that the imposition of a duty of care which went beyond an obligation not to leave those downstream in a worse position than they would have been had the river flown uninterrupted by any ESB works would amount to the imposition of a positive duty to prevent harm rather than what was said to be the appropriate limitation on the duty of care which was to refrain from conduct which might cause harm.

7.23 Insofar as the "just and equitable" leg of the test identified in *Glencar* is concerned UCC advanced a number of points which, it was argued, ought lead the Court to conclude that this aspect of the test was also met.

7.24 First, insofar as there might be a question as to whether the duty of care asserted was an established category of same, or at lease analogous to such an established category, UCC argued that their position was supported by the decision of the UK Supreme Court in *Robinson*, which was said to endorse the proposition that physical loss resulting foreseeably from positive conduct constitutes such an established category of duty of care, at least in some cases.

7.25 Against that proposition ESB argued that its conduct could not be characterised as positive conduct in the first place on the basis, already alluded to, that the evidence established that at no relevant time was the outflow from the Lee dams greater than the inflow.

7.26 In like manner, while UCC submitted that the imposition of a duty of care on a dam operator was established in *M.J Cordin v. Newport City Council* QBD (TCC) 23

January 2008. However, it was argued by the ESB that the purpose of the dam in that case was flood control which purpose was said to be the basis on which a positive duty of care not to expose persons downstream to a foreseeable risk of flooding was said to arise.

7.27 On the basis of those arguments, the ESB asserted that there was no established case law which extended a duty of care to the operator of a dam (which did not have as its specific purpose the alleviation of flooding) which required such an operator to take reasonable steps to prevent downstream flooding by adjusting its operations to minimise the risk of such flooding. As a result of those arguments, the parties then passed to consider the factors which were said to be potentially relevant to the Court's assessment of whether the general "just and reasonable" test had been met.

7.28 In that context UCC submitted that it was just and reasonable to impose liability on the ESB which was an entity engaged in what is said to be a hazardous industrial process so that it must be obliged to take reasonable care in its operations not to cause injury or damage. UCC relied on a number of bases for that general contention.

7.29 First, it was argued that the ESB had extensive knowledge of the risks of flooding to those downstream and exercised significant control over river levels. Second it was said that the ESB operated, and has held itself out as operating, the Lee Dams with a view to minimising flooding. Third, it was said to be noteworthy that, on the evidence, the proposed duty of care would have involved a very limited loss of revenue to the ESB and it is said that the ESB is not entitled to put profit before the safety of those downstream: Finally, it was argued that the duty suggested is not a particularly onerous one, as the decisions that the ESB were being asked to take in

exercise of the proposed duty of care were the very decisions that they were already taking in the operation and control of the dam.

7.30 UCC further submitted that it would be inappropriate that the sole duty of care on the part of the ESB should be confined to one limited to guard against the collapse of the dam. Thus, it was argued, a dam operator would not be liable even if it knew that its activities were likely or certain to cause risks to the prejudice of all those downstream. The ESB is a statutory corporation which, it is said, cannot be distinguished from private competitors and which is generating electricity for its own economic benefit, rather than a public authority which is exercising its powers for the benefit of the community. In these circumstances, it was said that the ESB takes the benefit of the Lee Dams and must take the burden, which is to take reasonable care for the safety of persons and property downstream.

7.31 In response, the ESB restated that it can only be properly said to be a cause of flooding if it increases the flow of the river, that is, if outflow from the dams exceeds inflow in such an amount that flooding results. The ESB maintained that it did not produce harm and did not aggravate the harm so that the flooding was not, therefore, a consequence of the activity undertaken by the ESB. It was said that the risk of the flooding which actually occurred and which caused damage to UCC was created by the river. UCC was said to deliberately conflate risks attributable to ESB with risks due to the river itself.

7.32 The ESB submitted that, for this Court to fix a level of water at the Lee Dams for the purpose of flood alleviation would be an inappropriate incursion into policy making which would affect the rights of every person along the river and in particular those who would, on UCC's case, be lawfully or "necessarily" flooded.

7.33 The crux of the defence case, therefore, that outflow has not exceeded inflow, is rooted in the "do not worsen nature" rule, as established in a number of cases involving dam operators in other jurisdictions, such as *Iodice, Greenock Corporation v. Caledonian Railway* [1917] AC 556 and *East Suffolk Rivers Catchment Board v. Kent* [1941] AC 74. UCC submitted that there are a number of problems with this standard, the primary one being that it is said to be a notional artifice which assumes that there is some hypothetical pre-dam standard of nature which no longer exists whereas, in truth, the dam itself has altered nature. The ESB is said to be now interposed between nature and those downstream, taking the benefit of the hydrogeneration and therefore is in a position in which it can control flooding and contribute to the safety of persons downstream.

7.34 It is also argued that the "do not worsen nature" rule does not account for the natural attenuating effect of the river valley or for peak flow in downstream tributaries, or high tide downstream, which means discharges may effectively worsen nature.

7.35 The ESB rely on a number of US, Canadian and UK cases to support the contention that it is a universal rule that the obligation of dam operators is confined to one which requires avoiding worsening a natural hazard, authorities which UCC contests are not easily transferable to this jurisdiction, given which is said to be their non-engagement with the constituent elements of the duty of care.

7.36 It thus follows that a key element of the argument put forward on behalf of ESB on the "just and reasonable" leg of the *Glencar* test really came back to the proposition that it has no obligation beyond not worsening nature.

7.37 This defence has, in turn, provoked a further dispute between the parties as to the correct causation inquiry in negligence. UCC maintained that causation is not relevant to whether a duty of care exists and that the correct causation inquiry is as to

whether a breach of duty actually caused the damage, which should lead the Court to assess whether the flooding would have been the same or worse if the ESB had exercised reasonable care in its operation of the dams. However, the ESB submitted that, where causation is in doubt, it is premature to discuss the duty of care and the true questions which the Court should address are whether the ESB or its property has done anything which produced or increased flooding or whether flooding would have been less in the absence of ESB.

7.38 It may well be that this argument is somewhat irrelevant. Obviously, if the duty of care owed by the ESB is as UCC asserts, then the issue of causation is as to whether a breach of that duty of care caused damage. But, as already noted, it is clear on the evidence that the ESB could have taken actions which would have alleviated flooding downstream. The issue is as to whether the ESB was under a duty so to do. If they were under such a duty, then a breach of that duty undoubtedly caused some of the damage downstream. But it is equally clear that, at no relevant time, was the outflow from the Lee dams greater than the inflow. It follows that, if the duty of care is confined in the manner asserted by ESB, no downstream damage was caused by a breach of a duty of care as thus defined. The question of whether damage was caused by a breach of the duty of care depends, therefore, on how that duty of care is defined.

7.39 The first, and potentially decisive, question which arises for consideration is as to the extent of the duty of care which might be said to be owed by the ESB to UCC. We, therefore, turn to that question.

8. The Duty of Care

8.1 It is important to start by re-emphasising that the ESB does not suggest that it owed no duty of care to downstream land occupiers such as UCC. The ESB accepted that it might be liable were the flow of water beyond its dams to have exceeded the

flow of water into those systems to an extent that it could be said that the additional flow caused flooding and, therefore, damage. Likewise, the ESB accepted that it would also owe a duty of care in respect of any breach of the integrity of its dams which was caused or contributed to by negligence. However, neither of those eventualities occurred and therefore, for the purposes of resolving this appeal, those concessions are not material. The core question is as to the extent to which the ESB owed a duty of care to manage the dam system in a way which at least had regard to the risk of downstream damage.

8.2 As already noted, the parties accepted that the broad approach to the question of determining whether a duty of care is owed can be found in the judgments of this Court in *Glencar*. As also noted earlier, insofar as there was any difference between the parties on this question, the ESB did place some reliance on the jurisprudence of the courts of the United Kingdom which suggests an incremental approach to the development of the law concerning duty of care in areas not previously subjected to detailed judicial determination.

8.3 In passing it is worth noting that the first two legs of the test in *Glencar*, being foreseeability and the absence of remoteness, were not problematic in the circumstances of this case. The ESB did not argue that it would not be foreseeable as such that the manner in which it managed the Lee Dams might cause damage to downstream land occupiers or that such damage would be remote. The ESB's argument on this point in reality turns on the assertion that this case comes within the "do not worsen nature" category. On that basis it is argued that a party will not be liable in negligence if they do not worsen nature even if it can be established that it was foreseeable that a failure to improve on nature would have caused damage which was not remote. That question in turn raises the issue of the circumstances in which parties

may be found liable as exceptions to the "do no harm" principle. For that reason, it is necessary to address the proper approach which this Court should adopt in considering any potential evolution of the circumstances in which a liability of that type may arise.

8.4 Since this appeal was argued, this Court gave judgment in *Morrissey v. Health Service Executive* [2020] IESC 6. One of the matters which the Court had to consider in *Morrissey* was the proper approach which should be adopted by common law courts when considering the evolution of the common law or its application to new or evolving circumstances. To a large extent the views expressed by the Court in *Morrissey* were in accord with the submissions made by the ESB in this case. As already noted there was, in reality, little difference between the parties on this question but we do consider it appropriate to state again the basic principles.

8.5 Where a court is called on to determine the appropriate approach in common law to new or evolving circumstances or where it is suggested that a court should consider developing the existing case law, a court should first seek to identify whether there are any fundamental guiding principles to be found in the existing case law. Where such principles can be identified then the principles in question should inform any evolution of the jurisprudence or the manner in which the law in the area in question should be applied in new or evolving circumstances.

8.6 However, it must also be recognised that there can be areas where it may be difficult to discern any overarching but consistent fundamental principle. In such circumstances it may well be that the existing case law has grown up on the basis of an attempt by the courts, on a case by case basis, to deal, within some overall broad framework, with many different types of circumstances. It is in that context that the incremental approach to the development of the law by making appropriate analogies with the position already identified in similar situations may provide an appropriate

approach. See in that regard the comments of Clarke C.J. in *Morrissey* at paras. 12.2 to 12.5.

8.7 Those two approaches were characterised in *Morrissey* as being the "back to first principles" model and the "evolution by analogy" approach. As was also noted in *Morrissey*, part of that analysis built on the previous case law including the judgment of O'Donnell J. *in Hickey v. McGowan and anor* [2007] IESC 6, [2017] 2 I.R. 196. In that case O'Donnell J. had reached his conclusions on the proper principles to be applied in that case by adopting what he considered "to be the cautious and incremental approach outlined by Fennelly J. in *O'Keefe*". O'Donnell J. in *Hickey* indicated that he proposed adopting that approach, having considered what seemed to be the different approaches adopted by, respectively, Hardiman and Fennelly JJ."

8.8 In the same context it is also appropriate to refer to *Robinson* where, in considering the proper approach to the evolution of the common law, the following was stated:-

> "[a]n approach based, in the manner characteristic of the common law on precedent, and on the development of the law incrementally and by analogy with established authorities".

8.9 We would add one further observation. The two approaches are not necessarily mutually exclusive. There may be situations where it is possible to identify at least some level of very broad general principle behind the existing case law, but where the application of such broad principle would, of itself, be insufficient to give any acceptable level of clarity as to how the law should be determined in new or evolving cases. In such a situation the Court should have regard to, and operate in a manner consistent with, any such principle for overall guidance, but may also have to consider

the "evolution by analogy" approach for a more detailed evaluation of the precise boundaries of any evolution.

8.10 The starting point, therefore, requires the Court to ascertain whether it is possible to determine whether some general principles can be discerned which inform the existing case law. The issue in this case concerns the general approach to be found in existing case law which suggests that, ordinarily, a duty of care will not be imposed which goes beyond requiring a party to refrain from doing harm (and does not ordinarily extend to imposing a duty to confer a benefit), but where the case law also recognises that there may be certain circumstances where a more onerous duty of care may arise. The question is as to the extent to which it may be possible to determine any general principle or balancing exercise which informs that case law. In addition, to the extent that any principle which may be found cannot resolve the issues in this case, a further question may arise as to where the "evolution by analogy" approach may lead.

8.11 In the context of the overall approach identified in *Glencar Exploration*, it is, perhaps, appropriate to start with one observation at para. 12.10 of *Morrissey* in which Clarke C.J. said the following:-

> "But the real question concerns how far it is possible to extend the concept of vicarious liability. Stating that it will be done when it is "fair, just and reasonable" does not really contribute very much to the analysis, for it simply begs the question as to the kind of circumstances that can be regarded as coming within that criteria. The real issue is to identify the type of situation which may legitimately give rise to vicarious liability."

8.12 We are not sure, for similar reasons, that the use of that part of the test identified in *Glencar*, which is to the effect that a court must determine whether it is "just and equitable" in all the circumstances to impose a duty of care, is really of any great assistance. It begs the question of how a court is to decide what is just and equitable. By reference to what criteria or considerations is the justice or equity of the case to be analysed?

8.13 Of course it must always be recognised that one of the underlying difficulties in this area of the law has been the challenge to define the boundaries of the circumstances in which persons may be liable in negligence for loss caused to others. While the views which Clarke J. expressed as to the ultimate outcome of the case in his judgment in *Cromane* did not find favour with a majority, we do not cavil with one aspect of the general approach which was identified in the following terms at paras. 11.4-11.6:-

> "[11.4]…The messy world of human beings involves a hugely dynamic system in which we constantly interact with each other in ways great and small. In such a situation it is inevitable that many actions or inactions have a myriad of consequences, some trivial, some potentially significant….
>
> [11.5] While it might be an exercise in reverse engineering, it is appropriate to recall that the underlying principle of almost any area of redress in law is to attempt to put a party back into the position in which it was before any wrongful act occurred. But the range of potential consequences of a minor lapse can be so wide, so disparate, so disproportionate to the extent of the lapse and, as one moves away from direct to consequential or indirect knock-on effects, so difficult to analyse, it is hardly surprising that judges have been

concerned to ensure that some limit has to be placed on the extent of legal liability for lack of care and, indeed, the scope of that duty of care itself. [11.6] However, the undoubted acknowledgement that there has to be some limit does not provide any easy answer to the question which has troubled the jurisprudence for many years, which is as to where that limit should be placed or, perhaps, even more fundamentally, by reference to what type of principle or overall approach should we assess where those limits are to be placed in particular types of cases."

8.14 It seems to us that the underlying questions which arise in this case stem from that difficulty. Is there any overarching principle which helps us to decide the limits of the duty of care for an electricity generator, such as the ESB, operating a dam system such the Lee dams? It might be said that the "do no harm" case law provides such a principle and informs some of the case law from other common law jurisdictions which is relied on by the ESB to suggest that no duty of care exists beyond an obligation to do no harm. The case law which suggests that a duty of care will not ordinarily be imposed so as to require a party to confer a benefit rather than avoid doing harm, spans many different types of situations. Thus a generic description of that case law can properly be described as the "do no harm" jurisprudence. It seems to us that the "do not worsen nature" approach taken in some of the dam cases, to which we will return, represents a particular application of the "do no harm" approach to cases such as this.

8.15 In that context we would respectfully agree with the more recent case law of the United Kingdom which seeks to frame the issue in terms of a "do no harm" principle, rather than the previous case law which tended to analyse such matters by distinguishing between acts of commission and acts of omission. The line between such acts can be very much a matter of interpretation. How do we analyse the failure

of a motorist to slow down when approaching a dangerous bend or an incident on the road that would lead a reasonable driver to reduce speed? It might be said that, if one looks at the overall act of driving, then the motorist committed the act of driving in a negligent fashion by going, or at least continuing, at a speed which was too fast in all the circumstances. Alternatively, the very same actions (or failure to take them) could be characterised as an omission to apply the brakes. It is easy to see how such an analysis might lead to the sort of questions which Hardiman J. was wont to describe as theological. In those circumstances we agree that the "do no harm" approach provides a more robust basis for analysis. The advantages of adopting the "do not harm" approach, rather than the traditional approach of distinguishing between acts and omissions, were identified by Lord Reed at para. 29 of *Poole Borough Council*:-

> "Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm…. In this context I am intentionally drawing a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply."

We are persuaded by and respectfully adopt that analysis.

8.16 However, the "do no harm" approach itself does not provide a perfect answer. Indeed, it appeared to be accepted by all sides both that there are exceptions to the general "do no harm" approach but also that the circumstances in which a duty of care may arise which extends beyond "do no harm" are significantly more limited than the

circumstances in which a duty of care may arise in the context of avoiding doing actual harm.

8.17 Analogies are rarely, if ever, perfect and can, indeed, be dangerous and misleading. However, it does seem to us that there is at least some similarity between the sort of questions which arise in this context and the questions which this Court had to face in *Morrissey* concerning the extent of a non-delegable duty of care. While the Court did not seek to provide an exhaustive list of the circumstances in which such a duty might be held to be present, the one area identified in which it was held that a non-delegable duty certainly does arise, and did arise on the facts of *Morrissey*, stemmed from a situation where some form of prior existing relationship led to the imposition of a non-delegable duty.

8.18 It is that sort of situation which would appear to have informed the views of the courts in the United Kingdom in *Robinson* as set out at para. 34 of the judgment in that case cited earlier. It is easy to see why such an exception must be held to exist.

8.19 Many cases of professional negligence, for example, do involve an allegation of failure to make things better. They are inconsistent with a pure "do no harm" approach. The reason is obvious. The very professional relationship itself is often designed to better the position of the patient or client. A doctor who negligently failed to diagnose a disease and thus failed to ensure that the patient obtained appropriate treatment could hardly argue that he should escape liability because he had done no harm. The patient was no worse off than had he not been negligent. The answer to his defence would, of course, be that the very task which he had undertaken was to competently diagnose the patient and, if appropriate, prescribe treatment which might better the patient's situation.

8.20 It must, of course, be acknowledged that the professional negligence cases at least build on and derive from a situation where many of the obligations of the relevant professional would originally have arisen from a contractual relationship between the parties. Indeed, in many professional relationships, a case of wrongdoing will frequently be pleaded both as a breach of contract and in the tort of negligence. The analysis of whether there is liability will normally be the same in either case, for it will almost inevitably be a term, whether express or implied, of the relevant contract that the professional duties be carried out in a competent manner. As was noted in *Morrissey,* part of the development of the law of negligence in respect of professional services stemmed from the fact that some such services have, in modern times, been delivered without a contract, in situations such as socialised medicine. The evolution of the law of tort in a number of areas has resulted from the need to reflect the fact that situations which may have been governed by contract in the past no longer involve any contractual relations so that questions of liability can only be determined within the confines of the law of tort.

8.21 Be that as it may, it must, of course, be recognised that there is no question of any contractual relationship between UCC and the ESB concerning the manner in which the ESB would operate their dams, nor is there any relationship which resembles contract even though not technically forming a legally binding agreement. That aspect of any analogy with the extension of the law of tort which was considered in *Morrissey* has no application in this case. However, the true question is as to the proper limit on the extent to which a duty of care may be imposed on a party which goes beyond a duty not to do harm. In particular, it is necessary to consider the extent to which any such duty may arise in cases where there is no formal or analogous prior existing relationship between the parties, but rather where it may be said that the general

circumstances are such as to impose a duty which goes beyond a requirement not to do harm.

8.22 It is accepted that the question of any potential duty of care which may lie on the operator of a hydroelectric dam to downstream land occupiers has never been the subject of specific judicial consideration in this jurisdiction. This Court is, therefore, free to determine the boundaries of any relevant duty of care but must, of course, do so in a manner which is consistent with the general principles identified by this Court and applying the appropriate approach to the application or evolution of the common law to new or evolving circumstances. In such a context it is always helpful to look at the case law of other common law jurisdictions.

8.23 Before doing so, however, we consider it useful to touch on certain aspects of the statutory role of the ESB.

9. The Statutory Role of the ESB

9.1 The statutory function of the ESB is principally to generate electricity. This stems from s. 10(1) of the 1945 Act, which provides for the mandatory generation and distribution of electricity at and from the "hydro-electric works" completed pursuant to the Act. Section 2 of the Act defines "hydro-electric works" as meaning "works for the generation of electricity by means of hydraulic power". Specifically, s. 10(1) provides:-

> "10.—(1) When an approved scheme has been carried out and the hydro-electric works provided for by such scheme have been completed (with such additions, omissions, variations, and deviations as shall have been found necessary in the course of the work), the Board shall generate electricity by means of such works and shall transmit and distribute such electricity to such places and in such manner as shall, in the opinion of the Board, be requisite for

making such electricity available for the purposes mentioned in the next following subsection of this section."

9.2 To that end, the ESB is given significant statutory powers. One of the arguments put forward by the ESB was to the effect that it would be contrary to its statutory mandate to impose on it any duty of care which might require it not to optimise the production of electricity.

9.3 In that context it is important to note that a key finding of Ryan P., speaking for the Court of Appeal, was to the effect that it would impose an impermissible restriction, amounting to an impairment of its statutory functions, to require the ESB to have regard to the sort of considerations which UCC suggests give rise to a duty of care to downstream land occupiers.

9.4 Against that finding, UCC argues that there is no statutory obligation on the ESB to generate electricity in a manner which disregards all other considerations beyond the very limited duty of care which the ESB accepts. That the ESB has a statutory obligation to generate electricity is clear. It seems to us that the purpose of that obligation is equally clear. The ESB is given significant statutory power which entitles it to interfere in a material way with a natural resource, being the River Lee. The social benefit which is to be obtained from conferring those powers on the ESB was, obviously, the generation of electricity. But we do not interpret s.10 of the 1945 Act as imposing an obligation on the ESB to always, and in all circumstances, produce the maximum amount of electricity. We do not, therefore, agree that the statutory mandate of the ESB necessarily precludes imposing a duty of care which might, at least in some circumstances, require it to refrain from maximising electricity generation.

9.5 It is undoubtedly the case that the statutory duty of the ESB to produce electricity would place an obligation on the ESB to pay particular regard to electricity generation in any decisions which it might make. However, there is a difference between saying that significant weight ought to be attached to the obligation to produce electricity (which is, as we have pointed out, for the common good), and saying that the obligation to generate electricity is such that it excludes any other consideration being taken into account, such as one which might require, in very particular circumstances, other issues to be considered in the balance in order to comply with a potential duty of care to downstream land occupiers.

9.6 For that reason, we do not consider that the undoubted importance of electricity generation, and the equally undoubted statutory obligation of the ESB in that regard, is such that it, of itself, could be held to entirely exclude the possibility of the ESB having a duty of care to at least have regard to downstream land occupiers in decisions concerning the operation of the dam. That does not, of course, mean that such a duty of care arises, but rather means that the statutory obligations of the ESB do not exclude such a duty of care if it can be considered to otherwise properly arise.

9.7 There is a detailed consideration in the judgment of O'Donnell J. in this case of the jurisprudence, particularly from the United Kingdom, which considers the broad question of the extent to which the existence of a statutory power may, in some circumstances, carry with it a duty of care to exercise that power in a particular way. We do not disagree with the analysis of O'Donnell J. in that regard, nor with the conclusions which he reaches on the question of whether a statutory power may give rise to a duty of care to exercise that power with regard to the interests of third parties. It is true, of course, that the ESB has many statutory powers. We do not consider that any duty of care which it might be considered to owe to downstream land occupiers

can be seen to derive from the statutory nature of its operations. Rather, we are of the view that any duty of care which might be held to lie on the ESB must be the same as would lie on an entirely private hydroelectric generator who operated without any specific statutory basis for the conduct of its business. We do not, therefore, consider that the statutory framework for the operation of the ESB plays a role either way in the proper resolution of this appeal. That statutory framework does not confer any immunity on the ESB from any duty of care which might otherwise arise in respect of a private operator. Equally, that statutory framework does not place on the ESB any duty of care which would not arise in the context of an entirely private operator.

9.8 In those circumstances it is next appropriate to turn to a consideration of the case law from other common law jurisdictions which deals with the duty of care on hydroelectric dam operators and which, we think it can fairly be said, comes principally, but not exclusively, from the United States.

10. The Foreign Case Law

10.1 In the course of both written submissions and oral argument, the ESB placed reliance on case law from other common law jurisdictions for the proposition that the common law does not recognise a duty of care on a dam operator (with the exception of a dam which had waterway control as part of its purpose) which goes beyond an obligation that can reasonably be described as one to "not worsen nature". That principle may be considered as the application of what might be considered as a more general "do no harm" duty of care in cases where the potential harm stems from natural occurrences.

10.2 Many of the cases cited were from United States state courts of final appeal which were concerned with challenges to first instance awards by juries. However, it

does appear that the courts concerned were seeking to define the common law principles applicable to the law of tort in their respective states and also had regard to decisions of other states in similar cases. It would, we think, be fair to acknowledge that the preponderance of the authorities cited do lend support for the proposition that it is a widely accepted view of many courts in the United States that a dam operator does not owe a duty of care to downstream landowners or occupiers beyond an obligation which might be characterised in modern terms as equivalent to the "do not worsen nature" or "do no harm" principle. In passing, it should be noted that it is accepted that different considerations might apply in a case where the purpose of the dam in question was to control a waterway. However, the issue in almost all of the cases cited concerned the operators of dams which were designed for other purposes, such as the generation of electricity. It should also be noted that some of the cases go back quite some time, but there are at least some relatively modern restatements of what is said to be the general principle.

10.3 There is no direct Irish authority on the question of the duty of care applicable to a dam owner in circumstances such as those which arise in the present proceedings. It is, of course, therefore, open to this Court to determine the extent of the relevant duty of care. However, as already noted, in so doing this Court must act in a way which is consistent with general principles and with the proper approach to the evolution of the common law. For those reasons, the Court should always give consideration to the case law of other common law jurisdictions where the courts in question have considered the parameters of the common law in the same or a similar area.

10.4 It is also, of course, the case that foreign jurisprudence is only of real assistance where the court concerned is dealing with very much the same legal question. In that context, it should be noted that some of the United States cases are concerned with

claims in nuisance, and others with claims under the principles first identified in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330. However, it is those cases which turned on a decision as to liability in negligence that are of particular interest in the context of this appeal.

10.5 Perhaps the clearest statements can be found in New York cases, starting with *Iodice*. That case involved a claim by persons whose property was damaged by flooding of the Mohawk river. The state of New York was said to have been negligent in the way in which it managed the Delta Dam reservoir. The plaintiff succeeded at trial. However, Vaughan J, in the Appellate Division of the Supreme Court of the State of New York, held that there was no duty on the part of the state to regulate the outflow from a reservoir so as to minimise or eliminate the flooding of lands downstream to any extent greater than would have been the case if the river had flowed naturally. The dam in the case in question was intended as a storage reservoir for the purposes of supplying water to a canal system.

10.6 Insofar as a common law duty might have arisen, Vaughn J observed, at pp. 649-650, that:-

> "There being no statutory duty to operate the dam for flood control purposes, any duty to operate the dam for the purposes of bettering natural conditions must be found in some rule of… common law… We know of no principle of common law which imposes any such duty… we simply have the question… whether a dam owner has the right to let nature take its course… we think the question must be answered in the affirmative."

10.7 On the facts of the case, there was no evidence that the flow which caused flooding to downstream land occupiers was greater than the natural flow of the river. On that basis, the appeal was allowed and the plaintiff's claims dismissed.

10.8 This decision was later affirmed without opinion by the Court of Appeals of the State of New York (see *Iodice v. State of New York* 303 N.Y. 740 (1951)).

10.9 *Iodice* was followed in *Elliott v. City of New York* (06 C.V. 296, 2010 U.S. Dist. LEXIS 121344, November 15, 2010). The dam in this case was again a reservoir dam designed for water supply. Patterson J in the Federal District Court for the Southern District of New York stated, at p.15:-

> "Under established New York precedent, there is… no responsibility by or duty on a dam owner 'to make flood conditions better for lower property owners than they would be if the river flowed naturally'."

The Court went on to hold that the proper evaluation required an assessment of whether water was released at a faster rate than would have occurred had the river flowed naturally.

10.10 This approach was approved by the US Court of Appeals for the Second Circuit in an appeal in the same case (see *Elliott v. City of New York* 497 Fed. Appx. 108, 2012 U.S. App. LEXIS 19735).

10.11 Another clear statement can be found in the judgment of the United States District Court in *Key Sales Company v. South Carolina Electric and Gas Company* 290 F. Supp. 8 (D.S.C 1968) where, at p. 23, Simons J observed:-

> "The Court concludes that under the applicable common law principles the only obligation imposed upon a dam operator in the operation of his dam is not to worsen conditions downstream beyond what would have occurred in the absence of the dam."

10.12 Having reviewed a number of authorities, including some cited earlier in this judgment, Simons J went on, at p. 25, to state the following:-

> "A dam owner may rightfully permit flood waters to pass over the dam in such quantities as flow into it. But a limitation on this right is that the water accumulated behind the dam must be discharged with ordinary care, or the owner will be liable for the resulting injuries. 93C.J.S. Waters para. 18. In the present instance defendant did not release any more water downstream than flowed into its lake, and the outflow was released in a careful and prudent manner, as is reflected by the discharge tables showing defendant maintained its dam at 360 feet under very unusual circumstances. Likewise, plaintiff is not entitled to damages if the injury to its property would have occurred even though the defendant's structure had not been erected. 93.C.J.S Waters para. 38."

10.13 However, the Court then went on to conduct an analysis of the evidence concerning water levels at particular times and what was held to be the absence of weather information which would reasonably put the utility "on notice that it should begin to spill water through its floodgates prior to the time it commenced to do so." However, having done so, the Court went on to conclude at p. 25:-

> "Plaintiff cannot recover in any event for a 'dam owner is not liable where he has not augmented the flow beyond that which would have occurred in the absence of the dam.' *Kambish v. Santa Clara Valley Water Conservation Dist.*, Cal. App., 8 Cal. Rptr. 215 at 217."

10.14 That case seems to us to represent an interesting aspect of what might be said to be an approach adopted by certain United States courts of various jurisdictions in some of the case law cited to us. There is, in those cases, a comment that there would not have been liability in any case because of a principle akin to that of "do no harm" or "do not worsen nature". However, there is also a detailed analysis as to whether the

evidence supported a contention that there were actions that could have been taken by the dam operator to make things better. It is difficult to see why such an analysis would have been carried out if it were absolutely clear that, in all circumstances, there could be no liability where the outflow did not exceed the inflow. If the principle were beyond debate that a dam operator could only be liable for doing harm or "worsening nature", then it is hard to see why there would have been a consideration of the actions of the dam operator to assess whether they could have been said to be negligent in any event. While it may be reasonable to expect a trial court to answer all questions before it, lest an appellate court take a different view on a point of principle, it is more difficult to see why final appellate courts would engage in a quite detailed analysis of the facts to determine whether it might be said that there was negligence, only to add that such analysis does not matter because there could not have been liability in any event due to the absence of a duty of care.

10.15 The Supreme Court of Arkansas, in *Power and Light Company v. Lewis Cash*, 245 Ark. 459, 432 S.W.2d 853 (1968), had to consider an appeal against a successful action brought by landowners suing a hydroelectric dam operator for failure to operate its dams in a manner that would have controlled flooding. The landowners were successful at trial. The Supreme Court of Arkansas allowed the appeal on two bases. The Supreme Court, in a judgment from Harris CJ, disagreed with the finding of negligence made by the trial court having regard to what it considered to be the actions of the utility company in facing an emergency of "unprecedented proportion". On the facts it would appear that weather forecasting had predicted rainfall of approximately one inch whereas four inches actually fell. The Supreme Court also considered that, even if there had been negligence, the plaintiffs' claim should have failed on the basis that such negligence would not have been the proximate cause of the damage. The

Supreme Court was not satisfied that there was anything beyond guesswork involved in the analysis of what would have been the case had there not been negligence.

10.16 On the one hand, it might be considered that the second finding of the Supreme Court of Arkansas was analogous to the application of a "do no harm" or "do not worsen nature" principle. On the other hand, the decision might be seen as involving a finding that, given that there would almost certainly have been significant flooding anyway, the plaintiffs had failed to establish what additional damage, if any, could be attributed to any negligence established on the part of the operator.

10.17 In *Baldwin Processing Company v. Georgia Power Company* 122 Ga. App. 92, 143 S.E.2d 761 (1965) Pannell J, in the Court of Appeals of Georgia, said the following at pp. 767-768:-

> "It thus appears that any claim by a lower riparian owner against the owner and operator of a dam above him because of high water must necessarily be based upon the negligent *release* of excessive water from the reservoir behind the dam such an action cannot be based upon the negligent storing, unless the negligent storing of water caused or forced the release of excessive water such as a break in the dam itself or the release of excessive water to prevent damage in the dam or a break therein."

10.18 Certainly that view is consistent with an application of a "do no harm" or "do not worsen nature" principle. It would, as the ESB accepts is the case in this jurisdiction, allow for liability in respect of negligently causing or allowing the dam to burst or in circumstances where more water was negligently allowed to flow out from the dam than was flowing in. However, if it is correct to say that no liability can attach in respect of negligent storage, then it would be clear that the ESB would be right to argue that there was no duty of care on it to manage the storage of water in its dams in

such a way as might have minimised the risk of the anticipated extreme weather leading to additional flooding.

10.19 In *Bryan v. Alabama Power Co.* (20 So. 3d 108 (Ala. 2009)), the Supreme Court of Alabama had to consider a claim against the operators of a hydroelectric plant. The plaintiff's downstream lands were flooded by an overflow from the Tallapoosa river. It would appear to have been accepted that the dam operators did not owe an ordinary duty at common law to engage in the amelioration of any naturally occurring floods. The case principally turned on the question of whether, in the circumstances of the case, it might be said that a heightened duty of care arose. That argument was rejected by the Supreme Court.

10.20 Lyons J, at p. 116, cited with approval the Supreme Court of Alabama's earlier judgment in *Ellis v. Alabama Power Co.*, (431 So.2d 1242, (Ala. 1983)) in which the Court stated, at p. 1245, that, "this Court has consistently held that one who owns or operates a dam owes a duty to lower riparian owners only to exercise reasonable care in operating or maintaining the dam". It is clear from the context of that statement that the phrase "care in operating the dam" did not include an obligation to exercise care to minimise downstream flooding below that which might have otherwise occurred.

10.21 In *Shamnoski v. PG Energy* (579 Pa. 652; 858 A. 2d. 589 (Pa. 2004)) lower courts held with the plaintiffs in their claim for negligence against a hydroelectric dam operator giving rise to damage caused by flooding resulting from hurricane Gloria.

10.22 However, the Supreme Court of Pennsylvania reversed those decisions with Castille J. observing, at p.679,

> "Because the dams did not fail and the damages which appellees sustained were a result of the natural effect of the storm, appellant did not breach any legal duty to appellees… The damage that appellees suffered resulted not from a rush

of water released through the breach or failure of a dam, but from the natural effect of a storm of this magnitude inundating this sort of severe downhill watershed, where landowners had unwittingly and tragically built their homes in the natural flood plain of the watershed."

10.23 With the one minor caveat referred to earlier, concerning the fact that some courts did appear to also have regard to the merits of the negligence claim itself, it would appear from the United States case law cited to us that there is a relatively consistent view across a range of states that the common law duty of care on a dam operator, whose dam was not designed for flood control purposes, does not extend to managing or operating the dam in a way which might reduce the risk of downstream flooding below that which would have occurred as a matter of nature in any event.

10.24 A similar view appears to have been taken by Canadian courts going back as far as *Wegenast v. Ernst* [1858] O.J. No. 308 8 U.C.C.P. 456 where the following was said by Draper CJ in the Upper Canada Court of Common Pleas at para. 10:-

> "…[T]he plaintiff had to guard against and flow of water which proceeded from natural causes. In other words, so long as the defendants let down no more from their pond than natural causes brought into it, and at no faster rate than natural causes were at the time supplying it, they would not be liable."

10.25 The more recent case of *Smith v. Ontario and Minnesota Power Co. Ltd.* [1918] 45 D.L.R. 266, is not completely on point but may be of some tangential relevance. That case principally turned on a breach of statutory duty arising out of a clause in the Act of Incorporation of the defendant company. In addition, it was held on the facts that more damage was caused to the plaintiffs because of the existence of the dam beyond the damage which would have been incurred had the dam not been there. In

that latter context it was held that there was liability for the additional damage but not, it would appear, for the damage that would have occurred in any event.

10.26 The one Australian case cited in argument, *Rodriguez & Sons Pty Ltd v. Queensland Bulk Water Supply Authority* [2014] NS2WSC 1565, was concerned with how the case in question should be pleaded so as to give the defendants adequate knowledge of the case being made against them. In addition, it would appear that the dam in question was designed for flood alleviation. Therefore, any comments on potential liability in respect of the negligent operation of dams are of no real assistance in considering the central issue on this appeal, being as to whether the operators of dams which are not designed for flood alleviation owe any duty of care to reduce the potential risk of flooding to downstream landowners below the level which would exist in the event of the dam not being there.

10.27 A similar comment applies in respect of one of the United Kingdom cases cited, being *Cordin*. It is clear that the case involved an allegation of negligence in respect of the operation of a system specifically designed to prevent flood protection. To that extent, we agree with the ESB that it is of little assistance in the context of this case. However, it may be of some relevance in respect of one of the issues to which we will have to turn when considering any possibly duty of care which might be owed by the ESB. One of the points made on behalf of the ESB was to the effect that the duty of care asserted on behalf of UCC was impermissibly vague and not such as would allow an operator to know what it was meant to do in order to comply with the duty in question. In *Cordin*, Jones J held, at para. 52, that the relevant duty was "to exercise reasonable care as to the manner in which it released flows from the reservoir so as not to expose the claimants to a foreseeable risk of flooding". While acknowledging that the duty of care in that case was seen to arise from the fact that the measures which

were said to have been negligently operated were specifically designed to prevent flooding, nonetheless it is worth noting that the Court had no difficulty in specifying the duty of care by reference to the very common test of reasonableness.

10.28 We should also briefly comment on the other United Kingdom dam cases cited in argument. UCC place reliance on *Embrey v. Owen* [1851] 6 Exch 353, in which it was observed, at p.371, that "the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below." It is said that the ESB breached their obligation to maintain the natural rapidity of the river's flow on that basis. Whatever may be the merits of that argument, it does not seem to us that it affects the issue with which we are concerned. The whole point of UCC's case is that the ESB should have increased the flow in advance of the storm so that it could decrease the flow during the storm. We do not, therefore, consider *Embrey* to be of any real relevance to the issues which we have to decide.

10.29 Both sides sought to place some reliance on *Greenock*. However, it seems to us that the facts of *Greenock* are sufficiently different from the facts with which we are concerned so as to render the decision in that case of limited assistance. The relevant municipal authority constructed a concrete paddling pond in the bed of a stream. During heavy rain the pond proved inadequate to accommodate the water volume thus leading to flooding and damage into a nearby street. It does appear, however, that the Court was of the view that, in order to successfully maintain proceedings for negligence in such circumstances, a person claiming damages must be able to show that, but for the relevant works, the flow of water would not have caused the damage concerned.

10.30 It is worth noting that the Supreme Court of Ontario did follow *Greenock* in its decision in *Smith*. *Greenock* was also followed by the House of Lords in the Scottish case of *Stirling v. North of Scotland Hydro-Electric Board* [1974] S.C. 1 in which Lord Avonside stated, at pp. 8-9, that an injured party should establish "that but for it the phenomena would have passed him scatheless".

10.31 While it is possible to identify some minor qualifications which can be made, we consider it fair to acknowledge that the preponderance of common law authority cited to us does appear to approach the question of the duty of care of a dam operator (where the dam in question has not been constructed for flood control purposes) as being confined to an obligation not to worsen nature. As we have already noted, that approach may be seen to involve a particular application of what is now described as a general "do no harm" general principle. However, it is also appropriate to consider the potential exceptions to that principle. Those exceptions were the subject of recent consideration by the United Kingdom Supreme Court in *Robinson*.

11. *Robinson*

11.1 Before turning to the decision in *Robinson*, we would wish to briefly comment on the detailed analysis of the ebbs and flows of the law in this area which is to be found in the judgment of O'Donnell J. in this case. That sequence of judgments may reasonably be characterised as a struggle to identify an entirely coherent red line between those areas where it may be said that a duty of care exists and those areas where no such duty will be held to apply. As we noted earlier, a significant strand of that case law involved proceedings against persons or bodies who are under a statutory duty. The question frequently addressed was as to whether, in the circumstances of each particular case, the fact that a statutory power to take action existed could give rise to a duty of care as to how that power might be exercised. However, for the

reasons which we have set out earlier, we do not consider that the statutory basis of the operation by the ESB of the Lee Dams is decisive either way in the particular circumstances of this case.

11.2 The reason why we have analysed in some detail the case law which was cited to us in argument, which comes from common law jurisdictions beyond the United Kingdom, is that that the jurisprudence in question, principally from the United States, does seek to apply general principles of the common law to cases involving dams. While accepting, as we have noted earlier, that the preponderance of that authority would suggest that the United States view is to the effect that the obligations of a dam owner, in circumstances such as those which face the ESB, do not go beyond a duty which might reasonably be described as requiring the dam operator to "do no harm" or "not worsen nature", we also consider that it is necessary to view that case law against the backdrop of recent developments in this area of law. *Robinson* seems to us to represent one such development which might be considered to represent an evolution in the case law and thus suggest that it may be appropriate to consider revisiting some of the earlier dam cases.

11.3 In saying that it remains, of course, the case that *Robinson* is but persuasive authority as, indeed, are the United States and other cases cited. We have already cited the passage from para. 34 of *Robinson* which sets out the circumstances in which the United Kingdom Supreme Court considered that a duty of care might arise to prevent harm which arises from a danger that was not created by the alleged wrongdoer. Four examples are given. UCC sought to rely on three of those categories. The one category not relied on is category (ii) which suggests that liability may arise where the alleged wrongdoer does something which prevents another person from preventing the harm. UCC did seek to rely on category (iv) which suggests that the status of the

alleged wrongdoer can create an obligation to protect. However, we have already indicated that we do not consider the statutory basis of the ESB's functions in relation to the Lee Dams to give rise to a potential duty of care and we do not, therefore, consider it necessary to analyse whether a category analogous to that set out in category (iv) exists in Irish law.

11.4 That leaves two categories, being category (i) which suggests that a duty of care may exist where the alleged wrongdoer can be said to have assumed a responsibility to protect the claimant from danger and category (iii) where the alleged wrongdoer has a special level of control over the source of the danger.

11.5 We propose to consider that latter category first. The initial question is as to whether such a source of potential duty of care exists in Irish law. If such a potential obligation can be said to arise then it will be necessary to consider whether it applies in the circumstances of this case.

11.6 We are persuaded that the analysis to be found in *Robinson* in regard to category (iii) is persuasive and represents the law in this jurisdiction. It must first be noted that each of the categories identified in *Robinson* are said to give rise to a duty of care even though the source of the danger was not created by the alleged wrongdoer. It seems to us to logically follow that such a situation must amount to an exception to the "do no harm" principle. The underlying assumption behind category (iii) is that the danger arose independently, that the alleged wrongdoer had some special control over that danger and failed to take appropriate steps to prevent the danger causing damage to the claimant. It follows that no liability could arise under that heading unless it represented an exception to the "do no harm" principle for the alleged wrongdoer would not have done harm but, rather, would have failed to prevent harm arising from a danger which the alleged wrongdoer did not create.

11.7 We have already commented that some of the exceptions to the "do no harm" principle stem from specific obligations undertaken to "do good" (or, in the words of the case law, to confer a benefit) such as the type of obligation frequently arising in the context of professional services. But we do not consider that the type of special relationship between parties which may give rise to an exception to the "do no harm" principle is confined to a formal arrangement between the parties whether founded in contract or not. We would view the "special level of control" category as deriving from a similar or analogous type of consideration. It brings the case outside the scope of the mere bystander who might happen to be able to act to prevent the harm or confer a benefit but chooses not to do so. That person has no special control over the problem. It requires some form of pre-existing situation whereby the alleged wrongdoer is placed in a special position of having a particular level of control over the danger in order that the person in question can be said to be in a different category from the mere bystander to whom the ordinary principle of "do no harm" would undoubtedly apply.

11.8 It was, of course, the case that the issue in *Robinson* itself involved a claim of negligence against the police. It might, in that context, be argued that the type of special level of control which ought give rise to a duty of care to prevent harm independently arising is confined to persons or bodies who have a special position in law. Certainly the focus of the debate in *Robinson* included an analysis of the position in the light of police powers. But we consider that it would be too narrow a basis for defining the appropriate boundaries of a duty of care to confine the concept of "special level of control" to persons or bodies who may have a legal power to exercise such control. In *Cromane,* Clarke J. cautioned against providing state or public authorities with an immunity which would not apply in an analogous situation to a private

individual. The view expressed in *Cromane* was that there should be a broad similarity between the duty of care of public and private persons or bodies faced with analogous situations unless there was some significant countervailing factor stemming from the role of the public official or body in question which would justify a different treatment. However, it seems to us that this concept works both ways. If those who exercise a special level of control by virtue of having a legal power may, in certain circumstances, have a duty of care which goes beyond requiring them to "do no harm" then it seems to us that like considerations should impose a duty of care on those who can exercise a significant level of control in practise over a danger which may foreseeably cause harm.

11.9 We are, therefore, satisfied that Irish law recognises, as an exception to the "do no harm" principle, a category of case where a duty of care can arise because of a pre-existing situation (i.e. one which existed in advance of the events leading to the claim) and where it can be said that the alleged wrongdoer had a special level of control over a danger which causes foreseeable damage which is not remote. We would emphasise that the degree of control must be significant and not tangential. We would also emphasise that the obligation which such a duty of care imposes is not unlimited. It is implicit in the duty of care that, with the special control which the alleged wrongdoer has, comes an obligation, but it is only an obligation to take reasonable care to prevent the danger causing damage. Furthermore, the obligation cannot arise if it would be likely to lead to the risk that the person exercising special control might suffer significant loss or damage themselves. There must be a reasonable relationship between the burden which may arise from exercising a special level of control in a manner designed to prevent foreseeable harm and the likely beneficial effects of that exercise of control.

11.10 In that context, it is necessary to address the issue raised on behalf of the ESB which suggested that the contended for duty of care said to arise in this case was impermissibly vague and imprecise. We do consider that the question of whether any duty of care to prevent harm not caused by the alleged wrongdoer can be said to arise in the particular circumstances of an individual case must include a consideration of whether the obligations which would thereby be imposed can be defined with some reasonable level of clarity.

11.11 The precise obligations which may arise under a duty of care will frequently be, at least to some extent, case specific. The obligations arising can normally be stated in relatively clear terms at the level of broad principle but the precise obligations which may arise in any particular circumstance may be more difficult to define with absolute precision. It is trite to say that the duty of care of a driver is to control his car in a manner which would be expected of a reasonable driver in the particular circumstances of the case. Sometimes the precise application of that general principle may be fairly obvious. There are speeds which would, to any reasonable driver, be considered excessive, and thus negligent, in the relevant driving conditions. The precise application of the general duty of care of a driver would clearly render that driver negligent if driving at such a speed. At the other end of the spectrum there are clearly speeds which any reasonable driver would regard as safe. But there may well be a grey area in the middle where a court will have to exercise a judgement as to whether speed was excessive.

11.12 Likewise, in the context of professional negligence, it is easy to state the general principle. The standard of care required of a professional is that which would be exercised be a reasonable and competent professional of the standing of the individual concerned. As with the example of the driver, there will clearly be cases

where the way in which a professional person carried out their obligations was out of line with any reasonable standards of the professional. There will equally clearly be cases where the way in which the relevant professional duties were carried out was such that a reasonable professional could have done things in exactly the same way. But again, there are undoubtedly situations where a difficult question of assessment may arise on the margins.

11.13 It seems to us to follow that it is not necessary to be able to predict in advance the precise obligations which might arise under a duty of care. The fact that there may be grey areas between actions which would undoubtedly breach the duty of care in the particular circumstances of an individual case and those which would not, does not mean that the overall standard of care will be so vague as to impose an impermissibly imprecise obligation. Most duties of care are defined by reference to some test of reasonableness. The standard of the reasonable driver. The standard of reasonable the professional. But what is reasonable may well be very fact dependent and may not always be capable of definition with absolute precision.

11.14 That being said, we do accept that a person is entitled to be able to know with some reasonable confidence where the boundaries of their duty of care lies. The fact that those boundaries may not be capable of being specified to an absolute level of precision does not in itself prevent a just duty of care being established but, if the boundary cannot really be specified with some reasonable level of clarity then, in our view, a contended for duty of care cannot be held to exist. In that context we note that the type of obligation identified by Lord Hoffman in *Stovin v. Wyse* was one which, it was said, must be capable of being "described exactly". We appreciate that the type of potential liability under consideration in that case was not the same as that with which we are concerned here. In that case, amongst other things, Lord Hoffman was

discussing the question of "general reliance" in the context of the exception to the "do no harm" principle, which applies where the alleged wrongdoer is said to have assumed a responsibility to protect the claimant from danger. Whatever may be the merits of requiring that level of exactitude in circumstances where a plaintiff is relying on the actions and statements of a defendant to seek to establish the assumption of responsibility, we do not think that the same level of exactness is appropriate in the context of the issue which we are now addressing. As we have already noted, the practical boundaries of the actions which may be required to meet a duty of care in many circumstances are not always capable of very precise definition.

11.15 In that context, it is also worth noting that, in some areas of the law, absolute boundaries are created by, for example, statute. In other analogous areas the law allows some level of general adjudication which a court must exercise. The contrast between a statute of limitations and the equitable principle of *laches* is one useful example. In the case of a statute of limitations, a person is either within the statute or outwith. The boundary can be defined with exact precision.

11.16 On the other hand, under the doctrine of *laches*, a court has to make an assessment as to whether an equitable remedy has been sought in a timely fashion having regard to all of the circumstances of the case. It is not possible, in such circumstances, to determine with exact precision the lapse of time which might be adjudged to have breached the principle of *laches* and which, therefore, may have disentitled a plaintiff to relief to which they might otherwise be entitled. It will ultimately come down to a judicial adjudication. A person who has allowed a period of, for example, two years to elapse before seeking an equitable remedy may not know for sure whether letting things lie for another six months might or might not lead to their claim being lost under the doctrine of *laches*. A lawyer may be able to give

considered advice but will not be able, at least in some cases, to be definitive. But the fact that there is no certainty in such cases does not lead to any ultimate unfairness. There are always arguments in favour of the certainty which a clear red line brings but there are also arguments in favour of the flexibility of a more general test. Both have their merits but both have their disadvantages as well.

11.17 Much of the law of negligence falls into a category which is more closely similar to the application of the doctrine of *laches* rather than that of a statute of limitations.

11.18 In summary, we are satisfied that Irish law recognises the potentiality of a duty of care existing to prevent harm from a danger caused independently of the alleged wrongdoer where that alleged wrongdoer has a special level of control over the danger in question which is substantial and not tangential. That level of control does not necessarily have to arise from a legal power. However, in assessing whether any such duty of care arises in the circumstances of any individual case or type of case, a court must assess the following factors:-

(a) Whether there is a reasonable relationship between any burden which would arise from imposing such a duty of care and the potential benefits to those who may be saved from the danger in question; and

(b) Whether it is possible to define the duty of care in question with a sufficient, but not absolute, level of precision so as to avoid imposing a burden which is impermissibly vague and imprecise.

11.19 It is next necessary to consider whether the duty of care which we have just identified applied to the ESB in the circumstances of this case and, if so applying, whether it can be said that the ESB was in breach of that duty of care. We now turn to that question.

12. Is there a Duty of Care?

12.1 There can be no doubt but that the ESB exercised a very significant degree of control over the flow of water in the river Lee both at the point of the Lee Dams but also downstream. It was not, for example, an incidental user of water taken from the river where the effects of either extracting water or allowing it to flow back in would not have been significant. Rather, the whole point of the dam system was to maximise the likelihood of there being sufficient water available at any given time available so as to generate electricity. The ESB is, therefore, able to exercise a significant degree of control over the flow through the dams and ultimately down river. It is, of course, the case that the ESB does not generate that flow itself. The underlying flow derives from nature. However, the ESB exercises a significant power over the natural flow which is undoubtedly capable of being deployed to potentially minimise the risk of adverse flooding events. It is also the case that the ability to exercise that significant level of control derives from substantial works which the ESB has carried out for its own benefit, albeit with a public benefit as well.

12.2 In that context we note the finding of the trial judge that the ESB had particularised, indeed, perhaps unique, knowledge of the way in which its operation of the Lee Dams could affect third parties and, in particular, downstream land occupiers. We also note the finding of the trial judge that the ESB was aware of potential risks to downstream land occupiers in the sense that it was aware that its actions could diminish those risks. We are satisfied that there was more than sufficient evidence before the trial judge to justify those conclusions.

12.3 But knowledge of itself is not decisive. It is, however, indicative of the level of control which the ESB could exercise over any danger deriving from a flood flow of water in the River Lee upstream of its dams. Those findings, in our view, therefore

support the conclusion that the ESB had a special level of control, not least because it had a great deal of empirical information which would allow it to operate its dam system in a way which had the potential to have a very significant effect on alleviating downstream danger.

12.4 That level of control was not, as such, based on any legal power. However, we have already indicated that we do not consider that the special level of control required to impose a duty of care which goes beyond "do no harm" must necessarily arise from a legal power. In all those circumstances, we are satisfied that the first element of the requirement for the imposition of a duty of care does arise in the circumstances of this case. The ESB had a significant level of special control over the risk of danger arising from flood conditions upstream of the Lee Dams. However, as we have already pointed out, such an assessment is not the end of the matter. It is necessary to go on to consider whether the other elements of the assessment which the Court must make arise in the circumstances of this case. The first such consideration is the burden which any asserted duty of care would place on the party having special control.

12.5 It is important, in the context of assessing the relevant benefits and burdens, not to be drawn into giving weight to hindsight. We note the evidence, accepted by the trial judge, which suggested that the potential loss of revenue which might have been suffered by the ESB, had it acted in a way which did not maximise the opportunity to generate electricity, was of the order of €100,000 – €130,000. There does not seem to be any basis for suggesting that any greater risk to revenue might have been considered likely in advance of the decisions taken at the relevant time. It is also clear that other factors, such as demand or the sources of energy, can affect the amount of electricity which it is considered desirable to generate from any particular source at a given time. Even in the absence of the particular circumstances which arose on the River Lee in

November 2009, it seems that maximising electricity generation is not always the only consideration. We do not consider, therefore, that imposing a duty of care which might require a relatively small reduction in the amount of electricity which could be generated would, as was argued by the ESB, have a prejudicial impact on the public interest.

12.6 Against that it is clear not only that there was, as found by the trial judge, awareness on the part of the ESB of the risk but also, at least in general terms, the potential scale of that risk.

12.7 In those circumstances, we are satisfied that there was more than a reasonable relationship between the harm that would be avoided by taking measures which paid proper regard to protecting downstream land occupiers and any burden which acting to protect those land occupiers would place on the ESB. The second aspect of the analysis identified earlier also, therefore, leads to the conclusion that a duty of care existed.

12.8 Finally, it is necessary to identify whether it is possible to specify the extent of that duty of care in a manner which would not render the obligations placed on the ESB impermissibly vague. In that context the trial judge identified the obligations of the ESB in the circumstances as requiring that, insofar as possible, the levels in the Lee Dams be maintained at TTOL and, in substance, held that TTOL was in effect MaxNOL in that spillage should occur in order to keep the level at TTOL.

12.9 Specifying the duty of care in that way would, at least, have the virtue of providing absolute precision. However, that finding of the trial judge was criticised by the ESB on a number of grounds including the suggestion that to impose a duty of care which would have required keeping the level not above TTOL would have amounted

to an excessive, and thereby impermissible, interference in the operations of the ESB. Such a duty was argued to be highly invasive and prescriptive.

13. The Test

13.1 We consider that this latter criticism is well made. As in all areas of the application of the law of negligence, the obligation on a party who owes a duty of care is to exercise reasonable care in relation to whatever activity they are involved in. In our view, the duty of care arising in this case is best expressed as an obligation to assess, having regard to existing conditions and relevant weather forecasts, the likely range of possible outcomes for downstream land occupiers and to form a reasonable judgement as to how to manage the Lee Dams so as to minimise the risk to those downstream land occupiers, provided that any actions which might be required for that purpose would not place an excessive burden on the ESB. It seems to us that identifying a duty of care in those terms is not impermissibly vague. There may, as in many cases such as those which we analysed earlier, be a certain grey area where a judgement call might have to be made. But similar grey areas exist in many applications of the general principles of the law of tort.

13.2 In conclusion on this aspect of the case we have, therefore, determined that the ESB had a significant level of special control over water levels in the River Lee downstream of the Lee Dams. While that control was practical rather than legal, we nonetheless consider that it is sufficient to potentially give rise to a duty of care. We have also concluded that the burden which would have been imposed on the ESB by requiring it to have regard to the interests of downstream land occupiers, at least in the particular circumstances which prevailed in November 2009, was such that it is appropriate to impose a duty of care to downstream land occupiers having regard to the relatively minor burden which would have been placed on the ESB by requiring it to so

act. Finally, we have concluded that it is possible to characterise the duty of care in question in a manner which is not impermissibly vague.

13.3 In all those circumstances we are satisfied that the ESB owed to downstream land occupiers a duty of care to assess, having regard to existing conditions and relevant weather forecasts, the likely range of possible outcomes for downstream land occupiers and to form a reasonable judgement as to how to manage the Lee Dams to minimise the risk to those downstream land occupiers provided that any actions which might be required for that purpose would not place an excessive burden on the ESB.

13.4 We also consider that this case can readily be distinguished from *Cromane*. In that context, a number of features of this claim are to be noted. What is in issue in this appeal relates to how the ESB operated the Lee Dams. What is in question is not some matter of policy, as was the case in *Cromane*. Nor is there here, as there was in *Cromane,* any question of mistake by State authorities on a legal issue. This case is one, rather, where there was a sufficiently close degree of proximity between the ESB and UCC as to give rise to a duty of care from the former to the latter. It was readily foreseeable that incorrect decision-making on the part of the ESB in relation to the reservoirs and the dams could have real consequences for UCC. While the 1995 Act outlined the powers of the ESB, it cannot be said, on a proper reading of that Act, that, in carrying on the operation of the facilities, the ESB was acting "under law", in the sense which that issue arose in *Cromane*, where the Minister was operating on an incorrect understanding of the law. It cannot be said either that there are any countervailing policy factors which would warrant excluding liability. In fact, we consider the contrary to be the case. (See *Glencar).* We consider that the limited exception to the "do no harm" limitation on the imposition of a duty of care which we have identified is an appropriate evolution of the case law consistent with such general

principles as can be discerned in the existing jurisprudence and also with the "evolution by analogy" approach.

13.5 It follows that it is necessary to next consider whether the ESB was in breach of that duty of care.

14. Was the ESB in Breach of the Duty of Care?

14.1 A key finding of the trial judge, in our view, was to the effect that the ESB had not done any risk assessment on the effects on downstream land occupiers of the operation of the Lee Dams other than in the context of a catastrophic dam failure. In one sense that may hardly be surprising. Clearly the ESB did not consider that it owed any duty of care to downstream land occupiers other than in the context of either allowing more water to come out downstream of the Lee Dams than had come in upstream or in the context of a dam failure. In fairness to the ESB, it should also be acknowledged that they had, from time to time, operated the dam system in a way which may well have been of assistance to downstream land occupiers. However, the fact remains that no risk assessment had been carried out as to the likely effects on downstream land occupiers of the sort of events which were to take place in November 2009.

14.2 It must be acknowledged that any obligation arising under a duty of care must go no further than to require a party to take reasonable care. The ESB are not a guarantor that problems might not arise anyway. While weather forecasting is an increasingly accurate science, at least in the short term, it is not infallible. On the evidence in this case, matters such as the saturation of the ground in the catchment area of the river leading to a high level of run off from that land into the river was a factor. However, the extent of the likely effect of a factor such as that would not necessarily be known to a high level of precision. There will inevitably be legitimate judgement

calls involved in estimating the likely consequences of adopting any particular method of managing the Lee Dam system. Provided that a reasonable judgement call is made in all the circumstances then there could be no negligence in the first place.

14.3 On the facts of this case, and in the light of the findings of fact of the trial judge, it is clear that there was a significant body of information available to the ESB in the immediate run up to the events leading to the flooding of UCC, from which it was clear that reducing the level in the Lee Dam system was reasonably likely to lead to a situation where there was a real prospect of a significantly more benign result for downstream land occupiers when and if the forecast very significant rainfall occurred.

14.4 This was not a case, for example, such as faced the Supreme Court of Arkansas in *Power and Light Company*, where what happened was significantly different from the forecasts or, indeed, one where the consequences could not have been predicted. Rather this is a case where it would have been reasonably clear that reducing the level in the dam system, and thus increasing its capacity to take a greater volume of rainfall, would have been likely to have a significantly positive impact on the downstream flow of water and, consequently, on the risk of flooding to downstream land occupiers.

14.5 As noted earlier, it seems clear on the evidence that the ESB did not consider that it had an obligation to have regard to the risks to downstream land occupiers which would result from failing to manage the dam system in a way which would give it greater capacity to absorb the anticipated rainfall. This is not a case, therefore, where it can be said that a rational and reasonable decision was made as to the precise manner in which the dam system should be managed so as to have regard both to the duty of care, which we have identified in respect of downstream land occupiers, but also to the ESB's obligation and entitlement to generate electricity and also having regard to the entitlement of the ESB to avoid an excessive burden in acting in the interests of

downstream land occupiers. We would consider that, in such a situation, a hydroelectric operator such as the ESB would be afforded a material margin of appreciation in making a judgement call on the appropriate balance between such matters.

14.6 However, we do not consider that there was any evidence which suggests that the ESB would, by reducing the level to at or near TTOL in the particular circumstances of this case, have placed any significant risk over its ability to generate electricity both in general terms and at least close to a manner which would maximise its economic benefit. In so saying, we would not go so far as the trial judge in deciding that the duty of care owed by the ESB required it to reduce the level to TTOL. It might well have been open to the ESB, for good reason, to have picked another level, above TTOL, which would nonetheless have provided for the likelihood of significant mitigation of the effects downstream but which might have been considered appropriate to enable the ESB to maximise electricity generation.

14.7 But it does not appear to us that any such decision was taken. Had such a decision been taken it would have been necessary to assess whether the considerations which led to it involved a reasonable relationship between the risks being taken in respect of downstream land occupiers and any departure from optimum conditions for the ESB. However, in our view, no such decision having been taken, and there being no evidence of any such exercise being carried out, we must conclude that the ESB cannot escape liability of the basis of that leg of the test, which determines that an alleged wrongdoer cannot be liable if the actions which might otherwise have been required of it would give rise to an excessive burden having regard to the foreseeable risks, on the one hand, and the consequences of taking action to diminish those risks, on the other.

14.8 In summary, we conclude that the ESB had in its possession more than sufficient scientific expertise and knowledge to be able to assess the potential effects on downstream land occupiers of any failure to increase the capacity of the Lee Dams so as to enable that system to absorb more of the anticipated storm flooding which the weather forecasts had reasonably accurately predicted. Given that we have determined that the ESB owed a duty of care, in the circumstances of this case, to make such an assessment and to have regard to the interests of those downstream land occupiers, we are satisfied to hold that the first aspect of the test which we have identified was established on the facts of this case.

14.9 So far as the second aspect of the test is concerned, we have also concluded that no judgement call was made as to the proper course of action to adopt which had included, as part of its analysis, the interests of downstream land occupiers. Likewise, it does not appear that any particular judgement call was made which also factored in any potential burden which would have arisen from altering the operation of the dams in a manner which would have given added protection to those downstream land occupiers. In the light of those findings we must hold that the ESB cannot escape from a liability which might otherwise arise on the basis of having made a reasonable balancing call in all the circumstances of the case.

14.10 We have already determined that the third leg of the test, being the question of whether any asserted duty of care can be defined with sufficient clarity to avoid it being impermissibly vague, is met in the circumstances of this case.

14.11 It follows that we are satisfied that the ESB was in breach of the duty of care which we have earlier identified. That finding is based on our analysis of the particular exception to the "do no harm" principle which places a duty of care on a party who has special control over a danger independently arising.

14.12 As to the other routes by which UCC sought to establish liability, we consider that difficult questions, both of law and of fact, would arise in relation to the possibility that liability might also have arisen under the "assumption of responsibility" leg of the potential exceptions to the "do no harm" principle identified in *Robinson*. Like difficulties, both of law and of fact, would arise in considering any potential application of the *Leakey* jurisprudence. A determination of those issues might well have consequences well beyond the facts of this case. In addition, findings in respect of those questions could not alter the result of the case. On that basis we think it would be best to leave such questions to a case in which they might prove decisive.

14.13 We would, therefore, confine ourselves to determining that the ESB is liable in negligence to UCC on the narrow basis which we have identified.

15. **The Consequences**

15.1 Having found that the ESB were in breach of a duty of care which they owed to UCC, it follows that this aspect of the appeal must be allowed. In those circumstances we have concluded that it is neither necessary nor, in the circumstances of this case, desirable to deal with some of the other issues which might have required determination in the event that we had come to a different view on the question of the duty of care.

15.2 We would emphasise that we have not reached any conclusion as to the applicability in this jurisdiction of any of the other aspects of the decision of the Supreme Court of the United Kingdom in *Robinson*. We have confined ourselves to determining that one of the exceptions to the do no harm rule which exists in this jurisdiction is equivalent to the special level of control exception identified in *Robinson*. The evolution, so far as the common law as it is understood in Ireland is concerned, of other exceptions should, we suggest, be considered on a case by case

basis having regard to the approach to the proper evolution of the law adopted both in *Morrissey* and on this appeal. However, we would propose that further consideration be left to cases in which a detailed analysis of such issues would prove decisive to the result.

15.3 Precisely because such issues can raise complex and difficult questions, we do not consider that it would be appropriate to express any views on those questions beyond those referred to above.

15.4 We have in addition taken a similar view in respect of the nuisance/*Leakey* basis on which the High Court also found in favour of UCC but on which the Court of Appeal found in favour of the ESB.

15.5 Finally, as already noted, the question of whether the ESB was negligent in respect of the warnings which it gave could not alter any award of damages which might legitimately be made under the heading of negligence in the operation of the Lee Dams. It follows that it is also unnecessary to deal with that issue.

15.6 We should also emphasise that the basis on which we have found that the ESB was negligent is not exactly the same as that adopted by the High Court. It is clear that the only damages, at the level of principle, to which UCC are entitled are damages representing the difference between the losses actually incurred and any losses which might have resulted in any event had the Lee Dams not been operated in a manner which we have found to be negligent. Determining what damage can be attributed as being causally linked to the negligence of ESB on that basis is a matter which the High Court will have to assess.

15.7 Finally, it follows from our finding that, at least in general terms, the High Court was correct and the Court of Appeal incorrect on the question of the liability of the ESB for negligence, that the question of contributory negligence on the part of

UCC remains a live issue. It will be necessary, therefore, to conduct a further hearing of this Court on that issue. Case management arrangements will be put in place to facilitate such a hearing in early course.

16. Conclusions

16.1 It is important to yet again emphasise that the only issue with which this judgment is concerned is the question of whether the High Court or the Court of Appeal were correct in their respective findings on the potential liability of the ESB for negligence and/or nuisance.

16.2 For the reasons set out earlier in this judgment, we have concluded that the approach identified in more recent United Kingdom case law, which analyses liability on the basis of a "do no harm" approach, is to be preferred to the more traditional consideration which differentiated between acts of commission or acts of omission. However, we have also identified that there can be exceptions to the "do no harm" rule such that a duty of care may arise, in certain limited circumstances, to confer a benefit.

16.3 We consider that one such exception arises where a party is in a special position of control enabling them to prevent harm being caused by a danger independently arising. While we consider that the special level of control in question does not necessarily have to arise from the existence of a legal power, we are satisfied that it must be substantial and not tangential. We also suggest that it must be shown that there is a reasonable relationship between any burden which would arise from imposing such a duty of care and the potential benefits to those who may be saved from the danger in question. In addition, we are satisfied that it is necessary to ensure that it is possible to define the duty of care in question with a sufficient, but not absolute, level of precision so as to avoid imposing a burden which is impermissibly vague and imprecise.

16.4 Applying that principle to the circumstances of this case we have concluded that the ESB did owe a duty of care to landowners and occupiers downstream of the Lee Dams. This duty of care arises on the basis that the ESB did have a special and substantial level of control which would enable it to prevent or reduce harm arising from a flood danger, that the duty concerned could, in the circumstances which prevailed in November, 2009, have been complied with without placing a disproportionate burden on UCC and that the duty concerned could be specified with reasonable clarity so as not to impose an impermissibly vague obligation on the ESB.

16.5 For the reasons also analysed in this judgment, we have concluded that the ESB was in breach of that duty of care.

16.6 In those circumstances, we did not consider it either necessary or appropriate to deal with the other bases on which it was argued that the ESB might be liable.

16.7 It follows that we consider that the appeal brought by UCC against the finding of the Court of Appeal (which in turn allowed the appeal against the decision of the High Court in its favour) must be allowed insofar as it relates to the overturned finding of negligence on the part of the ESB. It also follows, in turn, that we suggest that it will now be necessary for this Court to consider the cross-appeal brought by the ESB against the finding of the Court of Appeal (again overturning the decision of the High Court) to the effect that there was not contributory negligence on the part of UCC. Case management arrangements will be put in place in early course to ensure a hearing in that regard.

16.8 Finally, and having regard to the fact that we suggest a finding of negligence against the ESB, we propose that it will be necessary for this case to continue in the High Court so as to assess such damages as can be established as being causally linked

to the negligence which we have found to have occurred. It obviously does not follow that all of the damage suffered by UCC will necessarily be the subject of compensation. It will be necessary for the High Court to assess the extent, if any, to which there would have been damage to UCC without negligence on the part of the ESB. Whether any damages awarded on that basis will need to be reduced to reflect a finding of contributory negligence will, of course, depend on the outcome of the second leg of this appeal.

16.9 However, and subject to the views of the parties and of the High Court, we do not see any reason why the assessment of damages cannot progress pending a final decision by this Court on the question of contributory negligence for the only effect of that decision will be to determine whether there needs to be a percentage deduction from the damages which could properly be awarded and, if so, what that percentage should be. We believe that these long standing proceedings should come to as speedy a conclusion as can justly be delivered and, in the absence of some significant countervailing factor of which we are unaware, consider that this can best be achieved by allowing the assessment of damages to be conducted in parallel with the hearing of the second leg of this appeal.

Annex 1 – Inniscarra Reservoir and Discharge Levels