THE COURT OF APPEAL

Neutral Citation Number: IECA 82

[2016 No. 92]

The President
Irvine J.
Whelan J.

BETWEEN

UNIVERSITY COLLEGE CORK – NATIONAL UNIVERSITY OF IRELAND

RESPONDENT

AND

ELECTRICITY SUPPLY BOARD

APPELLANT

JUDGMENT of the Court delivered by the President on 20th March 2018

Introduction

1. ESB operates hydroelectric generating systems on five Irish rivers, including the River Lee, which has two stations with which this case is concerned. The Lee Scheme was constructed in the 1950s, pursuant to statutory authorisation under the Electricity (Supply) (Amendment) Act 1945. Inniscarra station is located upriver of Cork City some 13km from the campus of UCC. Carrigadrohid station is further again, 14km from its sister facility. They work together for the most part with the outflow from Carrigadrohid feeding into the Inniscarra Dam. In normal operation mode they are centrally controlled from Turlough Hill Control Centre in County Wicklow, but in flood conditions the local staff manage the systems from Inniscarra. Operators are nevertheless on hand at Carrigadrohid in case communication between them becomes impossible.

2. November 2009 was a time of very wet weather in Ireland and particularly in the Cork region. A severe storm on 19th and 20th brought heavy rains to the whole country. ESB's hydroelectric stations had to be carefully monitored to ensure that they did not become dangerous by reason of any threat to dam integrity. The storm on the Lee was the worst in the history of the dams and possibly for nearly 100 years. As the water levels rose further and further to the maximum permissible levels and beyond in the Lee dams, ESB controllers allowed the flow of the river through the system to increase gradually but very substantially in accordance with their protocols for such situations. That meant ensuring that the outflow from the dams was less than what was coming down the river into the reservoirs. The eventual maximum quantity of water going downriver was destined to result in severe flooding. Whereas operators could assume that a flow of 150 m3/s would stay within the river banks, they ultimately had to release more than 500 m3/s until the storm abated and water levels fell.

3. As the situation developed during 19th November, ESB activated its notification system by alerting people on its contact list that water discharges from Inniscarra were being increased to deal with the swollen flow of the river and the risk of flooding. When things got even worse, the warnings became more severe and urgent and were broadcast widely in the region.

4. There was extensive flooding in Cork City. UCC was severely affected, with many low-lying buildings suffering damage from water.

5. In due course, UCC sought to recover the substantial cost of repairs and losses from ESB, which it blamed for the flooding of its campus buildings. In January 2012 UCC issued proceedings against ESB claiming damages in negligence, nuisance and under the rule in Rylands v Fletcher but it subsequently abandoned the last of these liability claims.

The Case brought by UCC Concerning Flooding and Warnings

6. There were two elements to the claim advanced, concerning flooding and warnings. The essence of the flooding case was that ESB had a duty of care to avoid unnecessary flooding and that it was in breach of that obligation as a result of which UCC suffered substantial loss and damage. In regard to warnings, UCC acknowledged that ESB had given certain warnings but maintained that they were wholly inadequate.

7. In its defence, ESB denied liability, claiming inter-alia that the dams actually had an attenuating effect on the flood so that the flood water that came down to UCC in the river was less than would have been the case had the dams not been there. It maintained that it had given adequate warnings in accordance with the obligation it had undertaken. All the claims other claims and a plea of contributory negligence advanced.

8. The flooding case UCC made in the High Court was not that ESB had opened the gates of its dams and released stored water, but that it should have had more space in them to absorb flood waters when they arrived. It alleged that ESB owed a duty of care to UCC and other downstream occupiers to avoid unnecessary flooding. It should, according to UCC, have anticipated the heavy inflow of water that the storm would bring and made sure that there was space in the reservoirs to accommodate a sufficient amount of the inflow as would have prevented a substantial part of the damage UCC suffered.

9. ESB did acknowledge having a duty of care in respect of two risks, but only those two, namely, dam failure and flooding caused by the release downriver of more water than came in to the dam. A major plank of defence was that, far from worsening the flood ESB had improved the situation over that which would have pertained if its stations were not there. It maintained that its statutory function was to generate electricity and, while it endeavoured to avoid spilling water and reduce flooding in a manner consistent with its primary obligation, it was not in any way legally bound so to do. It did not owe a duty of care to avoid unnecessary flooding, as claimed by UCC. There were many reasons why such a legal requirement was erroneous as a matter of law. Neither could it work in

practice because it is hopelessly vague, the theory on which it is based is illogical and it is not justified by law.

10. The case was unusual to say the least. The hearing in the High Court occupied some 104 days. The documentary material put before the Court amounted to more than 100 books. The trial judge referred to the cornucopia of law that had been furnished to him. In spite of this intimidating burden, the judge delivered his judgment with remarkable and enviable expedition. The judgment itself is something of an epic, extending as it does to more than 500 pages, in addition to appendices that account for a further 50. It is fair to acknowledge the extraordinarily difficult task that the High Court undertook and discharged in a remarkably short time for such an extraordinary undertaking.

11. The first paragraph of the judgment contains the essence of the judge's finding on the flooding issue.

> "In the waning hours of 19th November, 2009, and on into the early hours of the 20th , a great volume of water that had been released through the Lee Dams and then flowed down the Lee Valley, entered Cork City and flooded the campus of University College Cork. The university claims ESB, as dam operator, is liable in nuisance and negligence for the damage caused. ESB claims the university is liable in contributory negligence. Both are correct."

12. The judgment repeated the quoted statement at paragraph 1188 in the concluding paragraph, adding the Court's decision on the apportionment of liability, attributing 60% liability to ESB and 40% to UCC. UCC succeeded in persuading the High Court that ESB owed it a duty to avoid unnecessary flooding. The judge held that ESB was liable in negligence and nuisance in regard to flooding and warnings. On flooding, he concluded that ESB should have created space in the reservoirs for more water. It should have kept levels lower, at a specific optimal level that ESB had identified in its own documents as the target top operating level, TTOL. This is a pivotal finding in the case. The Court found ESB guilty of further wrongs including having inadequate discharge rules and ESB's failure to undertake risk assessments. However, it was the trial judge's conclusions concerning flooding on which his primarily finding of liability depends.

13. ESB maintained that it fully discharged its legal obligations pursuant to its statutory mandate and common law. Moreover, and fundamental to its defence was the fact that its scheme did not add in any way to the flooding, but actually reduced it.

14. In respect of the appeal, this Court is satisfied that the conclusions reached by the learned trial judge in imposing liability on ESB in respect of flooding and warnings are erroneous and that the appeal must be allowed. 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.

15. In this judgment, the Court sets out the reasons for these conclusions. This Court has not undertaken to address the judgment of the High Court paragraph by paragraph first because it is not necessary to do so and, secondly, because it would be quite impracticable. This Court concludes that the High Court erred in fixing TTOL as the level that ESB was obliged to observe for the water in its reservoirs; that the statutory provisions for the Lee Scheme did not envisage the imposition of a policy imperative of flood alleviation as imposed by the High Court; that common law did not oblige ESB to observe such a duty; that ESB did not by its actions and words take on such liability; that whereas TTOL was an unjustified specific instruction, unnecessary flooding was impractically vague and unachievable; that the law of nuisance did not supply what negligence could not; that the warnings ESB gave were adequate in the circumstances; and that overall the action should not have succeeded. Other matters considered relevant are also addressed, including contributory negligence, which does not arise in light of the Court's decision unless the matter proceeds to a further analysis. The Court endevours to follow this general sequence.

The High Court Judgment

16. Before describing the judgment under appeal it is necessary to introduce the protocols of operation and management of the generating stations.

17. ESB created its own rules and procedures in a collection of instructions called 'The Lee Regulations'. They are not, despite the formal title, of statutory or official origin outside of the ESB. These internal regulations were first embodied in a document produced in 1969 and they have been revised from time to time since the first edition was circulated. The Lee Regulations cover the operation of Carrigadrohid and Inniscarra stations. They deal, *inter alia*, with operation, management and control in normal conditions and in flood situations. They provide for emergencies, with a checklist of the steps that the local operator is to take. They have contact phone numbers of senior personnel if they are needed. The regulations have been adapted to take account of system changes as well as structural alterations in the dams and machinery. The fact that ESB was in a position to make these regulations without reference to official sanction is probably a reflection of its previous embodiment as a national statutory corporation or a semi-State body as these enterprises used to be called.

18. It is important for electricity generation that there is sufficient water to work the turbines and so the regulations provide for a minimum level in the reservoirs. Of more critical concern is the maximum height or level of water because every dam operator must avoid overtopping. If the water level is too high i.e. in excess of the maximum safe level, the danger exists of dam failure resulting from spilling of large quantities of water over the top of the barrier. The forces that come into play in that situation risk undermining the base of the dam and in the consequential collapse of the whole or part of the retaining structure. That would be a nightmare scenario of catastrophic proportions. There is, accordingly, a maximum, normal operating level, MaxNOL, that may not be exceeded; if water reaches that level, the operator must urgently reduce the level by spilling water as a priority over all other concerns including production of electricity.

19. Another concept the subject of major controversy in this case has the acronym TTOL, the Target Top Operating Level. It will be necessary to discuss this concept in detail. Not only did it feature prominently in the expert evidence and in submissions in the High Court, it occupied a pivotal position in the trial judge's reasoning and decision, making some 300 appearances in his judgment.

20. The Lee Regulations: Regulations and Guidelines for the control of the River Lee, revised December 2003 provide a definition of this term as follows:

> "The 'target top operating level' which the station shall endeavour to maintain during non-flood conditions. The target top operating level varies throughout the year to take account of seasonal factors such as low flows in summer and likely floods in winter. See Drawing" [giving reference and title and location in Appendix 6].

21. The judgment makes frequent reference to the first part of this definition and to the statement of evidence of Mr. Brian O'Mahony, chief engineer of the ESB. The full passage in the statement at page 35 is as follows: –

"TTOLs are basically economic targets, whose main purposes are to provide for optimising availability for power generation and minimising unnecessary spilling of water from the reservoirs. The TTOLs are higher in Summer, to allow for greater storage of water during dry periods. This ensures that the stations will be available for electricity generation for longer during dry weather periods. The TTOLs are lowered during Winter, when inflows to the reservoirs are higher, to avoid the need for spilling water, except after significant rainfall. The TTOLs are not intended to have any role with regard to dam safety or flood management. TTOLs are operational targets for the stations and lie within the operational band between the Maximum and Minimum Normal Operating Levels. As the name suggests, discharges from the reservoirs in their operational bands are normally only through the turbines, as part of normal station operations. Exceptions to this are when decisions are made to increase discharges in advance of a potential flood, in which case, water will also be spilled through the deep sluices at Carrigadrohid and the spillways at Inniscarra."

22. In a document entitled 'Lee Plant Controllers HCC Instructions' – document ESB – 700019 – 29 dated 04/03/2004, at page 9 the statement appears: "Levels should be maintained as close as possible to the winter and summer operating levels". The trial judge held that the different, individual TTOLs for the two reservoirs were binding measures which the ESB was obliged to respect by keeping water at no higher level and by spilling down to that measure if the water level rose above it. I introduce TTOL at this point before describing the findings of the trial judge and to give some indication of the nature of the controversy that exists about this concept. It was not even agreed between the parties in the High Court that TTOL is a specific level.

23. The Lee Regulations provide for advance discharges to be made by the Hydro-Manager on the advice of the Hydrometric Officer in order to increase storage or to reduce flooding at a later stage. This can happen when the available information indicates that spilling is likely within hours or days. From operational experience, the ESB knows that discharges of up to 150 m^3/s will be contained within the banks of the river. It is a rule that the peak discharge not exceed peak inflow during the rising flood. More water does not go out than comes in. Appendix 5 of the Regulations contains information that flooding of homes downstream of the dams has not occurred with discharges of up to 250 m^3/s.

24. During a flood period, which is a decision for the Hydrometric Officer, the top priority is dam safety, otherwise known as dam integrity. All other factors are secondary. In cases of spilling at Inniscarra at more than 150 m^3/s the regulations provide for flood warnings to be given. The precise nature of those warnings is detailed later in this judgment.

25. There is a table of discharges for each dam so that they are increased gradually when conditions demand larger discharges than 150 m^3/s so that there is not a sudden large swell but rather an incremental increase in volume flowing down the river. Another table provides for discharges during and following a flood, again subject to outflow not exceeding inflow.

26. Turning now to the judgment of the High Court. In Chapter 47, under the heading Key Questions of Fact Arising, the High Court judge answered no less than 261 questions submitted by the parties. The Court was concerned that key issues of fact might be lost and for this reason he asked the parties to identify the key questions which, in their opinion, needed to be addressed. Inevitably, they were unable to agree and supplied separate lists.

27. The questions proposed by the parties raised many different issues. The Court's many answers to the questions posed include the following findings:

(i) TTOL is the top operating level which the Lee Stations must endeavour to maintain during non-flood conditions, both by reason of the Lee Regulations and as a matter of law.

(ii) Hydro-generation is what the Lee Scheme is designed and engineered to do; the Court did not accept that the Lee Dams are multipurpose dams.

(iii) In-flow during the flood-event of November 2009 exceeded all other recorded events since the Lee Scheme commenced in 1957.

(iv) The water levels were too high in the period leading up to 19th November 2009.

(v) Had water-levels been maintained at lower levels, closer to and/or at TTOL prior to 19th November 2009, this would have made a difference to the flooding experienced by UCC in November 2009.

(vi) Had ESB made advance discharges above 150m3 /s on 16th and/or 17th and/or 18thand/or 19th November 2009, this would have made a difference to the flooding experienced by UCC in November 2009, but for ESB to do so would, it appears, have led to its flooding other people's property, something it cannot lawfully elect to do.

(vii) UCC was unsuccessful in establishing, on the balance of probabilities, an alternative sequence of discharges in which ESB could have engaged on the 19th.

(viii) ESB's management of the Lee Dams in November 2009 attenuated flooding both by comparison with the in-flow to the reservoirs, and by comparison with fluvial conditions that would have prevailed in the absence of the Lee Scheme but greater alleviation or obviation of flooding would have occurred through consistent operation to TTOL.

(ix) ESB's discharge in November 2009 did not cause any material and avoidable worsening of the flood by reference to tide, tributaries or rate of rise, if one looks to the water-levels that presented but it did so if one has regard to the fact that those start-levels were too high because of its persistent failure to operate to TTOL.

(x) International practice insofar as known to the Court or any proven hydro-electric standard of performance in 2009 applicable to a hydro-electric operator did not require that such hydro-electric operator should devise a flood alleviation standard other than in respect of the design storm; neither did such practice require that it not be TTOL (by whatever name or acronym known). As to a 'proven hydro-electric standard of performance', the Court referred to a previous answer.

28. The High Court judge expressed his conclusions at paragraph 1187 as follows:

"(1) ESB could, and should reasonably, have reacted to the weather forecasts it received on and from 16th November, 2009, so as to spill water earlier and in greater amounts than it did, and thus created the space for more water at the Lee Reservoirs;

(2) ESB could and should reasonably have maintained lower water levels than it did in the Lee Reservoirs in the period leading up to 19th November, 2009, specifically by operating consistently to TTOL *("the highest level allowable in the operation of the reservoir under normal operating conditions"* (Lee Regs, *iv*), and a level aimed at *"optimising availability for power generation and minimising unnecessary spilling of water from the reservoirs"* (O'Mahony Affidavit, 35));

(3) the dam-discharge rules operated by ESB were neither necessary nor appropriate in the circumstances presenting in November 2009 and this was recognisable at the time;

(4) had ESB operated consistently to TTOL, such discharges as occurred would have been neither necessary nor appropriate;

(5) during the flood events of 19th /20th November, 2009, ESB failed in meeting the standard set by its own 'do not worsen nature' rule of operation;

(6) during the said events, ESB operated a system of discharges intended to maintain dam integrity in the face of a storm that it was obvious at the time was not a design storm, but by failing to pre-plan properly was equipped only to release discharges that satisfied the demands of the design storm;

(7) ESB failed to give to anyone, including UCC, adequate and/or timely warning about the events that ESB knew to be presenting;

(8) ESB failed to undertake any adequate risk-assessment exercise that, if properly undertaken, would have quickly identified the manifold deficiencies that presented in the Lee Regulations and in ESB's operation of the Lee Dams and which were causative of the damage suffered by UCC in November 2009; and

(9) UCC failed to take any of the many reasonable steps, not least in terms of its pitching of floor-levels and development of a campus-wide flood-response plan that it could and should have taken in respect of the siting and safe preservation of those of its properties that were flooded in November 2009.

29. The trial judge concluded, accordingly, that ESB was negligent and also liable to UCC in nuisance because it did not provide more storage space for water in its reservoirs in the period leading up to the storm of 19/20th November 2009. ESB, he found, had a duty to keep the reservoir levels at TTOL; the general duty was to avoid unnecessary flooding, as UCC had contended, which meant in the particular circumstances maintaining water-levels at these specifications. The judge arrived at this conclusion by a process of reasoning that may be outlined broadly as follows:

(i) ESB was conducting a hazardous commercial operation.

(ii) It had the capacity to alleviate flooding.

(iii) It was aware of the danger of large flows of water on downriver properties.

(iv) It had previously operated policies of flood avoidance/reduction.

(v) ESB personnel had made statements extolling the flood alleviation properties of the hydroelectric stations.

(vi) Documentary evidence confirmed that ESB had a policy of avoiding flooding.

(vii) ESB had accepted that it had a duty of care to downstream occupiers such as UCC but its attempt to limit the scope of that duty to merely not letting out more water than came in, was essentially meaningless. That was no more than reflecting the legal obligation that rested on ESB in law under the rule in *Rylands v Fletcher* and the law of nuisance. The duty of care had to mean something more. In his view that duty extended to the obligation to avoid unnecessary flooding and specifically to maintain reservoir levels at TTOL.

(viii) The defence advanced by ESB that its duty was no more than was expressed in the maxim "Do not worsen nature" could not succeed in circumstances where:

a. nature was in fact altered irrevocably by the construction of the hydroelectric station apparatus including the dams;

b. the operation sometimes did in fact worsen nature when a discharge was made to lower the level in the reservoir;

c. ESB had taken on the role of flood avoidance;

d. The Lee Regulations envisaged flood avoidance;

e. TTOL was a standard specified by ESB which it was required to achieve and maintain.

(ix) The cases from other jurisdictions concerning dam liability cited by ESB could be distinguished or according to the trial judge were wrongly decided.

(x) In respect of contributory negligence, the Court made a finding, inter-alia, that UCC was responsible for the acts and omissions of its expert advisers in respect of its buildings.

30. Three crucial interlocking issues lie at the heart of the case:

(i) Did ESB owe a duty to UCC and other downstream occupiers to avoid unnecessary flooding?

(ii) Was ESB obliged in pursuance of such duty to keep the water level in its reservoirs to TTOL?

(iii) Is it a defence for ESB that it did not add to the flow of water in the river at any material time in relation to the flood events of 19/20 November 2009?

31. TTOL is so dominant as a basis for the High Court's finding of a duty of care and also as the standard of care to be achieved that it occupies a position of importance over any other issue. It makes its first appearance early in the judgment and is a constant presence in the reasoning of the trial judge. The number of appearances and the extent of the reach of this concept make it clear that the validity of the conclusions in regard to TTOL played a major role in the liability conclusions of the High Court judge. If the trial judge's conclusions on this central pillar of the rationale of the case are incorrect, the appeal must succeed. By the same token, if the High Court was correct in regard to TTOL that buttresses UCC's resistance to the arguments of the ESB.

32. In relation to TTOL the trial judge found that ESB should have operated its hydroelectric facilities in a manner that maintained storage space to accommodate the large volume of water coming into its reservoirs so as to reduce the risk of flooding to properties located downriver. The trial judge's other conclusions supporting his finding of liability on the part of ESB echo or reflect this crucial determination or else follow on from it. Thus, the operation and maintenance by ESB of its reservoirs and dams are considered against this background. Similarly, the duty to warn – although not the adequacy of warnings – arises from the obligation that the Court identified. It follows that the liability imposed by the High Court on the ESB and the outcome of this appeal depend on whether the High Court was correct in this finding of liability.

33. The High Court concluded on the evidence that if ESB had kept its reservoir levels lower at TTOL, as the Court found it was obliged to do, the flooding at UCC would have been less damaging. UCC's case was that almost all of its buildings would have been spared and there is no doubt but that significantly less damage would have been done.

The Appeal

ESB's Principal Grounds of Appeal
34. The trial judge held that ESB reduced flooding on 19/20th November 2009 by holding back some of the water flowing down the River Lee but it had a duty to hold back more water, such duty being to avoid unnecessary flooding.

35. The duty so imposed is novel and troublesome and its formulation and application by the trial judge were wrong in legal principle and factually misconceived.

36. A duty to avoid unnecessary flooding is meaningless without a clear and objective principle to differentiate necessary flooding and unnecessary flooding but there was none.

37. The decision rejected the correct reference point for distinguishing flooding that was legally caused by ESB from flooding that was not – the natural flow of the river. An effect on the natural flow is the basis of ESB's potential liability, not whether the result is necessary or not. Aside from statutory authority, ESB is not entitled to cause any flooding, necessary or otherwise.

38. The duty formulated by the trial judge is correctly described as a duty to rescue, i.e. to prevent harm for which one is not responsible. The standard legal conditions for the imposition of such a duty were not present.

39. The duty was imposed in the teeth of a statutory scheme that is inconsistent with that, and in a manner that converted a statutory power to alter water levels in the river into a duty to do so in a particular way. This was impermissible in law.

40. The trial judge attempted to distinguish between necessary and unnecessary flooding by reference to an economic guideline – known as TTOL – used by ESB and hydro-electric generation. Thus, liability was based by the trial judge upon an internal regulation of ESB; made by ESB for its own purposes; interpreted by ESB in a manner that was never contradicted at the trial by any relevant evidence; and which was then re-interpreted by the trial judge as having a completely different meaning. That re-interpretation was then substituted for expert evidence as to how a reasonable hydroelectric operator would behave, in order to establish civil liability. It was necessary for UCC to convince the trial judge to use TTOL in this way because there was no evidence of hydroelectric practice before him to support any standard of care of the kind advocated. ESB is unaware of any case in the common-law world in which a duty of care, the standard of care, legal causation and the definition of recoverable damage have been established in this way.

41. As to warnings, the judgment took a duty assumed by ESB to provide notifications of a specific type – which ESB discharged – and derived from a duty to provide very different warnings, of the sort that a flood alleviation agency might give. Again, he dismissed international practice and explicitly transferred a standard from one activity into another.

42. In relation to contributory negligence, UCC's carelessness was so egregious as to break the chain of causation.

UCC's Summary of its Case in its Position Paper
43. ESB operates the Dams and Reservoirs at issue pursuant to statutory provisions which confer on the ESB and extraordinary statutory privilege to carry out operations and derive a profit from an inherently hazardous industrial process which poses a risk to downstream residents. Absent any statutory immunity, UCC maintains that ESB is under a duty to exercise its privilege reasonably and without negligence and without causing a nuisance except to the extent that this is a necessary consequence of the operation of the Lee Scheme.

44. The learned Judge's conclusion that, in the circumstances arising, that ESB had a duty of care not to cause unnecessary flooding cannot be impugned. ESB accepted that it owed a duty of care to persons downstream, thereby acknowledging the foreseeability of damage and proximity underlying such a duty. With respect to whether it was just and reasonable to impose a duty of care not to cause unnecessary flooding and to warn, UCC maintains that the learned Judge was correct in law and in fact in concluding that it was so just and reasonable.

45. The learned judge's conclusion that, as a matter of common sense and justice, ESB had a duty of care not to cause unnecessary flooding, is unassailable, given, in particular: the foreseeability of the damage caused to UCC; ESB's special and particular knowledge of the risk; ESB's capacity to minimise and reduce flooding; the harm at issue, namely, physical injury; and ESB's assumption of responsibility for flood alleviation.

46. The learned judge was correct in law and in fact to find that ESB had assumed a duty of care to avoid unnecessary flooding, given, in particular, that: ESB had made representations to "the world at large"; the Dams were operated so as to provide flood alleviation; and UCC reasonably relied on ESB's representations.

47. The learned Judge was equally correct in his conclusions on ESB's breach of its duty of care. Indeed, ESB accepted – in an Affidavit sworn by Ms. Louise Davies on behalf of ESB on 8th October 2014 – that it could have managed the Dams and Reservoirs differently in November 2009. The Court was correct in law and in fact in concluding that, independently of the foregoing statement of Ms. Davies, ESB had fallen below the standard of a reasonably competent dam operator.

48. With respect to nuisance, the learned Judge was correct in observing that the continuous previous state of affairs of maintaining water levels in excess of TTOL gave rise to liability in nuisance and that the facts gave rise to both private and public nuisance.

49. The trial judge's conclusion that the ESB's breach of duty and nuisance caused damage to UCC was fully supported by the evidence.

50. UCC referred also to its cross-appeal in respect of the trial judge's findings and apportionment on contributory negligence and costs.

Preliminary Notes on the Law
51. In the view of this Court, the trial judge conflated avoidability of harm and liability in tort. The test of liability either in negligence or nuisance is not whether the ESB knew that specific quantities of water in the flooded river passing through its plant and egressing the dams would cause flooding downriver. Conflating avoidability with negligence elides the distinct elements which it is incumbent upon a plaintiff to establish before liability negligence can be demonstrated.

52. The argument advanced on behalf of UCC was "If you can operate at the optimum and actually avoid a risk down-stream, then we say whatever about other cases, other circumstances, other levels, in this particular case there is no good reason why you don't operate at that level, given the huge consequences." (Day 3, p. 90). The Court is satisfied that on its true construction the duty being contended for by UCC is a bespoke duty tailored to it exclusively and directed to the an obligation to take whatever measures were necessary to obviate flooding particularly of UCC's buildings at any time when the river Lee was in flood or burst its banks.

53. It is noteworthy that on day 3 of the hearing variations of the word "avoid" were mentioned approximately 47 times. At its heart, the thrust of the plaintiff's argument is that since the harm to the plaintiff's property was avoidable and hence it was negligently caused.

Duty of Care
54. The present state of the law as expressed by the House of Lords in *Caparo v. Dickman* [1990] 2 AC 605 is for a three stage test to decide whether a duty of care exists: reasonable foresight, a relationship of proximity between claimant and defendant and a consideration of the question whether it would be "fair, just and reasonable" to impose a duty of care in the circumstances.

55. In *Glencar Exploration plc v Mayo County Council 2002 1 IR 84* Keane CJ stated

> "....in general, the law of negligence is directed to a positive act which causes injury or damage rather than a failure to take action so as to prevent such injury or damage. No doubt in the course of a particular operation an omission to do something may render the defendant amenable in damages: "

The Chief Justice continued;

> "Ultimately, in *Caparo plc v Dickman* [1990] 2 AC 605, a different approach was adopted, epitomised in a passage in the judgment of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at p. 481 as follows:-
>
> > 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'."

Keane CJ noted;

> "In *Caparo plc v Dickman* [1990] 2 AC 605, Lord Bridge summed up the approach in England as follows at p 617:-
>
> > 'What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other'."

Keane CJ continued;

> "In considering whether that approach, or the more cautious approach favoured in *Caparo plc v Dickman* [1990] 2 AC 605 and *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 should be adopted, I think it is helpful to refer again to the philosophy reflected in Lord Atkin's approach in *Donoghue v Stevenson* [1932] AC 562.;
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> > 'The bystander who sees a building on fire and knows that there are people inside no doubt foresees that if he waits for the fire brigade to arrive rather than attempting to rescue them himself they may die. But the law has never imposed liability in negligence on a person who fails to act as a more courageous citizen might in such circumstances. A strict moral code might censure his timidity: the law of negligence does not. It is precisely that distinction drawn by Lord Atkin between the requirements of morality and altruism on the one hand and the law of negligence on the other hand which is in grave danger of being eroded by the approach adopted in *Anns v Merton London Borough* [1978] AC 728, as it has subsequently been interpreted by some. There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J at first instance in *Ward v*

McMaster[1985] IR 29, by Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 and by the House of Lords in *Caparo plc v Dickman* [1990] 2 AC 605. As Brennan J pointed out, there is a significant risk that any other approach will result in what he called a 'massive extension of a *prima facie* duty of care restrained only by undefinable considerations …'."

56. Proximity between ESB and UCC is at least questionable in light of the fact found by the trial judge at [para. 763] that advance discharges of water ahead of the flood event would indeed have benefited UCC's land but would have been unlawful since it could only be achieved by the gratuitous flooding of the property of others which lay between the dams and UCC.

57. In the context of omission Chief Justice Keane stated: "The facts of a particular case, however, when analysed, may point to the reasonable foreseeability of damage arising from the non-exercise of the power and a degree of proximity between the plaintiff and the defendant which would render it just and reasonable to postulate the existence of a duty of care. That approach is consistent with the reluctance of the law to impose liability for negligence arising out of an omission to act rather than out of the commission of positive acts which may injure persons or damage property".

58. As O'Donnell J. stated in the Supreme Court in *Walsh v Jones Lang Lasalle Limited* [2017] IESC 38, "It is, as Keane C.J. pointed out in Glencar, wrong to speak of somebody being negligent in the abstract. Negligence in law means a breach of an existing duty of care". (para. 54)

59. *Cromane Seafoods Ltd and another v Minister for Agriculture, Fisheries and Food*, 2016 IESC 6 is a useful more recent analysis of the current state of the duty of care in Irish law, post *Glencar* (No. 2).Clarke J.[as he then was] addressed the limits of the duty of care:

"12. The Limits of the Duty of Care

12.1 It might be said that the first occasion on which there was an attempt to develop the general principle behind the disparate case law on the question of a duty of care was in *Donoghue v. Stevenson* [1932] A.C. 562. In Lord Atkin's famous speech in that case he made the point, which I have already sought to address in this judgment, that in the practical world there cannot be given a right *'to every person injured… to demand relief*". Lord Atkin then went on to establish the so-called neighbour principle by which he meant that a duty of care was owed to *'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'*.

12.2 ...(in Glencar (No.2))...this Court considered the further development of the law in the United Kingdom which is found in *Caparo Industries plc v. Dickman* [1990] 2 A.C. 605. In that case, the two-step approach adopted in Anns, being proximity and an analysis of whether there were countervailing requirements, was replaced by at least three steps, being forseeability of damage, proximity, and the fairness, justice and reasonableness of imposing a duty of care. I will briefly return to the question of whether there may, in fact, be four steps. What Keane C.J. suggested in *Glencar* was that there is a further requirement that, in all the circumstances, "it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff.

12.3 ..... part of the problem encountered in attempting to identify a general principle has been that the principles have been expressed in such very general terms that it may be very difficult to identify, with any real level of precision, how those principles are to work in practice. It is easy to see that there may be a limit to the duty of care created by proximity or neighbourhood. It is said that it relates to those who one might reasonably have had in one's contemplation. But just where that boundary might lie in practice can be hugely debateable. Likewise, it is easy to say that there should be a limit on a duty of care by reference to the requirement that it be 'just and reasonable' that the duty be imposed. But where does it stop being just or reasonable in practice to impose the limit?

12.5 It may well be that Keane C.J. in *Glencar* identified four matters that required to be considered, being forseeability, proximity, the presence of countervailing public policy considerations and the justice and reasonableness of imposing a duty of care. Be that as it may, it may not be necessary, for the purposes of this case, to attempt, yet again, to identify whether it is possible to identify any overarching principle for placing a boundary on the duty of care which does not run the risk of being open to criticisms such as creating a test which was 'slippery' (see *Stovin v. Wyse* [1996] A.C. 923) or "will o' the wisp" (see *Caparo Industries v. Dickman* [1990] 2 A.C. 605). But at least that debate forms the backdrop to what is the important issue which must be addressed in this case which concerns the extent to which public authorities may be held to owe a duty of care.."

60. Clarke J. considered the activities of a statutory body in the following passages:

"14.8 I note this last qualification because, of course, sometimes a public official may simply be doing something which could just as easily be done in a private context. A statutory body charged with, for example, establishing a utilities network (such as electricity) could hardly expect to have a different standard or duty of care applied to it when constructing safe power lines than that which might apply to a private electrical contractor doing much the same thing. A public official who happens to drive a car in the course of their public duties could not (except in very unusual circumstances) expect to be assessed on any different basis to any other road user just because they happen to be driving about in the course of their official business.

14.10 Returning to *Glencar*, it does not seem to me that the application of the principles of proximity and forseeability in a relatively even-handed way as and between public and private persons or bodies should, at least in the vast majority of cases, cause too much difficulty. Persons or bodies carrying out public functions should be entitled to the same, but no more, limitations on the duty of care applied to them deriving from the exclusion of liability in respect of consequences for a lack of care which might not be regarded as foreseeable or which might be regarded as excessively remote. Where those boundaries might lie in an individual case may, of course, be subject to legitimate, and sometimes difficult, debate. But those difficulties can arise just as much in the application of those principles in unusual situations arising in a purely private context.

14.11 It is in the context of the third criterion, being the question of the presence of a sufficient countervailing policy or public interest factor, that a legitimate distinction between the public and private spheres is most likely to arise. It is not that that principle may not apply in the context of a purely private relationship between plaintiff and defendant. It is just that the sort of countervailing policy or public interest factors whose proper application may lead to the exclusion of a

duty of care may more commonly arise in the public sphere and may, therefore, lead more frequently, on their proper application, to an exclusion of liability in that sphere.

14.12 Finally, although it is unnecessary for the purposes of this case to reach any concluded view of the question, it is at least open to argument that the possible fourth criterion mentioned in *Glencar* (being that it must be just and equitable to impose liability) does not really add very much to the overall picture. If there is a situation of reasonable proximity between the parties and if the loss arising is foreseeable and if there are no countervailing policy factors which would warrant excluding liability, it must be asked whether there could often be a basis for saying that it would nonetheless be in accordance with justice and equity to decline to impose a duty of care."

61. This Court finds the above statement of principle both relevant and of assistance in determining the issue of liability in negligence in this case. At issue in the instant case is the precise way in which ESB carries out its statutory mandate of generating electricity. If the trial judge is correct in his findings on liability then ESB is obliged to tailor the operation of its dams and reservoirs and amend its own internal operational manual, the Lee Regulations, and conduct its business so that inundations arising from natural flooding by waters passing through the dams impact to the minimum extent possible on UCC's property.

62. This Court is satisfied that if conduct would be tortuous if committed by a private person or body, it is generally equally tortuous if committed by a public authority: see, for example, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, as explained in *Gorringe*, para 39.

63. That general principle is subject to the possibility that the common law or statute may provide otherwise, for example by authorising the conduct in question: *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas. 430.

64. Public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm: as was stated by Lord Toulson at page 12 stated in Michael, "the common law does not generally impose liability for pure omissions...."

65. If the trial judge is correct in his findings of duty, then intervening properties may have to be flooded or have an enhanced risk of inundation for the proper discharge of ESB's duty to UCC. Such a scenario is contrary to public policy and not in the public interest. As is admitted in the judgment (at para763), it would expose ESB to claims in damages from thousands of owners downstream.

Omissions and the Measured Duty

66. In *Stovin v Wise,* Lord Hoffmann said: "… it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect".

67. Lord Steyn characterised omission *in Gorringe v Calderdale* [2004]1WLR 1057 thus:

> ". . . in a case founded on breach of a statutory duty the central question is whether from the provisions and structure of the statute an intention can be gathered to create a private law remedy? In contra-distinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether the statute excludes a private law remedy."

68. In *Stovin v. Wise* [1996] A.C. 923 at 945, Lord Hoffmann stated that the point of distinguishing acts from omissions in the law of negligence: "is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity".

69. This Court is satisfied with regard to the measured duty that omissions in the context of a statutory body corporate are directed generally towards a finding of non-performance of a statutory duty. ESB is not a public authority but rather a statutory body corporate.

70. It is clear from cases such as *Stovin v. Wise* and *Sandhar* that a special relationship, such as one founded on ownership of land, is required if there is to be an affirmative duty to prevent injury to another person caused by natural forces.

71. O'Donnell J. for the Supreme Court in *LM v Commissioner* [2015] IESC 81, 13th November 2015 stated;

> "14. .. the significance of these developments is that the question of the existence of a duty of care now involves a much greater focus on the distinctive features of the area in which a duty of care is sought to be imposed. The questions involved in permitting a private law action for carelessness in the performance (or non-performance) of public law functions in general are complex. ....As Lord Toulson put it in *Michael v Chief Constable Constable for Wales* [2015] 2 WLR 343 at para. 114, echoing earlier observations of Lord Hoffmann in *Stovin v Wise*:
>
> > 'It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible'."

Policy

72. In *Whelan v AIB* [2014] IESC 3 O'Donnell J . in the Supreme Court commented;

> ".., the just and reasonable test in Glencar is also essentially a policy consideration..... It is also important that the question must be approached at that level of abstraction. As Lord Browne-Wilkinson observed *in Barrett v. Enfield London Borough Council* [2001] 2 A.C. 550 (pp. 559-560);
>
> > '… the decision as to whether it is fair, just and reasonable to impose liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered. … Questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken … that decision will apply to all future cases of the same kind'."

O'Donnell J further stated; " the just and reasonable test in Glencar is also essentially a policy consideration".

73. In *Robinson v Yorkshire* [2018]UKSC 8th February 2018, the UK Supreme Court , Lord Reed, in an analysis,which in this court's view, reflects to a significant degree of convergence of the approach with in the leading decisions of *Glencar, Cromane* and *Whelan* in this jurisdiction, noted *inter alia*;

> "35. ...there are certain circumstances in which public authorities, like private individuals and bodies, can come under a duty of care to prevent the occurrence of harm: see, for example, *Barrett v Enfield London Borough*....., as explained in *Gorringe* at paras 39-40. In the absence of such circumstances, however, public authorities generally owe no duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body: see, for example, *Smith v Littlewoods Organisation Ltd* [1987] AC 241, concerning a private body, applied in *Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] AC 874, concerning a public authority.
>
> 36. That is so, notwithstanding that a public authority may have statutory powers or duties enabling or requiring it to prevent the harm in question. A well-known illustration of that principle is the decision of the House of Lords in *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. The position is different if, on its true construction, the statutory power or duty is intended to give rise to a duty to individual members of the public which is enforceable by means of a private right of action. If, however, the statute does not create a private right of action, then 'it would be, to say the least, unusual if the mere existence of the statutory duty [or, a *fortiori*, a statutory power] could generate a common law duty of care": *Gorringe*, para 23.
>
> 37. .... public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party: .....In *Michael*, Lord Toulson explained the point in this way: Page 13 'It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else'. (para 97) There are, however, circumstances where such a duty may be owed.....They include circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the individual has relied.
>
> 39. The position was clarified in *Gorringe v Calderdale Metropolitan Borough Council*, which made it clear that the principle which had been applied in *Stovin v Wise* in relation to a statutory duty was also applicable to statutory powers. Lord Hoffmann said that he found it difficult to imagine a case in which a common law duty could be founded simply on the failure, however irrational, to provide some benefit which a public authority had power (or a public law duty) to provide (para 32). He was careful to distinguish that situation from cases where a public authority did acts or entered into relationships or undertook responsibilities giving rise to a duty of care on an orthodox common law foundation (para 38)."

Nuisance

74. Nuisance is generally described in terms of an interference with the enjoyment of land.

75. The balance in all nuisance cases has to be held between the freedom of a landowner to use his property as he pleases and the duty on a proprietor not to inflict material loss or inconvenience on adjoining proprietors or adjoining property; and in every case the answer depends on considerations of fact and degree.

76. The critical question is whether what UCC was exposed to was *plus quam tolerabile* when due weight has been given to all the surrounding circumstances of the offensive conduct and its effects … Any type of use which in the sense indicated above subjects adjoining proprietors to substantial annoyance, or causes material damage to their property, is prima facie not a reasonable use.

77. In *Holbeck Hall Hotel Ltd v Scarborough BC* [2000] 2 WLR 1396 CA, the Court of Appeal held that the owner or occupier of land owed a duty of care to prevent danger to a neighbour's land from lack of support due to natural causes where the owner or occupier knew, or was presumed to have known, of the defect or condition giving rise to the danger even though he had not created it, "Liability lay when the danger in question was reasonably foreseeable. In considering the scope of the measured duty of care, the courts are still in relatively uncharted waters. But I can find nothing in the two cases where it has been considered, namely *Goldman v Hargrave* and *Leakey v National Trust* to prevent the court reaching a just result. The requirement that it must be fair, just and reasonable is a limiting condition where foreseeability and proximity are established. In my judgment very similar considerations arise whether the court is determining the scope of a measured duty of care or whether it is fair, just and reasonable to impose a duty or the extent of that duty" per Stuart -Smith L.J.

Rylands v Fletcher

78. This claim was abandoned and the appellant asserts that there is significance attached to that fact. However, this Court is satisfied that the Respondent remained free to make such adjustments to its claim as it was advised to do and no adverse inference relevant to the determination of liability can be fairly drawn from the abandonment of the claim pursuant to *Rylands* in these proceedings.

Riparian Law

79. As a matter of law, a lower riparian proprietor such as UCC is obliged to accept the natural flow of the river. This is consistent with ESB discharging a duty to downstream occupiers and owners not to worsen nature.

80. By disregarding the long established legal principle that a lower riparian owner such as UCC is under an obligation to receive the natural flow of water the trial judge fell into error and thereafter misdirected himself as to the legal consequences of an outflow from the ESB dams no greater materially than the inflow from the flooded river.

81. Riparian rights and duties are indicia of land ownership. The law of private nuisance as between landowners, by reasons of history and the evolution of societal norms over time is informed by and reflects the key principles of riparian law.

82. Absent the establishment of a positive obligation on ESB to hold water back there can be no cause of action in negligence, the measured duty or nuisance because riparian law permits discharge of the flow of the river.

Omissions are Failures to Intervene
83. It is clear from undisputed legal authority that the common law does not generally impose liability for pure omissions without just cause.

84. In *Council of the Shire of Sutherland v. Heyman*, Brennan J. said:

> "[9] …the general principle expresses a duty to take reasonable care to avoid doing what might cause injury to another, not a duty to act to prevent injury being done to another by that other, by a third person, or by circumstances for which nobody is responsible
>
> [10] I can be liable only for an injury that I cause to my neighbour. If Ido nothing to cause it, I am not liable for the injury he suffers except in those cases where I am under a duty to act to prevent the injury occurring.
>
> Indeed, he is not in law my neighbour unless he is foreseeably 'affected' by my conduct. But he can be said to be 'affected' by my omission to act to prevent injury being done to him only if I am bound to act and do not do so. *He cannot be said to be affected by my omission to act if I am not under a duty to him to act."*

Preliminary Issues Arising

Did ESB admit a duty of care to alleviate flooding and does ascertainment of duty of care involve consideration of causation?
85. The ESB submits that the trial judge made an error of law in rejecting consideration of causation in deciding the existence of a duty of care and as to the effect of its acknowledgment of a particular duty of care.

86. ESB argues that it has accepted a duty of care related to risks that it created, such as the risk of flooding caused by dam break or the making of discharges greater than the natural flow of the river. It says that there is nothing inconsistent in accepting proximity for the purpose of the duty to take care not to cause injury by one's actions but to deny it for the purpose of a positive duty to prevent injury caused by a third party or by nature. This accepted duty is consistent with practice and with law, as is claimed. We are not at this point addressing the validity of the duty but rather the relevance of causation in establishing it and the legal effect of the acknowledgement made by ESB.

87. UCC submits that "it is common case that ESB owes a duty of care to persons downstream and the only question is as to the scope of that duty of care and, in particular, whether, as contended by ESB, it is limited to a duty of care not to release more water downstream than nature would have sent were the dams not there". From this, UCC argues that foreseeability is satisfied and proximity is effectively conceded and thus, the only issue is whether it is just and reasonable to impose a duty of care in the terms proposed by UCC.

88. As a matter of logic the concession point does not appear to be correct. If it is indeed the case that ESB has made a significant concession and that on analysis its value as the Court would be entitled to say that the concession was of little or no value. It could declare that the ESB said it had one kind of duty but that it transpired on analysis that the acknowledged obligation was no more than existed anyway at law or under some other rule, in which case the value of the concession would be eliminated. But that does not by itself create and impose a new and more expansive obligation. The fact is that ESB has acknowledged a certain duty of care which has come in for criticism and possible rejection as being valueless, as to which it is not relevant for the purpose of this discussion whether the conclusion is correct or not. It is wholly illogical however to say that because a person acknowledges one thing and that the acknowledgement is worthless, it necessarily follows that the acknowledgement means something quite different and actually a thing that the person has explicitly rejected. This view of the ESB's acknowledgement is erroneous accordingly.

89. Neither is it a novel proposition to introduce causation in a discussion of duty of care. It is well-established that the kind of harm that has befallen the plaintiff is relevant to the duty of care. The duties imposed to protect a person against particular harm, not in respect of everything that might happen to him. ESB submits that the kind of hard to which a person is exposed as a risk by the acts or omissions of the defendant is properly considered in determining the nature of the duty of care. It may indeed be necessary in determining the existence of a duty of care and not just its scope. Acknowledging a duty in respect of some kinds of harm does not mean accepting responsibility to avoid any and every kind of harm. ESB in this case accepted that it had a duty not to worsen natural conditions and it also had to ensure the integrity of the dam. It cited *Calvert v William Hill* [2009] 2 WLR 1065, a case in which failure by bookmakers to close the claimant's telephone gambling facility after having undertaken to do so was held not to have caused his gambling losses because even if he had been excluded he probably would have gambled away his money with other bookmakers.

90. Among many authorities to similar effect is *Johnson v Gore Wood* [2002] 2 AC 1, in which Arden LJ said:

> "91. As I have said above, the key issue on this appeal is the scope of the duty owed by Gore Wood to Mr Johnson on the facts of this case. Starting with *Caparo v Dickman*, the Courts have moved away from characterising questions as to the measure of damages for the tort of negligence as questions of causation and remoteness. The path that once led in that direction now leads in a new direction. The Courts now analyse such questions by enquiring whether the duty which the tortfeasor owed was a duty in respect of the kind of loss of which the victim complains. Duty is no longer determined in abstraction from the consequences or vice-versa. The same test applies whether the duty of care is contractual or tortious. To determine the scope of the duty the Court must examine carefully the purpose for which advice was being given and generally the surrounding circumstances. The determination of the scope of the duty thus involves an intensely fact-sensitive exercise. The final result turns on the facts, and it is likely to be only the general principles rather than the solution in any individual case that are of assistance in later cases."
>
> 91. It is clear therefore that causation is relevant according to the highest authorities and that it was legitimate for ESB to draw the distinction it did between responsibilities it was accepting and those it was not accepting.

TTOL
92. TTOL, as already stated, stands for Target Top Operating Level, a concept that is pivotal in this case. The High Court held that ESB's failure to maintain water in the reservoirs at this specific level was the crucial conduct amounting to negligence. ESB, as the Court held, was in breach of its duty to avoid unnecessary flooding because it did not keep its reservoirs at this level. Any

uncertainty that might attend unnecessary flooding was removed by the trial judge's identification of this standard specification as a precise definition of the obligation that the law imposed on ESB.

93. TTOL is central, not only to the trial judge's conclusions in regard to ESB's liability, but also in the process underlying the foundational obligation to avoid unnecessary flooding. It affects duty of care and standard of care. It is essential to the structure of the judgment and also a free-standing criterion of negligence. It is clear, therefore, that if this pillar of the judgment is shown to be unsound, the overall determination and verdict on ESB's liability cannot stand.

94. In his argument before this Court, Mr. Murray SC, Counsel for ESB, said:

> "We know from the judgment that TTOL, a term appearing in ESB's own internal regulations, not published to the world at large, is not too high and that flooding that occurs downstream when ESB maintains waters above TTOL is unnecessary.
>
> TTOL was thus determined by the judge to be ESB's flood alleviation standard although the evidence was that it is no such thing; a guideline acknowledged by UCC's witnesses to be purely economic, to be intended to reduce the need for spilling has become the determinant of legal liability for flooding, attainable only by the spilling which it was intended to prevent.
>
> TTOL defines the duty of care, the standard of care, it defines the damage for which we are liable, it bridges the causation giving rise to that damage and it differentiates those who can sue us for "causing" flooding from those who cannot, those who are the TTOL plaintiffs and the below TTOL plaintiffs. It does an awful lot of work."

95. The Lee Regulations – Regulations and Guidelines for the control of the River Lee, revised December 2003- contain the following definitions of what are known as MaxNOL and TTOL:

> "Maximum Normal Operating Level
>
> The "maximum normal operating level" is the highest level allowable in the operation of the reservoir under normal operating conditions. It can only be exceeded under special flood instructions.
>
> Target Top Operating Level:
>
> The 'target top operating level' is the top operating level which the station shall endeavour to maintain during non-flood conditions. The target top operating level varies throughout the year to take account of seasonal factors such as low flows in summer and likely floods in winter. See Drawing .."[giving reference and title and location in Appendix 6]

96. The Chief Civil Engineer of the ESB, Mr. O'Mahony, described TTOL in his statement of evidence as follows:

> "TTOLs are basically economic targets, whose main purposes are to provide for optimising availability for power generation and minimising unnecessary spilling of water from the reservoirs. The TTOLs are higher in Summer, to allow for greater storage of water during dry periods. This ensures that the stations will be available for electricity generation for longer during dry weather periods. The TTOLs are lowered during Winter, when inflows to the reservoirs are higher, to avoid the need for spilling water, except after significant rainfall. The TTOLs are not intended to have any role with regard to dam safety or flood management. TTOLs are operational targets for the stations and lie within the operational band between the Maximum and Minimum Normal Operating Levels. As the name suggests, discharges from the reservoirs in their operational bands are normally only through the turbines, as part of normal station operations. Exceptions to this are when decisions are made to increase discharges in advance of a potential flood, in which case, water will also be spilled through the deep sluices at Carrigadrohid and the spillways at Inniscarra."

97. In a document known as 'Lee Plant Controllers HCC Instructions' dated 04/03/2004, at page 9 it states that levels "should be maintained as close as possible to the winter and summer operating levels".

98. The trial judge distinguished between TTOL and MaxNOL, the former of which was of course lower than the latter. At para.67 of the judgment he held: "UCC contends that this lower level offers a level at which generating potential at the Lee Dams can be optimised while ensuring that water levels are generally kept lower. On the basis of the evidence before it, the Court accepts this contention".

99. There was disagreement in the case not only concerning the meaning and effect of TTOL, but even as to whether it was a level . The trial judge held that it was indeed a specific level, a conclusion that appears to be irresistible. The actual controversy that was perhaps obscured by the search for the meaning of the words was in respect of the import of the concept of TTOL. Was it an optimal point in height *i.e*. a level to which it was proper for the operators at least to aspire to achieve or was it a level above which it was desirable to have water levels for the promotion of generation? This was the essence of the discussion. Some witnesses gave their understanding of the concept, in some cases based on information they had acquired from ESB personnel. They were, of course, cross-examined by reference to the words used and admitted or were obliged to admit that the definition said what it said.

100. Ultimately the trial judge determined correctly that, as defined in the regulations, TTOL was necessarily a level and a very specific level that was different for winter and summer. The word level is actually used in the definition, so there could not be a finding that TTOL, as such, meant anything other than a level. It does appear, however, that this definition issue obscured the actual controversy that underlay the superficial disagreement. The question was what did this concept require of the ESB operators of the dams.

101. Another fundamental question concerned the status of the regulations themselves, in which the use of the word "regulations" served to add to the confusion between substantial effect and definition of the term.

102. Para.953 of the judgment is as follows:

> "Observation #17: *Green* is supportive of the application of a *Leakey* duty to ESB. ESB contends that *Abbahall* suggests that in a measured duty case, it ought generally be possible to formulate what the plaintiff wants the defendant to do as an injunction. If so, such a form of relief can be formulated in the within proceedings. Thus: 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."

UCC submits that this is not to be taken literally. It is, however, clear that the High Court was strongly of the view that there was a powerful directive at work that fixed ESB with a quite specific imperative. At para.998, the judge says that;

> "...By consistently operating to levels beyond TTOL…ESB moved beyond the optimal into the excessive. Even applying the principles that ESB derives from the above passages, liability arises for ESB."

103. In other locations, the point is reiterated or re-emphasised. At para. 1075, the judge concludes as follows.

> "1075. …. In short, ESB was negligent in keeping water-levels as high as it did, placing ESB in a position where its capacity to handle a large, reasonably foreseeable flood event was severely limited."

104. The High Court also considered it relevant that there was no physical impediment to maintaining lower water-levels and noted that the provision in the Lee Regulations for advance discharges was predicated on spilling.

ESB Submissions on TTOL

105. ESB argues that the High Court in effect treated TTOL as MaxNOL which it says was clearly erroneous. It instances problems of practicality in the application of the order to keep to TTOL:

> "The flood of 2009 occurred with a table of discharges applied when water reached MaxNOL. If the same discharges were made at TTOL, substantially the same flood would have occurred. Bad as UCC's suggestion for using TTOL as a limit was, the trial judge misunderstood it anyway. UCC meant that water-levels should be kept down to TTOL and then let rise until discharges commence at MaxNOL. What happens in that event is that the space from TTOL to MaxNOL acts as storage to subtract water from the river flow. But the problem is this: if you have a rule to keep levels down to TTOL, when do you decide to start storing? All that UCC could say to this question, was that for 2009 there would have been, in retrospect, a certain amount of alleviation, by which some buildings would have been saved, but not all. But the question is totally unanswered: if one keeps levels down to TTOL – which requires spilling when TTOL is exceeded – what is the criterion for deciding to switch from spilling when TTOL is exceeded to storing? This does not operate like the discharges at MaxNOL, because they are not for alleviation. There must be an alleviation target and trigger mechanism to start using the space which one has guarded for that purpose. UCC's claim fosters the illusion that a lower level makes alleviation, whereas it is only one element of it. The illusion becomes pernicious when it is used to suggest that "high water" causes flooding. Yet in 2009, the "high water" that existed, somehow reduced flooding. Something in UCC's argument is very wrong at a basic factual level.
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> . . .
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> Because the trial judge misinterpreted UCC's case in relation to TTOL, there was no evidence that, by ESB treating TTOL as MaxNOL, there would have been any improvement in conditions for UCC. Accordingly, there was no causative link established between the breach of duty as found and any damage to UCC."

106. The High Court judge expressed his conclusions at para. 1187 as follows:

> "(1) ESB could, and should reasonably, have reacted to the weather forecasts it received on and from 16th November, 2009, so as to spill water earlier and in greater amounts than it did, and thus created the space for more water at the Lee Reservoirs; (2) ESB could and should reasonably have maintained lower water levels than it did in the Lee Reservoirs in the period leading up to 19th November, 2009, specifically by operating consistently to TTOL ("the highest level allowable in the operation of the reservoir under normal operating conditions" (Lee Regs, iv), and a level aimed at "optimising availability for power generation and minimising unnecessary spilling of water from the reservoirs" (O'Mahony Affidavit, 35)); (3) the dam-discharge rules operated by ESB were neither necessary nor appropriate in the circumstances presenting in November 2009 and this was recognisable at the time; (4) had ESB operated consistently to TTOL, such discharges as occurred would have been neither necessary nor appropriate; (5) during the flood events of 19th/20th November, 2009, ESB failed in meeting the standard set by its own 'do not worsen nature' rule of operation; (6) during the said events, ESB operated a system of discharges intended to maintain dam integrity in the face of a storm that it was obvious at the time was not a design storm, but by failing to pre-plan properly was equipped only to release discharges that satisfied the demands of the design storm; (7) ESB failed to give to anyone, including UCC, adequate and/or timely warning about the events that ESB knew to be presenting; (8) ESB failed to undertake any adequate risk-assessment exercise that, if properly undertaken, would have quickly identified the manifold deficiencies that presented in the Lee Regulations and in ESB's operation of the Lee Dams and which were causative of the damage suffered by UCC in November 2009; and (9) UCC failed to take any of the many reasonable steps, not least in terms of its pitching of floor-levels and development of a campus-wide flood-response plan, that it could and should have taken in respect of the siting and safe preservation of those of its properties that were flooded in November 2009"

107. ESB submits that the trial judge ignored the evidence about TTOL as an economic guideline citing ESB witnesses and some of the UCC witnesses. There was also no evidence that ESB's operations contravened any appropriate international standard.

108. ESB argued that it does not spill to bring levels down to TTOL. "Provided levels are below MaxNOL, the only way TTOL is reached is by generation". It did not maintain high water levels in November 2009; they were high because inflows had consistently exceeded generation and discharge:

> "There was no evidence to support a finding that the maintenance of "high water levels" was unreasonable for a hydroelectric dam operator. On the contrary, the evidence established that it was both reasonable and normal for a hydroelectric dam operator to operate its reservoir towards the upper reaches of its storage space. Neither was there any evidence that ESB's designation of MaxNOL as the only mandatory spill level was unreasonable or otherwise than consistent with normal and prudent hydroelectric practice. There was no evidence that any water level below MaxNOL was considered to be unreasonably high or in breach of any standard of performance for a prudent hydroelectric dam operator. On the contrary, the evidence established that a prudent hydroelectric operator is free to exploit all water levels below its mandatory spill level. Mr Cowie said as much in his evidence; Mr Shibatani also accepted that the dam operator would want to be above his "firm yield line", if he could.
>
> In the absence of independent evidence from an appropriately qualified expert as to what level the ESB reservoirs should have been maintained at, UCC lighted upon TTOL and its use of the word "top" as a convenient basis for criticism. That criticism was unfounded and the trial judge fell into error in accepting it as evidence of any breach of duty."

UCC Submissions on TTOL
109. Starting water levels have a critical impact on the level of ultimate discharges. They determine the level of empty space in the Dams and Reservoirs, which indisputably will determine the level of discharge. High water levels reduce the options available to the dam operator to react to the flood and remove a significant part of the operator's operational flexibility. In sharp contrast, maintaining water levels at lower levels maximises operational flexibility.

110. The time of year, weather patterns and catchment conditions were also such that any reasonable dam operator would have realised the necessity to reduce water levels. The particular conditions prevailing in 2009 would have led any reasonable dam operator to lower water levels. They included rainfall statistics and the fact that the catchment was saturated.

111. The evidence established that in October/November 2009, water levels in the Reservoirs were kept significantly above TTOL, while winter levels prior to 2009 were consistently above TTOL, and indeed "a long way above the target". The approximate winter average was one and a quarter metres above TTOL. Water levels only reached winter TTOL once in six years. Quite simply, ESB ignored TTOL, which is a level set by them and repeatedly acknowledged in their documents.

112. The High Court judge expressed his conclusions at para.1187 as follows:

> "The language of the Regulations and the HCC Operating Instructions clearly suggests that water levels ought, at least, to be 'heading towards TTOL from wherever they were starting'. Dr Bree had to accept that the HCC Operating Instructions actually instructed operators to strive to achieve TTOL."

113. The Judge correctly held that even if the Court were to accept ESB's interpretation of TTOL and that there was no obligation in its internal rules and procedures to attempt to achieve it, it was unreasonable for ESB not to maintain lower water levels in October/November 2009 having regard to the obvious risk that its high-water levels created.

114. The evidence demonstrated that there was no physical impediment to maintaining water levels at lower levels and such lower water levels could have been achieved by either or both generation and spilling.

Discussion

Was ESB obliged in pursuance of such duty to keep the water level in its reservoirs to TTOL?
115. TTOL is crucial to this case. It is the foundation stone of the trial judge's analysis of the duty of care that rested on ESB, as he found. It is not only a reason why he held that a duty rested on ESB but also the standard of care that ESB should have observed and did not. UCC's case does not depend on having TTOL fulfil this role but the judge's determination of the case rests squarely on this measure or standard. The process of reasoning employed by the judge led him to find that ESB owed UCC a duty of care to avoid unnecessary flooding, which meant as he held that ESB had to operate its reservoirs to achieve TTOL. In my judgment, the High Court was incorrect in its analysis and conclusions relating to TTOL.

116. TTOL was a standard that ESB set for itself and it represented a specific level in each reservoir, which varied according to whether it was winter or summer but not otherwise. This flood happened in November so the winter level of TTOL applied in each of the reservoirs. The High Court held that TTOL represented a binding standard to which ESB was obliged to conform. Breach of that standard as in fact happened constituted negligence. If ESB had complied with this requirement, almost all of UCC's buildings would have been spared flooding.

117. In the Court's view, this analysis of TTOL was erroneous. TTOL cannot be used to create the duty of care or even the standard. It is a guideline, expressed as a target. According to the evidence, TTOL had only been achieved on one occasion during the previous 6 years at Inniscarra dam. TTOL has whatever status ESB confers on it and no more. Whether TTOL was achieved or not cannot establish negligence because the two questions are separate and independent. It is no doubt the case that the language used by ESB in describing its protocols and instructions as the Lee Regulations, as well as references to TTOL, is conducive to misunderstanding but that does not alter the status of the target set by ESB.

118. The Lee Regulations are not regulations as a lawyer understands them, i.e. binding rules, unless ESB says that they are. They do not simply by existing enjoy any particular status. They are internal to ESB and wholly dependent on how they are treated by that body. If they are binding that does not arise from the form in which they appear or their description but because ESB says that they are binding. Even then, ESB is not to be held negligent for breach as such, as if the acts or omissions constituted actionable breach of statutory duty. The conduct constituting non-compliance may indeed be evidence of negligence but breach alone of the provision is not sufficient. ESB could change the levels of TTOL if it chose to do so for its own reasons. The instructions in regard to operation of the dams could exist without TTOLs. And to illustrate this point further, compliance with TTOL would not be an answer to a claim in negligence; the facts that constituted compliance might be a defence but not the fact of compliance. Assuming a duty as found by the judge in accordance with UCC's submission whereby ESB had to avoid unnecessary flooding, it would not be sufficient for ESB to point to its own regulations, rules or protocols and say that because it was in compliance with them it was not negligent.

119. ESB is required to operate the dams safely. If it chooses to circulate rules and regulations internally, however described, and to enforce them or not in all circumstances or only some, those are decisions for the organisation to make. But they do not create liability if the company does not enforce them, unless the conduct in question is in fact negligent. We do not say that the provisions of the Lee Regulations are irrelevant; they may arise for consideration on the question of negligence in a number of ways. For example, if it were to be suggested that it was impossible to devise a measure such as TTOL, for whatever purposes, the fact that it was actually specified in documents generated by the company would clearly be relevant.

120. The trial judge held that the ESB should have operated to TTOL. Indeed, he went further and explicitly stated that it should treat TTOL as MaxNOL. It seems clear that the judge did not mean this latter declaration to be literally and invariably applied but that does not remove a real difficulty of understanding about this imposition.

121. ESB points to problems of theory and practice about implementing the proposed rule of TTOL and there is validity in these objections. It is really difficult to understand how ESB and its personnel could know when it is appropriate, i.e. not negligent to allow the reservoir to fill up beyond TTOL in order to alleviate downstream flooding. The purpose of having this limit would be to get space above it for flood water to be accommodated but when is that to be filled up? If TTOL is the effective normal limit, it becomes in effect MaxNOL, as the trial judge observed at one point without intending it literally as is said above.

122. It is also evident that the solution found by the High Court represents a highly invasive and prescriptive approach to the management of the Lee Scheme. That point alone is a ground for concern about the conclusions reached by the trial Court. It is a matter for ESB to operate the hydro-electric scheme for generating electricity and managing the whole apparatus. It is not for the Courts to interfere at a micro-managing level. It is proper for the law to look at the consequences of management decisions but there are substantial reasons why the Courts should not specify what the water level in the reservoir should be. It is true that the specification fixed by the High Court is a standard devised by ESB itself but that does not answer the point. Whatever the source of the rule now to be imposed on ESB the Court is fixing the standard.

123. The approach of the High Court also opens up a further seam of potential liability and litigation. The Lee Regulations and TTOL were devised by ESB and it is not –apparently—disputed that the company can alter those provisions if it considers that appropriate. They are matters for management and not for the Courts. If in the result a party suffers harm and holds ESB responsible, legal action may be instituted in which the challenge is not based on negligently caused damage and loss but on criticisms of the management protocols. Another party whose property is flooded may challenge the level at which TTOL was set.

124. The trial judge found the TTOL standard by interpreting the Lee Regulations, but he did that as if they were formal independently binding rules but that was not the legal position. He referred to the evidence as a basis for his interpretation but the testimony at trial did not furnish him with the necessary foundation. The witnesses did not actually give relevant evidence. They were in a position to do no more than say what was written in the text and what they understood the words to mean. The High Court rejected the ESB witnesses' evidence as to the role of TTOL, preferring its own interpretation of the words of the definition.

125. The trial judge treated the Lee Regulations as having binding force, not as instructions or protocols by an employer to employees but as requiring compliance by reason of their own status.

126. The expert evidence did not support the conclusion of the trial judge that TTOL could be employed as a measure of the duty resting on ESB in respect of flood alleviation. It is even more difficult to see how it could be deployed in the search for the duty of care. ESB points out that this standard was never intended as a flood protection measure.

127. ESB queries why UCC focused its case entirely on the damage to its buildings, because it could not succeed in showing, even if reservoir levels had been below TTOL, that its land would not have been flooded.

128. TTOL is an internal target set by ESB and is not a mandatory obligation; it does not establish a duty of care nor does it fix the standard of care. It is also overly prescriptive and precise and incapable of general application. It is potentially in conflict with the duty to avoid unnecessary flooding. If it were to be demonstrated that flooding could have been lessened by having the water in the reservoirs even lower, the case could be made that ESB was negligent in having TTOL itself too high. In an action for negligence or nuisance, proving compliance with TTOL would not be a defence.

129. It is probably not too much to say that the trial judge became somewhat fixated on TTOL. His conclusions on the particular concept were erroneous and they also appear to have led him to other conclusions that are also mistaken. The judge's concentration on TTOL may well have diverted him from more reliable modes of analysing liability.

The Statutory Mandate

Is the duty imposed by the High Court on the ESB to avoid unnecessary flooding inconsistent with the Electricity (Supply) (Amendment) Act, 1945 under which the Lee Scheme was authorised, constructed and is operated?
130. Section 2 of the Electricity (Supply)(Amendment) Act, 1945 provides that the expression "hydro-electric works" means works for the generation of electricity by means of hydraulic power.

131. The relevant sections are set out in the judgment and, for the purpose of the appeal, sections 6 (1), 10 and 34 should be referred to. Section 6 provides for the execution of the scheme for hydroelectric electricity generation and it is expressed in mandatory terms, following the granting of approval. Section 10 (1) is also mandatory and applies when the scheme has been completed, directing that "the Board shall generate electricity by means of such works". Section 34 gives the ESB various powers including power to to alter water levels.

132. Sections 10 and 34 are as follows.

> "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.
>
> 34.—From and after the completion of the works provided for by an approved scheme, it shall be lawful for the Board to control and from time to time to alter or otherwise affect, in such manner as the Board shall consider necessary for or incidental to the operation of those works, the level of any lake, pond, or other water on or connected (directly or indirectly) with the river in or on which such works are situate."

133. The ESB argues that it is obliged and not merely empowered to use the Lee Scheme and all its apparatus to generate electricity and that the trial judge was in error in holding that the Act was merely permissive. In addition to the mandatory nature of the obligation to generate electricity, the appellant points out that the Act does not provide for use of the Scheme for flood alleviation. "The powers conferred on ESB in relation to the alteration of water levels are only as are necessary for or incidental to the operation of the works, and that operation is for the purpose of the generation of electricity."

134. UCC does not dispute the mandate to generate electricity and the power to alter water levels but it challenges the proposition that the Act requires ESB to generate above all else or that the power as to water levels applies only to generating electricity. For these contentions, UCC points to the terms of the section. It claims that the power to alter levels is incidental to the operation of the works and not the generation of electricity as such. Also, the section gives discretion in respect of what ESB considers necessary to the operation of the works, which means that it is not mandatory. Finally, the section refers to what "shall be lawful" which UCC argues provides a defence for ESB in certain circumstances which it says do not apply here.

135. The High Court judgment holds that the defence of statutory authority is not available to ESB in this case for three reasons. First, ESB's actions are performed pursuant to statutory powers not in fulfilment of statutory duty. Secondly, the defence requires

that the nuisance created be an inevitable consequence of the statutory power being exercised, but in this case ESB could have taken alternative action that would have reduced the flood damage done to UCC. Thirdly, the damage was not the inevitable result of generating hydroelectric power or managing the Lee Scheme, but it could have been avoided by taking reasonable care through consistent targeting of TTOL.

136. The High Court judge referred to evidence in the case concerning the tension between hydro-electric generation and flood alleviation. It was not that they were wholly incompatible and indeed the process of electricity generation gave rise to some element of flood attenuation. The judge found that the duty that he held existed was not incompatible with the ESB's function in regard to electricity generation. He held that ESB performed flood alleviation, which contradicted its own case, and that this activity meant that ESB had undertaken responsibility for doing so. The duty was not requiring it to perform a new task but merely to carry out an existing one using reasonable care in doing so. ESB says that this approach was erroneous, principally because it held that if any alleviation was carried out it implied a responsibility and liability to do anything that might be considered to be flood alleviation.

137. ESB's case is that some flood alleviation is an incidental and inevitable consequence of hydroelectric function. A second element of flood alleviation is compatible with hydroelectric function but not inevitable; it does not in a word interfere with generation. Further and other flood alleviation as a priority objective conflicts with hydroelectric generation as a primary purpose. It is claimed that the trial judge failed to make the crucial distinction between the third category and the other two. ESB provides and provided in 2009 alleviation of the first two kinds but not the third.

138. The question of voluntary assumption of responsibility as contended for by UCC and accepted by the trial judge because of the previous behaviour of the ESB and publications and statements is considered separately. The point that arises here is the distinction drawn by ESB between what it maintains are different kinds of flood alleviation and the complaint it makes that the trial judge did not recognise the distinction between actions and practices that are consistent with electricity generation and those that interfere with that function. The essential point that ESB makes in this connection is that performing the first two categories of flood alleviation is not a determinant nor even an indicator as to whether the third category is within statutory authorisation or has been undertaken voluntarily by the ESB. It is submitted that the trial judge while falling into error in the manner described did nevertheless accept that ESB tries where possible to reduce downstream flooding in a manner that does not detract from its hydroelectric purpose. The following is what he said at paragraph 109 of his judgement—

> "109. Acceptance that Lee Dams operate with objective of flood alleviation. ESB tries, where possible, to reduce downstream flooding in a manner that does not detract from its hydro-electric purpose. However, one will search in vain in the evidence to find any convincing explanation as to why ESB does not operate to TTOL - *"the highest level allowable in the operation of the reservoir under normal operating conditions"* (Lee Regs, iv), and a level aimed at *"optimising availability for power generation and minimising unnecessary spilling of water from the reservoirs"* (O'Mahony Affidavit, 35). ESB would perhaps contend that this is to confuse TTOL (a commercial level) with MaxNOL. The Court does not accept this contention. By operating to TTOL, ESB combines optimal usage with substantial flood alleviation. MaxNOL still sits separate and apart as the level which can never be exceeded without the necessary design-flood discharge being affected."

139. ESB argues that the trial judge in this passage records accurately what ESB tries to do and how it maintains that such actions are compatible with the statutory function. The complaint that ESB makes is that the trial judge, although in this passage acknowledging ESB's case, nevertheless imposed a much wider obligation representing a significant alteration of function, using past performance of this lesser and compatible endeavour. The reference to TTOL does not appear to be an argument in contradiction to the recorded position of ESB. It does emphasise the importance that the judge attached to TTOL, a crucial question in the case which is extensively considered elsewhere.

Discussion

140. This question of statutory compatibility depends on the meaning of the Act, specifically section 34 in light of the interpretation to be given to the works that are referred to in the earlier sections. It is clear in this Court's view that ESB has the power to alter the water level as it considers necessary in connection with the operation of the works, whose purpose is generating electricity. That appears to follow from section 10 (1) which mandates the Board to generate electricity by means of such works. Secondly, it is correct to say that ESB is conferred with something of a discretion by section 34. That means that it is lawful for ESB to exercise control over water levels in such manner as it considers necessary for the operation of the works. The section empowers the Board to do what is necessary by declaring that it shall be lawful for it to do that. In regard to third objection by UCC to ESB's submission on this section, consideration must await discussion of the matters covered in paragraph 888 of the judgment.

141. It is obvious that the legislation does not provide for flood alleviation as a statutory purpose. One could not suggest that the Act prohibits ESB from engaging in flood alleviation to any extent. It is a reasonable interpretation to say that measures considered appropriate by ESB are permissible but only to the extent that they do not impair the exercise of the mandatory functions. The Board is entrusted with the operation and management of the Scheme but obviously within the boundaries of the statutory requirements. If it were to be suggested that there is an implicit statutory obligation to operate as a means of flood defence that would be mistaken.

142. The more difficult question is the converse: is it impermissible under the Act to prioritise flood protection over electricity generation? We think the answer is yes; there is a clear duty, namely, to produce electricity. So, a decision as a matter of policy to do something not specified in the Act would not be justified. That is not what happened here but the argument by the ESB is that the duty now imposed by the High Court does represent a policy change which ESB is required to implement. It is necessary to discuss elsewhere in this judgment the implications of the particular duty but for the purpose of this section, it seems to this Court that if the duty to avoid unnecessary flooding imposes a policy imperative on the ESB that prioritises flood prevention/reduction/alleviation over electricity generation, then it is contrary to the statutory scheme.

143. In view of the specificity of the conclusions reached by the High Court, namely, that ESB owed a duty to avoid unnecessary flooding which in fact means maintaining anti-flooding storage space as a general obligation imposed by law, and to do so specifically by adhering to TTOL, this must be considered to be the imposition of a policy that is not contained in the Act, that is imperative and that inhibits and even impairs ESB's capacity to carry out its statutory mandate.

144. The appellant is accordingly entitled to succeed on this point.

Case law does not Support Duty claimed by UCC

145. The Court is satisfied that the case law does not support the common law duty claimed by UCC and imposed by the High Court whereby ESB is obliged to avoid unnecessary flooding, whether defined in general terms or in the specific form of an order to keep to TTOL.

146. The cases concerning dams include *Greenock Corporation v Caledonian Railway Co* [1917] AC 556, in which the corporation installed a concrete children's paddling pool in a park. It altered the course of a stream and obstructed the natural flow of water. In conditions of "rainfall of extraordinary violence" the stream overflowed and a great volume of water that would have been carried off by the stream in its natural course poured down the street into town and damaged the plaintiffs' property. The House of Lords held the corporation liable. Lord Shaw of Dunfermline said at page 579:

> "A person making an operation for collecting and damming up the water of a stream must so work as to make proprietors or occupants on a lower level as secure against injury as they would have been had nature not been interfered with. And this is so although the water accumulated suddenly, or the fall was extraordinary or even unprecedented in quantity. These are the general propositions of the law." This case can of course be regarded as an example of Rylands v Fletcher liability, but it was not actually decided as such and Lord Shaw expressed himself in general terms.

147. In *Stirling v North of Scotland Hydroelectric Board* [1974] SC 1, Lord Avonside said:

> "In my opinion, these authorities establish that no compensation is due on the provisions of the relevant clauses of the schemes of the defendants unless it be proved that the damage of which complaint is made would have afforded a ground of action had the scheme not been in existence. The person claiming damages is not put in a special position by reason of the existence of the schemes. Where his claim relates to damage by flood alleged to have been caused by an opus manufactum, he is put to the proof proper to such a claim, and an essential part of that proof lies in showing that the flood would not have occurred had nature been left undisturbed. The 'damage' of the schemes is 'actionable damage' and compensation is payable on proof of such damage and not on some ground equivalent to insurance. The pursuer has not proved, and indeed in my view in the end of the day has not attempted to prove, such a case, and accordingly his claim must fail."

148. ESB relies on a compendium of cases from Canada and the United States, which the trial judge summarises in an appendix to his judgment, in which he explains why he does not find them helpful. There is a theme running through them that corresponds to Lord Shaw's reference to the plaintiffs' right to be "as secure against injury as they would have been had nature not been interfered with" but that is not sufficient, as the High Court held.

149. *Iodice v State of New York*, 247 App. Div. 647, decided on 24th January 1951, was a claim in respect of damage to property caused by flooding as a result of the overflow from a river. The State of New York maintained a dam upstream of the flooded property of the plaintiff enclosing a reservoir for water supply. The claim was remarkably similar to the present. Vaughan J. stated the claim as follows: –

> "[t]he Liability of the State asserted by claimants is predicated, not upon negligence with respect to the maintenance of the river channel, but rather upon the theory that having the means to draw down the impounded water, it was the duty of the State to do so to the end that the water level should be kept below the spillway level so that 'a portion of any heavy rainfall' would be retained in the reservoir and not discharged into the river in such an amount as to cause the river to overflow its banks. Stated simply, claimants' theory is that by building the dam the State assumed, in some way, a duty of making conditions better for lower property owners than they would have been if no dam had been constructed.
>
> There can be no question that if the water in the reservoir had been drawn down sufficiently far, the dam could have held back all the additional water all patient by the excessive rain of 3.81 inches which occurred October 2, 1945. However, we know of no authority and none has been called to our attention which imposes any such duty upon the State nor is any case been cited which imposes such a duty upon a private individual or a corporation. If there was some duty, either statutory or at common law, on the part of the State to regulate the outflow of water from the dam so as to minimize or eliminate the flooding of lands below to an extent greater than would be the case if the river flowed naturally, then a negligent omission to perform the duty of such regulation would sustain an action for damages. We find no such duty. The dam was authorized and is intended as a storage reservoir for the purpose of supplying water to the Barge Canal. The funds used for its construction were authorised solely for the improvement of the canal system and not for flood control purposes. There being no statutory duty to operate the dam for flood control purposes, any duty to operate the dam for the purpose of bettering natural conditions must be found in some rule of the common law which would be applicable to a private individual or a corporation. We know of no principle of common law which imposes any such duty.
>
> In this case, there is no breaking of the dam, no sudden and unwarranted opening sluice gates, no seepage of water and no artificial channels. We simply have the question as to whether a dam owner has the right to let nature take its course, i.e., the right to permit floodwaters to go over his dam where the volume of water cast into the channel below the dam does not exceed the volume coming in above the dam. We think the question must be answered in the affirmative."

150. The Court reviewed a large series of American cases, as well as the Canadian case of *Wegenast v Ernst* (8 Upper Canada Common Pleas Rep 456), all of which identified the same legal principle.

151. A case from Oregon that the Court cited, *Crawford v Cobbs Mitchell Co* (121 Or. 628) contains the statement:

> "That an upper riparian proprietor who has impounded the waters of a stream may release impounded floodwaters through his dam without liability to a lower owner, provided he does not swell the natural flow of the stream below the dam to the damage of the lower owner, admits of no dispute:" citing a series of authorities.

152. Similar judicial pronouncements in different States supported the same rule. *Iodice* was a judgment of the majority of the New York Court and the dissenting judgment contains much of the essence of the case made here by UCC. On appeal to the Court of Appeals of the State of New York, the decision was summarily upheld by decision of six members of the Court with one dissent.

153. The issue arose again, this time in the Federal Courts in *Elliott v City of New York* (2010) a decision of the United States District Court for the Southern Division of New York decided on 16 November 2010. The case concerned a water supply dam and reservoir that were constructed between 1941 and 1953 and located in Sullivan County, New York. The plaintiffs' claim was based on common law negligence and also involved an environmental issue with which we are not concerned. Each party moved for summary judgment on the basis respectively that there was no answer to the claim and that the claim was unfounded. The defendant succeeded. What follows is what the Court held concerning the claim as to the duty allegedly owed by the City to the plaintiffs.

154. The Federal District Court cited the established precedent of the above case. The defendant was entitled to summary judgment. "Since the Dam and Reservoir were not created for flood control, the Iodice rule governs; the only duty imposed on Defendant is to

avoid making the flooding worse than it would be under natural conditions." The 1951 decision of the highest Court in New York had been reaffirmed as late as 2008 in *Allen v City of New York* and again in 2010 in *Stormes v United Water New York*. The decision in Elliott was affirmed by a summary decision of the United States Court of Appeals, Second Circuit, which declared:

> "The dam owner is not liable for downstream damage as long as it does not increase the flow of water from the dam beyond its natural flow. New York Courts have reaffirmed this principle." The Court then cited the Allen and Stormes cases. "Here, the City did not increase the flow of water over the spillway beyond that which is incurred naturally as a result of the storms in question. Plaintiffs conceded that the City's dam actually attenuated the flooding. The district Court correctly granted summary judgment on plaintiffs' negligence claims. The City owed no duty to plaintiffs."

155. The trial judge in this case considered that a more pertinent case was *People v City of Los Angeles* 34 Cal.2d 695, which was decided on 7 February 1950 by the Supreme Court of California. The facts are set out in the opening paragraph of the judgment of Traynor J as follows.

> "In 1913, defendant city of Los Angeles completed its aqueduct to the Owens River, which previously emptied into Owens Lake, a salt-water lake without outlet. The city completed in 1939 an extension of its aqueduct system into the Mono Basin watershed and in 1941 its Long Valley Dam at the upper end of Owens Valley. From 1919 to 1937 it diverted virtually all the flow of the Owens River into its aqueduct above Owens Lake. By 1921 the lake was dry and remained so until 1937; as a consequence, valuable mineral deposits in the bed of the lake were made available. In 1937, 1938, and 1939, the city released large quantities of water onto the lake bed, causing extensive damage to the mineral deposits and chemical plants located on the lake bed. In 1939, the state, as owner of the lake bed, brought this action for an injunction to define the extent to which the city may release water onto the lake bed. The trial Court granted an injunction and the city has appealed."

156. The California Court held that the principles governing the disposition of the case had been set forth in a previous decision in which the lessee of mineral rights from the State secured a judgment for damages against the City for the damage to its chemical plant and business caused by the flooding of Owens Lake in 1937. "It was there held that by its long-continued diversion of water from Owens River the city had obligated itself to continue that diversion within the reasonable capacity of its aqueduct system for the benefit of those who had reasonably relied on such diversion in undertaking the development of the mineral resources of the lake bed. In the present case it is necessary to decide whether the city's obligation can be enforced by injunction, and if so, to determine the extent of the injunction."

157. The High Court distinguished those cases that supported ESB in its "Do not worsen Nature" defence for a variety of reasons. On the other hand, those that it found going the other direction were held to be relevant. It will be apparent that this Court finds it difficult to see how the High Court could have found the Los Angeles case mentioned above to be more in point than *Elliott*. The circumstances of *Iodice* and *Elliott* and the issues raised for consideration are in fact remarkably similar to this case, whereas *City of Los Angeles* is clearly distinguishable on the facts.

158. ESB relies on these decisions as representing correct statements of the common law. The defence as advanced by ESB is that the events complained of by UCC in the proceedings do not give rise to any liability arising from the operation of the dams. They actually reduced the flow, but the High Court found that ESB could and should have effected further reductions. In regard to the principle expressed in the phrase "Do not worsen nature" the trial judge held that it was not applicable in circumstances of long-standing constructions that had permanently changed nature. In that he was in error. It is erroneous to think that because the constructed station represents a permanent alteration of the pre-existing natural condition of the river, the defence proposed is inapplicable. If that were the case, no development of any kind could make the defence that it was not adding to the existing situation, that is, the flow of the river as it would be in the absence of the development.

159. The standard of not worsening nature has been adopted in other jurisdictions in respect of single purpose dams, but that is what this dam is also. It is not a multipurpose dam. It is a separate question whether ESB has, by its words or conduct, assumed or accepted a legal liability that can be invoked by downstream occupiers, but that is not to be confused with the legal question arising from the nature of the dam. The trial judge correctly rejected the suggestion that this was a multipurpose dam.

160. UCC's submissions argue that the authorities relied on by ESB to support its argument about not worsening nature being the appropriate standards do not go as far as ESB contends and are easily distinguishable. This Court is of the view that the New York cases *Iodice* and *Elliott*, some 50 years apart, have particular relevance to the issues in this case and that the judge's dismissal of these authorities was unwarranted. He could have found valuable assistance in them in the analysis that they make of the issues. Obviously, such precedents are not binding, but they are undoubtedly persuasive, particularly when they relate to similar arguments, situations and events as happened here.

161. The High Court found that the existence of the dams represents an alteration of nature and that the operation of the system sometimes worsens nature because the dams release quantities of water into the river at times which is greater than the water coming in. Again, that seems to be a non-sequitur. The nature of a dam of this kind is that it will sometimes discharge water for the purpose of lowering the level in the reservoir. Any time that the level of the water in the reservoir goes down means that more water is going out than is coming in. And that sometimes happens. It did not happen at any relevant time in mid-November 2009, so therefore it seems that this point is purely theoretical and of no materiality to the question of liability. Similarly, the fact that the river valleys have a natural attenuating effect does not actually have any impact on the question as it arises in this case.

Did ESB voluntarily assume responsibility for flood alleviation by its statements and presentations?

162. In Chapter 23 of the judgment under the heading: KEY DOCUMENTARY EVIDENCE the High Court analysed a series of documentary materials and presentations without expressing any particular conclusions in that section. However, it is clear that the judge considered them an important building block in the case, as subsequently appears in the judgment. He is at a later stage somewhat pejorative in the language that he uses, sometimes saying that ESB has touted the flood alleviation benefits of the dams and sometimes using other expressions. However, the implication is clear. The judge regards these documents as being declarations by ESB of the flood alleviation features of the dams and the fact that ESB has publicised this feature and emphasised it in various ways in documents and in presentations given by ESB personnel. He held that these publications and declarations and documents declared that the ESB was committed to flood alleviation in the dams that it accepted this responsibility and ESB was actually obliged to perform this function in the dams. These declarations indicated an acceptance on ESB's part of the obligation to engage in flood alleviation.

163. It is the view of this Court that even assuming that ESB had declared such an interest that is a far cry from ESB accepting legal responsibility for doing so. The point about the cases on acceptance of responsibility such as *Hedley Byrne v. Heller* and subsequent

cases up to and including *Customs & Excise Commissioners v. Barclays Bank* is that the party charged has allegedly accepted a responsibility for which it will have a liability in law if it fails to comply with the responsibility it has accepted. We have to look at these statements and documents and ask whether they mean that ESB has accepted responsibility for carrying out flood alleviation so as to afford legal redress to parties downstream in the event that ESB fails to carry this out. That is a heavy responsibility and it is not something that a body such as the ESB is going to take on lightly.

164. This Court is to say the least not satisfied that a statement made at a presentation by an engineer employed by the ESB, even its Chief Civil Engineer, even if it was one that trumpeted the flood alleviation benefits of the dams would be sufficient to fix his employer with a legally enforceable duty to operate its hydro-electric generation operation so as to alleviate flooding. Something like that would require board approval in the case of any company or body such as ESB.

Interim Electricity Generation Licence
165. The High Court judge expressed his conclusions at paragraph 1187 as follows:

> "The first document relied upon is the Interim Electricity Generation Licence granted to ESB by the Commission for Energy Regulation on 21st April 2006. Condition 19(1) requires the licensee to take all reasonable steps to protect persons and property from injury and damage that may be caused by the licensee when carrying out its generation business. UCC argued that the Court should construe this as giving it a right of action against ESB in respect of breach. One can debate the question of generation business and whether any injury or damage resulted. In other words, did the ESB cause any injury or damage in the course of its generation business? Barrett J. rejects that proposition in Chapter 49 at paras. 874 and following on the basis, first, that basic requirements for such an action are not met. He does not actually go further with any specification of those requirements. Secondly, the judge refers to *Glencar* and the judgment of Fennelly J. in which he out-ruled an action for damages for breach of a duty imposed by statute on a public body. Even though ESB is not actually a public body, the same principle he held applied and this meant that UCC was not entitled to proceed in this way."

166. That left a series of other documents as follows:

Lee Dams Publicity Brochure
167. This document, in the passage quoted by the judge, says:

> "Occasional flooding of the valley downstream of Inniscarra has always been and will continue to be inevitable . . . due to the topography and . . . climatic conditions in the area. However, flooding downstream . . . has been minimised by the presence of the dam. The discharge from Inniscarra has always been less than the peak natural inflow . . . since the dam was built. ESB issues flood warnings to those known to be at risk downstream of the dam during periods of floods. The River Lee is not a major factor in city flooding. ."

168. The Court is satisfied that nothing in that statement could be taken as an assumption of responsibility of any kind.

The Contribution to Irish Society of Irish Hydroelectric Dams
169. This is a copy of an article by Mr. J. O'Keeffe of ESB on the above topic, which says that the contribution of the dams to the reduction of flooding on the River Lee is significant. It says that the Inniscarra dam attenuates flooding due to most short duration flood events on the River Lee and it is possible to prevent the peak discharge reaching peak inflow in all but the most severe events. It goes on to say that the dams have reduced the risk of flooding, but it has not been eliminated. Again, on no interpretation is this an acceptance of responsibility on the part of ESB to operate so as to alleviate flooding

River Lee: Assessment of Dam Safety (1987)
170. This is a study commissioned by ESB and carried out by external experts with what appears to be a German name. The quotation says that the natural runoff shall by no means be increased by the plants. It goes on to say that if the dams and reservoirs provide a reduction of flood peaks, the plants can be considered to be multipurpose plants. In many countries, the government follows the principle of sharing the benefits gained or losses incurred by paying contributions to the hydropower plant. This report recommends investigating the possibilities for flood reduction by modifying existing control regulation. It suggests that the matter should be discussed with the relevant authorities.

171. Of significance is the fact that this is a study carried out by an outside body engaged by ESB. Further the comments made by the experts were conditional and they did no more than make recommendations and suggestions. That being so, the Court is satisfied that they add nothing to the case put forward by UCC. Indeed, if anything, they would appear to be more helpful to the ESB insofar as they have any importance or materiality.

Internal Paper on Hydro Generating Plant: Limits on Use of Storage (1979)
172. This is a paper that suggests that ESB should voluntarily modify use of its hydro resources in the national interest. One would expect that any important agency or enterprise would give rise to internal documents of this kind. Reports and suggestions and explorations are the kind of things that companies engage in, but it does not mean that they are bound by any statements in the documents or that they are obliged to follow up any suggestions. Again, in this case, there is nothing to indicate any acceptance of responsibility.

River Lee Levels – Cork City (Sensitivity to Inniscarra Discharges) (September 1994)
173. This is an inundation study carried out by ESB. The High Court observes that it demonstrates that ESB had a detailed knowledge of the downstream effects of discharges from the Lee dams and the significance of inflows from downstream tributaries. There is a quotation indicating that but it has otherwise no significance for acceptance of responsibility.

Report on Management of Lee Floods of February 1997
174. This report records a decision by ESB personnel during a flood event of February 1997 to commence spilling at Inniscarra earlier than was necessary for dam safety: "this was done with the intention of reducing the flooding downstream of Inniscarra . ." The Court comments that this may be compared with the decision by Mr. O'Mahony, the Chief Civil Engineer, on 19th November 2009 to allow the level at Carrigadrohid reservoir to rise above MAXNOL.

AXA Insurance Report 2004
175. At para. 311 the judgment refers to a report of AXA Insurance in 2004. Axa was the insurer of ESB and it conducted an onsite visit to evaluate the exposure of ESB to various risks including dam liability.. The judge then says that "given the duty of absolute good faith between insured and insurer, the Court had particular regard to this report". This was a report by the insurer and then

there was a response by ESB. Obviously, AXA was concerned to identify relevant matters that might possibly give rise to liability and any other relevant consideration for the purpose of making recommendations and even calculating the premium to be paid. But it is not correct to say that in compiling this report, AXA was under an obligation of absolute good faith or *uberimma fides* towards the ESB. If the latter were supplying information to the insurer, the situation would be different because the insurer is entitled to be put in possession of all information that might influence a decision in regard to acceptance of risk. No doubt, the same would apply to dealing with a claim. But it does not work in the opposite direction. That is not of particular importance in this case, but since the judge said that he paid particular attention to it because of that point, it is worth observing. The views of the insurer do not commit the ESB to anything. Obviously, the insurer is concerned to identify any potential liabilities and not just ones that are prominent or even realistic. The report mentions that ESB managed flood control alone and commented that that might induce a 100% responsibility in the case of claims. Naturally, the insurer is concerned with whether its insured is the only body that may be considered to have exposure in the case of a claim. It seems that these observations, comments and concerns on the part of the insurer are just what one would expect to find in a document of this kind. Neither this document nor ESB's response represents an acceptance of responsibility.

176. A further document is a report by the ESB on a Lee flood in December 2006. This is the occasion when there was a discretionary departure from the provisions of the Lee Regulations. The judge observed that the same thing happened in November 2009 in regard to the Carrigadrohid reservoir, although the High Court thought that the decision should have been made at an earlier stage when it would have made a difference. It would have made a difference, but it does not follow that holding off making that decision until Mr. O'Mahony did so was actually negligent in any sense. The report in this case concludes that the decision to invoke the discretionary clauses of the Regulations increased the storage capacity of the reservoirs prior to the large flood inflows and that mitigated flooding downstream of Inniscarra. It recommended that the discretionary clauses should be continued in the Regulations. Again, here, the fact that this decision was made in 2006 and was successfully implemented does not mean that subsequent behaviour was negligent.

177. The judge points to differences in drafts of ESBI reports on the flood events of November 2009. One draft said that the Inniscarra reservoir level at the start of the major inflow on the 19th November 2009 was 48.3m. That level was higher than the Target Top Operating Level (TTOL) at Inniscarra for November which is 47.5m. There was heavy rainfall in October and November 2009, exceeding the normal monthly average and additional spilling earlier in the month would have been required to achieve TTOL at the start of 19th. Later versions of the report did not contain that material. But is that sinister? Is it intended that there is significance in that? If so, what is it? Obviously, on one view, the writer of the original draft thought that this was relevant, even important, and for some reason changed his or her mind, or when the document went to another more senior person for review and editing, he or she thought it should be removed. It is not as if the facts stated in that document paragraph are in any way in dispute or not clear. The point the judge makes is that here is a reference to TTOL. But so what? Is one to infer from this material that it is actually an acknowledgement by the ESB through ESBI in this draft that the operators of the reservoir at Inniscarra should have been at TTOL? Did the write of the original draft let the cat out of the bag only to have the situation now ascertained by discovery of documents? The point is that it may be possible to argue those things, but the mere fact that a document is changed does not mean that it was changed dishonestly or for the purpose of escaping liability.

178. At para. 861 of the judgment, the trial judge notes that an External Dam Safety Committee (EDSC) report of 1992 stated that one of the aims of the Lee Regulations was to minimise flooding downstream. Such a statement cannot impose liability in law where it did not exist previously. First, this committee is an external body engaged by ESB to provide advice as an outside expert consultant. Second, a statement of that kind insofar as it engaged a liability on the part of ESB would prima facie appear to be outside the remit of such a committee. Third, that body cannot speak for ESB. Fourth, it would appear that the statement is a matter of judgment or opinion or of the committee's view of a fact. The committee might be correct or not, ESB might or might not have paid any attention to this particular observation, concentrating on the matter at hand which is the view of the committee about the safety of the dams. There is nothing to show acceptance by ESB of the correctness of the statement. For a variety of reasons, therefore, this committee's observation cannot create liability.

Conclusion

179. These documents do not disclose a basis for a conclusion that ESB, through its publications and statements or those of its employees, has accepted responsibility for flood alleviation of the kind suggested bu UCC as being a legally enforceable duty. It is noteworthy that UCC has not cited any case to support fixing ESB with liability on the basis of statements of this kind. It is a quite different matter to say that the ESB has liability because of its use and occupation of the hydroelectric stations, reservoirs and dams. That is a matter that arises by law, if it does arise. The issue here is where the trial judge was entitled to infer acceptance by ESB of such extensive liability from these different documents and statements.

180. This Court's conclusion about these documents is that they go nowhere near accepting responsibility for flood alleviation in the sense contended for by UCC, namely, a legally enforceable obligation to operate the reservoirs in a manner that is specifically directed to alleviating downstream flooding as opposed to doing something on a voluntary basis in the interest of the community, including everybody downstream and Cork city, and doing so as a by-product of the electricity generation business that ESB carries on. So, it is one thing to carry it on as an ancillary operation to the extent that it does not interfere with electricity generation, but it is a wholly different matter to accept legal liability.

Previous Conduct in Avoiding/Reducing Flooding

Source of the Duty on ESB to avoid Unnecessary Flooding

181. The High Court held that hydro-electric generation and flood alleviation were not incompatible. There was actually no dispute as to the fact that ESB does engage in some flood alleviation. The issue is not whether it is impossible for ESB to do that or whether it is prohibited by the legislation from engaging in the level of alleviation that it does. The matter in dispute is whether ESB has a duty that is legally enforceable by UCC and other downstream occupiers to carry out flood alleviation of the nature claimed by UCC. The fact that the ESB claims flood alleviation benefits arising from the operation of the hydroelectric scheme and that it endeavours to minimise downstream flooding do not establish that legal obligation. Neither does the fact, if it be a fact, that the ESB adopted a position in the litigation that drew criticism from the Court.

182. The Court's reasoning seems to be as follows:

(i) The ESB performed flood alleviation for decades.

(ii) The Lee Regulations incorporate provisions that facilitate flood alleviation.

(iii) The evidence in the case showed that hydro-generation and flood alleviation were compatible.

(iv) The ESB's position in Court was inconsistent with statements that it and its employees made previously.

(v) The ESB had gone about pronouncing that it placed a premium on public safety and sought had little to complain about when it was taken at its word "and an impression arises among the world at large as to how that concern will approach and structure its activities."

183. The judge was strongly critical of the position taken by ESB's in the litigation which was to deny having a legal obligation to alleviate flooding, citing the "contrary *spiel* it had spun to the world since the late 1950s."

184. The reasons advanced in his judgment do not establish a legal basis for the imposition of an enforceable duty to alleviate flooding. The evidence of the operation of the dams does not give rise to a legal liability to achieve any particular level of flood alleviation. Nor is there actual evidence to support an inference of a legally enforceable obligation to carry out any flood alleviation. The fact that a person or body does an act which is of assistance to another does not, without more, create a legal liability. The evidence before the High Court was that ESB conducts its operations with a view to being a good neighbour. A responsible body will endeavour to assist but without assumption of obligation.

185. ESB does not cause flooding; its hydroelectric stations do in fact have the effect of reducing flooding; its own procedures, rules of operation or regulations envisage flood risk reduction but it does not follow that it has a legal obligation to prevent flooding or to avoid or prevent some flooding or flooding of buildings not land. A party is entitled to say it does that, even to take pride in doing so: that still does not mean it assumes legal liability to do so to a specific standard.

Unnecessary Flooding

186. At paragraph 1023 the High Court considers the duty of care proposed by UCC in relation to flooding. UCC contended that ESB owed it and other downstream occupiers a duty of care not to cause unnecessary flooding. The Court then says that:

> "In its closing submissions, UCC has reformulated this as a duty to take reasonable steps not to cause flooding which can reasonably be avoided. It maintains this is but an alternative phrasing of the same question, and avoids the issue raised by ESB as to what is 'necessary/'unnecessary' flooding. The Court must admit to a preference for the previous formulation. This is because that formulation appears to offer a greater certainty of expected action for those subject to the duty of care. Assuming that a duty of care does arise, and the Court considers that it does, it appears to the Court from the evidence before it that the issue of what is 'necessary'/' unnecessary flooding is easily determined: unnecessary flooding is that which occurs after ESB crosses the point of optimisation that is has itself identified as its top operating level, viz. TTOL".

187. The argument proposed by UCC that found favour with the trial judge is that ESB has a duty of care to downstream owners and occupiers to prevent unnecessary flooding. That formulation has difficulties in legal principle and in practice as will appear. The trial judge recognised the problem of uncertainty that is associated with the proposed formula and prescribed a rule that ESB must comply with TTOL, that is, that it must operate the dams so as to maintain the levels at TTOL. In the case of failure to do that and where the flooding of UCC's buildings would have been less severe if TTOL was observed, liability for the damage falls on ESB. That decision may have solved one problem and created others but it did not offer any explanation as to how such a duty may arise in that form as a matter of law.

188. ESB submits that the duty that the High Court imposed was wrong for a number of reasons which are considered in turn in this judgment. There remains however ESB's objection to the formulation of this duty on the ground that it is unknown to the law. Granted that the trial judge identified the duty with the specific requirement of keeping to TTOL, there nevertheless appears to be a prior conclusion as to the nature of the duty expressed in general terms. It is therefore necessary to give some consideration to this matter at the level of generality before turning to the specific basis on which the duty is claimed.

189. ESB submits that one cannot qualify different kinds of harm so as to differentiate between good harm and bad harm, which is essentially what it identifies UCC as proposing in the distinction between unnecessary harm and its sibling necessary harm. Attempting to make such a distinction is simply confusing.

190. ESB maintains that flooding could not have been avoided in this case, on any view of the case and that does not appear to be in dispute. It is indeed accepted by the trial judge. ESB argues that even if it had empty reservoirs in advance of 19 November 2009 there would have been flooding of some person' s land. True, most of UCC's buildings might have escaped but not all. That leads to the conclusion that some flooding was inevitable and it follows irresistibly that ESB cannot be responsible for the inevitable flooding. The responsibility for that must lie with nature so why is nature not responsible for the rest of the flooding that came from exactly the same source? It may be that the flooding that ESB is calling inevitable is what UCC is calling necessary but the same question arises. It follows on this argument that UCC's case seeks to impose on the ESB something different from a duty not to injure others; that is an affirmative duty to prevent nature from injuring others.

191. That is not the only problem. It is a duty to prevent nature from causing some of the damage it would do if not interfered with. How much damage is to be prevented? As much as can be prevented by using reasonable care. But what does that mean?

192. The trial judge solved the problem of distinguishing between necessary and unnecessary flooding by reference to TTOL; flooding that followed adherence to TTOL would be deemed necessary, flooding that followed failure to keep to TTOL was unnecessary. However, ESB points out that the level of the reservoir does not affect the flow of the river. UCC's expert Mr Stevenson agreed that a dam operator could not function to a legal obligation to prevent unnecessary flooding.

193. The concept is wholly vague, impractical and it also seems to be necessarily retrospective. A judgment whether flooding was necessary or unnecessary in any sense that one can conceive of – even if one prefers avoidable or unavoidable – can only be made it would seem in retrospect. If that is correct, it makes it impossible for a dam operator to operate to such a standard, thus confirming the validity of Mr Stevenson's view.

194. UCC's position is couched in very general terms. It says that the duty can be described as a duty to prevent flooding which can be avoided by using reasonable care when making discharges from the dams. That is not without difficulty. The obligation as mentioned elsewhere in this judgment is then to take reasonable care to avoid such flooding is can be avoided by taking reasonable care. Unnecessary flooding seems to mean flooding that cannot be entirely avoided. But that leaves the question as to what the extent of the duty is. UCC maintains that the duty "is anchored in entirely orthodox principles of foreseeability, proximity and what is

fair, just and reasonable." It then proceeds to invoke *Glencar v Mayo County Council*. It moves then to the proposition that ESB has conceded foreseeability and proximity is effectively not in dispute. One might think in those circumstances that the question would remain as to whether it was just and reasonable but UCC further submits that the "relevant duty of care need not be demonstrated to be 'just and reasonable' at all." It nevertheless proposes reasons why it is just unreasonable to impose such a duty. Firstly, a duty self-evidently arises where physical damage has been suffered. This is a strange proposition to advance baldly. It cannot be intended to stand as a general proposition because that would be nonsense. It presumably is based on the assumption that foreseeability and proximity had already been established in respect of the specific harm that is in question. The second point is that there has been an assumption of responsibility on the part of ESB.

195. UCC then lists 10 points to prove why it is just and reasonable to impose this duty. However, the problem identified by the ESB concerns the nature of the duty that is sought to be imposed and that is not answered by furnishing reasons why it might be considered just and reasonable.

196. How is ESB to know what it is to do to satisfy this test? At para. 11(b) of the submissions, UCC says that the duty on ESB is to exercise reasonable care "in respect of its control of the discharges it makes from the dams". Again, this begs the question because it assumes that which has to be proved. There is actually no evidence that ESB discharged water from the dams.

197. This duty involves a definition that is circular but that is only one problem. It is wholly unspecific. Whereas TTOL provides certainty whatever its other frailties, unnecessary flooding has the opposite objectionability: the duty it expresses is unknowable in advance and indeed even retrospectively it cannot be measured.

Nuisance

198. The High Court held that the ESB was liable to UCC in respect of nuisance, both generally and in regard to the measured duty identified by the Privy Council in *Hargrave v Goldman* [1967] 1 AC 645 and by the English Court of Appeal in *Leakey v National Trust* [1980] QB 485.

199. This case is primarily about negligence. UCC's claim is not that ESB discharged stored water into the River Lee which resulted in flooding of its lands and buildings. It is that the ESB managed and controlled the water in its reservoirs in a manner that failed to ensure that there was sufficient storage space available for incoming floodwater. There is therefore no question of direct injury being inflicted by ESB on UCC but rather the indirect effect of failing to abate the flood to a greater extent than in fact happened. Obviously, that is more properly a claim in negligence but that is not to say that nuisance might not also arise. Having said that, it is difficult to see how a claim in nuisance might succeed where negligence failed. If the ESB was not in breach of any obligation that is owed to UCC pursuant to a duty of care, it would seem to follow that the use of its land in connection with its execution of its functions would be excused of fault.

200. The situation is different from some lawful activity carried out on land, which is performed without negligence but which nevertheless gives rise to interference with neighbouring land or other land affected. For example, legitimate factory work not negligently performed could create discharges in the form of effluent or odours or noise and persons affected would not be defeated by the absence of negligence in the operation. The difference with the present case is that it is not something that arises incidentally from the operation of the business that is alleged to produce the nuisance. The modus operandi of the business is itself the subject of complaint. It is not that the business gives rise to discharges. The case is that the business is operated in a manner that does not take proper account of the operator's obligation to persons who may be affected. The complaint is not about what ESB sends out of its reservoirs but rather about what it does not keep in them. Perhaps the least that can be said is that if UCC were to succeed in nuisance alone having failed in negligence, the case would be unusual and perhaps unique and would take the law some distance beyond the existing jurisprudence.

201. The decision on this part of the case and indeed on the issues generally is heavily dependent on the understanding by the Court of the operations carried on by the ESB at the two generating stations. Did a natural hazard arise on the land? Or did one come to be there by the operation of nature? Or was it the case that the ESB collected water in its reservoirs in exercise of statutory power or even in accordance with a mandate to do so and did so lawfully and legitimately? It is not an unlawful use of land to collect and store water for one's own purposes. There is in those circumstances an obligation to to make the reservoir safe, which in this case the ESB maintains it did. It is impossible to deny that the river itself, swollen by the storm which was the worst in the history of the dams and perhaps for a substantially longer period, was the cause of the flow of water that went down stream and flooded UCC. Is it a correct legal analysis in those circumstances to talk of a natural hazard arising on ESB's land which it was within its power to deal with? Is it possible if the answer is affirmative to define the standard of alleviation that represents discharge of the duty? ESB draws attention to these difficulties in its submissions on this part of the case and others. Consideration of the different issues in the case tends to overlap from one point to another. As discussed elsewhere in this judgment, TTOL is a central concept that dominates everything from the duty of care in negligence to the standard applicable in nuisance.

202. The High Court did acknowledge at paragraph 859 of the judgment that "ultimately, flood damage arises from a natural event" but went on to hold that "a person controlling the water has some level of responsibility as regards the accumulation of that water and any flooding that occurs." It is immediately apparent that these short quotations contain the seeds of misunderstandings that infect the Court's analysis of liability, including the issues arising in nuisance. The qualification in "ultimately", the conclusion in "controlling" and the moderation in "some" are rich in implicit meanings that assume facts and conclusions that could only be decided after careful analysis.

203. As with other controversies in the appeal, the broad legal principles covering nuisance and Leakey liability are well established in the authorities and little disputed between the parties. The trial judge does not misstate the law but it is not always easy to understand the precise legal journey on which he has embarked in order to arrive at his conclusions. It is clear, however, that the judge held that ESB was liable to UCC not just in negligence but also in nuisance, standard nuisance to use that expression as well as Leakey liability. It is the application of the law that is in issue.

204. The ESB protests at the trial judge's finding that it was guilty of public nuisance because the case was not pleaded by UCC. The plaintiff located its claim under the legal headings of negligence, private nuisance and under the rule in *Rylands v Fletcher*. It subsequently dropped the last legal claim. The case that the defendant came to meet was negligence and nuisance, that is, private nuisance. The matter is however of little importance in the final analysis because as ESB points out "it is inconceivable that there would be liability in public nuisance if there were none in private nuisance."

205. We are concerned with naturally occurring nuisances and the obligation on the occupier of land to deal with them in order to protect neighbouring occupiers or such others as are entitled to invoke protection. The reason why other possible headings of nuisance do not arise is because of the nature of the claim. Indeed, one of the arguments put forward by ESB is that "it has never

been held that a hazard can be constituted by something, such as a dam, which, because of its presence, gives rise to an improvement in conditions for the plaintiff when compared to those conditions without the presence of the thing."

206. This point is another illustration of the overlapping issues in the case. The law generally is summarised by Jackson LJ in *Vernon Knight Associates v Cornwall Council* [2013] EWCA Civ 950 in a passage quoted by Clerk and Lindsell, 14th edition as follows:

> "(i) A landowner owes a measured duty in both negligence and nuisance to take reasonable steps to prevent natural occurrences on his land from causing damage to neighbouring properties.
>
> (ii) In determining the content of the measured duty, the Court must consider what is fair, just and reasonable as between the two neighbouring landowners. It must have regard to all the circumstances, including the extent of the foreseeable risk, the available preventive measures, the costs of such measures and the resources of both parties.
>
> (iii) Where the defendant is a public authority with substantial resources, the Court must take into account the competing demands on those resources and the public purposes for which they are held. It may not be fair, just or reasonable to require a public authority to expend those resources on infrastructure works in order to protect a few individuals against a modest risk of property damage."

207. The authorities are very well-known and it is unnecessary to cite passages from them. The starting point is *Goldman v Hargrave* [1967] 1 AC 645 in which the Privy Council held an occupier of land in Australia to be under a duty of care to abate a fire which had started by lightning striking a tree on his land and which spread to his neighbour's land. The Court of Appeal in England applied and adapted the principle identified in Goldman to a case where a natural phenomenon in the form of a mound or hill which slipped and moved and damaged neighbouring property: *Leakey v National Trust* [1980] QB 485.

208. ESB submits that none of the authorities establishes a duty of care between two physically disparate riparian owners in respect of the natural flow of a river. It provides a helpful summary of the principal authorities and the factual circumstances that gave rise to them, which it is unnecessary to reproduce. The general principle is clear and like other issues in this case and indeed many cases generally it is the application of the rule that gives rise to dispute.

209. Some arguments should be noticed. It is no doubt correct as proposed by the ESB that any obligation imposed under this head cannot be in conflict with the statutory scheme under which ESB operates the generating stations. The duty is less because the law recognises that the party to be bound is not responsible for the presence of the offending condition. ESB argues that liability cannot arise without fault and that in view of the limited nature of the duty, it is inconceivable that there could be no liability in negligence and yet a liability under this head in nuisance. The remarks made above reflect this Court's concerns on this latter point. It does seem clear that in the circumstances of this case, not to speak of the wide range of possible applications of the principle in question, it is difficult if not impossible to envisage the outcome that ESB considers inconceivable.

210. It is suggested that all of the authorities deal with some kind of interference by the defendant's land with the plaintiff's land, whereas this case is dealing with a river passing through ESB's lands/dams in materially unchanged form.

211. Where liability has been imposed, it has been possible to specify the nature of the hazard and the steps necessary to deal with it. In principle, the party affected has a legal right to go on to the neighbour's land to do the work himself or, at least, to call upon the owner to permit the endangered neighbour to do so. Another aspect of that is the suggestion that this kind of liability gives the potentially injured party a right to obtain an injunction, a point that the trial judge addressed when he suggested that such an order might dictate that:

> "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."

212. The form of injunction envisaged by the judge is scarcely surprising. The ubiquitous and all-purpose concept is the point of departure and the ultimate goal of every issue in the case. The problem however as ESB submits is that this suggested order would have done nothing to save UCC on the occasion of the flood. All it would have done is to cause spilling to take place at a lower level.

213. At a later point in its submissions, ESB drew attention to a matter that counsel also emphasised in regard to the judge's enthusiasm for TTOL. The only way it can operate as a protection for UCC or other downstream occupiers, assuming it were to be adhered to by the ESB, is if the space between TTOL and MaxNOL is available for use in the case of an increased flow of water coming down river into the reservoirs. On this assumption, there would be such accommodation available but the difficulty that arises as to when it is reasonable or required to depart from the general rule in order to use this space for storage. If a further surge comes down, there may be complaint that it was unnecessary or insufficiently justified by the crisis that previously presented. One way or another, a new problem arises and the new zone of potential liability by ESB for making the wrong decision as to when to abandon TTOL. The whole point of establishing this absolute requirement, as the High Court directed, is to have space available; it is then necessary to decide when it is legitimate or required to bypass this standard completely.

214. The essence of the liability recognised by the Courts in this exceptional class of cases where a duty is placed upon a person to offer relief to a neighbour where the person is not responsible for the hazard is that a harm has come from the defendant's land and goes on to or is in danger of going to the plaintiff's land. This central feature is missing from the present case, as ESB submits, because it has done nothing to affect the state of the river that is passing in its channel through its land and that of UCC.

215. It is also relevant to note that these parties are in a legal relationship as riparian owners, with mutual obligations and rights and it is unnecessary to look outside that scheme for rules governing their conduct as riparian owners, which the proposed liability and that imposed by the High Court does.

216. UCC argues that the facts of this case actually fortify the case for imposition of the *Leakey* duty. That is because "ESB's active involvement in harnessing and managing nature on an ongoing basis is a feature not replicated in any of the other cases." In a flight of fancy, they say that the equivalent would be if the defendant in *Goldman* was engaged in business attracting and controlling lightning. This observation is indeed correct in identifying a very significant difference between this case and all those others but the conclusion this Court considers appropriate is different. Referring back to the discussion above about the possibility of different findings in respect of negligence in nuisance, the point is made that the complaint here about the activities of ESB is not about something that arises as a hazard on its land by reason of some adventitious circumstance. UCC makes the case that ESB is negligent in the way that it carries on its business of generating electricity because, in that capacity, it has a duty to UCC to avoid unnecessary flooding. The claim is that ESB has breached that very duty by its acts and omissions in achieving its statutory

purposes. The distinction drawn is accordingly apt to extinguish this particular duty under the heading of nuisance. Neither is it a correct or legitimate reading of the facts of *Goldman* to say that the defendant attenuated the hazard.

217. It is suggested that the ESB is not entitled to any attenuation of the legal duty imposed because "ESB deliberately released water and, in the course of so doing, caused damage which could have been avoided by heeding weather reports and spilling earlier." Obviously, if that is a correct description of what happened it has implications and legal consequences in terms of liability. However, for the purpose of this discussion it is more relevant to note once again that the occasion of the hazard is the very operation being carried on by the ESB. It is not a harm or a hazard or a threat that arises and that ESB can deal with but fails to do so.

218. Obviously, as with many of the cases in nuisance generally and under the measured duty, there may be debate as to whether the appropriate heading is negligence or nuisance and the Courts have frequently declared that it does not matter which is the appropriate rubric. However, some differences remain and applied to a greater or lesser extent depending on the factual circumstances in issue. In the present case, it does not appear to be of real significance whether nuisance is in issue as well as negligence. As stated above, it is difficult to see how ESB could be held liable in nuisance if it was not also – and primarily – answerable in respect of negligence.

219. ESB argued that the measured duty is confined to neighbouring owners or occupiers, a point which does appear to be borne out by the facts of the leading authorities. That does not of course negative the possibility of some circumstances arising in which the Courts would apply the rule in non-adjoining cases. It is of some significance to note the reach of the state of the authorities. The trial judge held that it was not a necessary condition for the law of nuisance to apply that the properties be adjoining. That is no doubt correct, even if it is not clear from the Leakey jurisprudence.

220. As stated above, this Court is not satisfied that there is any overriding or even different issue presented by application of the law of nuisance either generally or by reference to naturally occurring nuisances in the context of *Leakey v National Trust* jurisprudence. The nature of the case, the reasoning of the High Court 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. Insofar as a decision is called for, the Court is of the view that nuisance under either of its presentations cannot supply for UCC anything that negligence cannot bring.

Conclusions

221. There is no hazard upon ESB's lands that can be identified for the purpose of being corrected or removed. The river is common to the lands of both parties. What distinguishes ESB's lands is only the dams. The dams are not, from the perspective of UCC, a danger, but give rise to an improvement on conditions as they would be if the dams were absent.

222. No water greater than the level of the incoming river flowed out of ESB's properties. The water levels in the river were not increased by ESB nor did ESB cause flooding. UCC's property was flooded, but the cause of same could not be said to emanate from ESB rather than the naturally occurring flood on the river Lee.

223. This Court is satisfied that if the findings of the trial judge are allowed to stand then it requires ESB to undertake choices as between the interests of different landowners, and it would require ESB to assemble considerable information in relation to the levels of buildings downstream and the purposes for which those buildings are used an operation outside the statutory remit it was given by the Oireachtas.

224. The duty requires a fundamental alteration of the operation of the Lee dams at the expense of hydropower output. This Court is satisfied that such a finding is not warranted in the current state of the law either of negligence or nuisance and including the measured duty and would be disproportionate.

225. If the trial judge is right and a measured duty of care arises, this Court is satisfied that it ought to be owed to UCC by every upstream riparian owner, not merely ESB Further it must be owed by ESB to every downstream riparian owner. The primary question in the case of each owner is: did he do what it was reasonable for him to do? Indeed, a similar duty would apply to UCC in respect of any proprietors downstream of its holding. This outcome represents a paradigm shift in the law of duties. This Court is satisfied that to take the law of obligations in such a direction goes against the principles counselled by Chief Justice Keane that it is preferable for legal obligations "to develop incrementally and by analogy with established authority".

226. The evidence shows that ESB did not "keep" upon its land or maintain thereon a " state of affairs", as that concept has been construed over the past century and more, which was caused to " escape". It is no more responsible for material flooding of the river Lee on November 19th/20th 2009 than any other riparian owner.

227. This Court finds that there was no basis in law for finding liability in nuisance and that determination ought to be set aside.

Warnings

Trial judge's finding of liability based upon assumed responsibility.

228. The question this Court must ask itself is whether the trial judge was or was not correct as a matter of law and fact when he concluded that ESB had failed to discharge the obligations it had assumed in respect of UCC.

229. For the purposes of considering whether the conclusion of the trial judge that ESB was in breach of the responsibility which it had assumed to UCC, the Court must first consider the circumstances in which ESB assumed such responsibility and the extent of the responsibility so assumed.

230. The starting point for this assessment is the Lee Regulations which at clause 1.2 deals with matters of concern during a 'Flood Period'. Relevant for the purposes of this appeal are the following extracts there, namely:-

> "During this period, the top priority is the proper management of the flood to avoid any risk to dam safety. All other factors such as efficiency of generation, system requirements, environmental, social, legal and economic considerations are secondary."

Before spilling at Inniscarra, the Local Plant Controller shall notify downstream residents and interested parties of the intention to spill. A list shall be kept in the Control Room at Inniscarra Station and shall be updated from time to time.

When the total discharge from Inniscarra is such that roads are likely to be flooded, *i.e.* greater than 150m3/s, a more general public

warning shall be given through the relevant authorities and the media. A separate list of up to date contact numbers shall be kept in the Control Room at Inniscarra Station for this purpose."

231. It is common case that UCC was one of the downstream interested parties which, because it was on the list kept in the Control Room, was entitled to be advised of any intention on the part of ESB to 'spill'. It is apparent from the judgment of the trial judge, that the list maintained in the Control Room for this purpose was a voluntary 'opt in' list. UCC had been added to the list in 2004 when it purchased a greyhound track at the location of the Western Gateway Building. The previous owner had been on the list because the greyhound track had been the scene of regular flooding over the years.

232. The High Court judge expressed his conclusions at paragraph 1187 as follows:

> "What is clear from clause 1.2 is that the parties on the opt in list are entitled to 'notification' of any intention on the part of ESB 'to spill'. Of significance is the fact that the word 'warning' is not included in the clause. Further, there is no mention of ESB volunteering to make known details concerning any intended spill such as the likely level of discharge or the overall volume to be discharged. Neither is there anything in the clause from which it could be inferred that ESB would provide those on the opt in list with all or any information that it had or could assemble concerning the consequences of any intended spillage, such as the areas or properties likely to be flooded during a Flood Period."

233. Important also is the responsibility assumed by the ESB to give a more general public warning through the relevant authorities and the media once discharges from Inniscarra exceed 150m3/s. That ESB undertook to give such a 'warning' is perhaps unsurprising in circumstances where at that rate of discharge the evidence was that the roads would likely be flooded. The greater the discharge above 150m3/s the greater the risk of flooding to downstream properties. Relevant in this regard is that the warning identified in this clause was to be transmitted to the general public through information provided by ESB to the relevant authorities and the media. ESB did not itself undertake to provide a general public warning. The list maintained for this purpose included An Garda Síochána, the Fire Brigade, the City Council, the County Council, local radio stations, national radio stations and AA Roadwatch. As was made clear by Mr. Brian O'Mahony, ESB's chief engineer, ESB principal obligation was to provide information to the local authorities because they were the flood response agencies. Further, the undertaking so given was of importance in the context of the obligations of the local authorities in respect of roads and the potential need to manage the evacuation of properties prone to flooding. The evidence before the High Court further established that the local authorities were well briefed prior to 2009 concerning the likely consequences of flooding for Cork city. They were in possession of a wide range of information as a result of reports prepared following floods of previous years and had, for example, possession of copies of inundation studies showing the impact of outflows from the dams on the city and downstream areas.

234. While the last-mentioned responsibility does not, on its face, oblige ESB to warn those on the opt in list of discharges in excess of 150m3/s, it was accepted that this had been its practice over the years. Accordingly, in considering the findings of the High Court judge concerning ESB's obligations based upon its assumption of responsibility, ESB must be deemed, by its conduct, to have undertaken to warn those on the opt in list of discharges exceeded 150m3/s. After all, it is not disputed that it was based upon the responsibility so assumed that ESB placed its two calls to UCD on the 19th November 2009.

235. It is important also at this juncture to record that there is nothing in the Lee Regulations from which it could be inferred that ESB had accepted responsibility to provide the type of information and warnings which the trial judge concluded were required to meet the obligations it had assumed. There was no evidence that it had undertaken to provide information as to the individual discharges it intended to make or as to the anticipated total volume of any proposed discharges. Likewise, there was no evidence that ESB had undertaken to provide warnings or information as to where discharges or inundation would likely end up or as to the possible effect of any discharges on the properties of downstream residents and interested parties on its opt in list. Finally, there was no evidence as to any past conduct on the part of the ESB from which an undertaking to give warnings of such a nature could be implied.

236. From what it agreed to do as per the Lee Regulations and from its practice of including those on the opt in list when giving a more general public warning via the relevant authorities and the media when discharges from Inniscarra exceed 150m3/s, the responsibility assumed by ESB was 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. UCC was to be notified when a spill was intended and given a warning when discharges were to exceed 150m3/s (emphasis added).

237. In terms of the liability found against ESB based upon its breach of the responsibility it assumed to those on the opt in list, this Court is satisfied that the trial judge was not entitled to rely upon factors other than those referred to at paras 17 to 20 above. He was not entitled to heighten or extend the obligations which ESB had assumed, if that is what he intended by para. 269 of his judgment, by reason of the fact that it had control of the dams and the discharges therefrom and knew of their capacity to accommodate the inflow of water by reason of the levels of those dams. Neither could the fact that ESB had disseminated inundation studies to the local authority, thus demonstrating its knowledge as to the consequences of flooding for downstream landowners, have any effect on the extent of its assumed responsibility. These would appear to be a number of factors which the trial judge impermissibly concluded impacted upon the extent of ESB's assumed responsibility to UCC. In this regard the Court accepts the submission made on behalf of ESB that its assumption of responsibility to provide notifications and warnings to those on its opt in list cannot be construed as an assumption of responsibility to provide different and more detailed warnings based upon such factors, as was the ultimate finding of the High Court judge.

Where the Warnings given on the 19th November 2009 Meaningful and Timely?

238. The High Court judge expressed his conclusions at paragraph 1187 as follows:

> "In circumstances where ESB, on the hearing of this appeal, did not seriously contest that it was to be inferred from the responsibilities which it had assumed that the warning it was obliged to give to UCC, in the event that discharges were in excess of 150m3/s, had to be both meaningful and timely and the trial judge found that it was in breach of this obligation, it is necessary for the purpose of testing the validity of that conclusion to consider the following chronology which refers to some of the more crucial aspects of the evidence concerning the events of the 19th November 2009."

19th November 2009

05.00: ESB receives a rainfall forecast from Met Eireann indicating a significant rain event predicted for the coming hours.

08.00: Increased discharge from Inniscarra of 160m 3/s Lee Regulations paragraph 1.2. About this time ESB made contact with the emergency services of Cork City Council and County Council. It alerted local radio stations, ESB Public Relations Department and RTE National Radio regarding a risk of flooding. The text of the weather warning issued was as follows:-

> "ESB Lee stations at Inniscarra dam has issued a severe weather alert. The areas at risk of flooding are the Inniscarra and Carrigrohane / Lee Road and areas down river of Inniscarra dam"

10:50: ESB calls persons and parties on its notification list including UCC. The calls were placed by Jerry Browne and Michael Shine. Mr. Browne advised those on his list that the ESB was "issuing a flood warning, due to heavy rainfall in the catchment" and that the ESB would be "increasing discharge from Inniscarra dam during the day". Mr. Shine had advised that "due to heavy rainfall we will be increasing discharge from Inniscarra dam during the day. Areas at risk are Inniscarra Bar, Lee Road and Carrigrohane."

10.57: ESB contacted Cork City Council as part of the "ring around" process.

11.20: In UCC Mr. Paul Prendergast, a buidings officer, who telephoned members of the Buildings and Estates Team and UCC's Superintendent of Engineering Services to apprise them of the notification that the college had received from ESB.

11.49: ESB contacts AA Roadwatch and all local radio stations asking them to broadcast the following warning:-

> "Water is being released from Inniscarra dam and this will severely effect the city centre. Conditions expected to worsen as high tide approaches at 6.30 p.m.

12.00: Concerned to protect electrical transformers in the basement of the Western Gateway Mr. Connaughton of UCC procured fifty sand bags from a local supplier and purchased a sump pump to back up other pumps already in existence.

12.09: Ms. Liz Kennedy of UCC circulated an e-mail to an intra University contact list concerning "Inniscarra dam water release - increase risk of flooding". It stated as follows:

> "[W]e have just been informed by the Buildings Officer that the Inniscarra dam will be releasing significantly more water than usual today. As a result there is an increased risk of flooding in low lying areas adjacent to the River Lee. All responsible persons are asked to carefully consider the implications of this for their own areas and to take any necessary appropriate action. If you require assistance please contact the Buildings and Estates Help Desk on extension __. If your call is urgent it is important not just to leave a voicemail but to ensure that you pass it onto a responsible person".

Based upon the aforementioned evidence the trial judge concluded that a warning had been received from ESB before that e-mail was sent but it was not clear who had "embellished" the succinct message which Mr. Browne had delivered.

Although not noted in the trial judge's chronology, at 12:09 Cork City Council placed warnings on its website advising of a flood alert for Cork City with a risk of flooding in vulnerable areas that evening and advising of the need to take steps to protect properties from flooding at Carrigrohane Road, the Mardyke western suburbs adjoining the river Lee and the low lying areas of the city centre.

13.24: ESB contacts Met Eireann to advise that rain would ease off in the evening.

14.00: Mr. Prendergast cycled the perimeter of UCC and as a result of his inspection concluded that he did not expect any flooding to impact the UCC building stock.

16.00: Notwithstanding the fact that ESB was discharging 225m3/s from Inniscarra dam reservoir levels were rising. ESB decides to issue a further warning to people on its list and other parties.

16.15: ESB made further warning calls to those on its warning list. The form that the warning was to take was agreed. The wording was:-

> "ESB will be increasing discharge from the dam on numerous occasions throughout the evening - this is a large, bad flood."

At the end of most calls Mr. Keely reiterated that the ESB would "be increasing discharge from the dam on numerous occasions throughout the evening

17.00: Mr. Prendergast of UCC walked the river banks by the Glucksman. He did not consider that the situation was worsening. He was reassured by what he saw in terms of water levels giving its low lying river location.

17.02: Mrs. Kennedy of UCC circulated a second e-mail to the appropriate intra University contact list. Like her earlier e-mail it was headed "Inniscarra dam water release - increased risk of flooding" save that the word "update" was added. This stated:-

> "We have just been informed by ESB in Inniscarra that they are going to release more water shortly. Please also see the notice below."

The notice below was her original e-mail of 12:09.

17.16: Cork City Council was advised that the ESB would be increasing its discharge from the Inniscarra dam throughout the evening and that "this is a large, bad flood".

18.00: Although not mentioned in the trial judge's chronology, ESB contacted RTE asking it to issue a serious flood warning with the result that on the evening news it was reported as follows:

> "ESB is warning of severe flooding in the Lee valley between Inniscarra dam and Cork City, approximately eight miles away. Exceptional rainfall has led to extremely large volumes of water flowing into the Carrigadrohid and Inniscarra lake further down stream. ESB is controlling the flood waters in the dam. However, given the scale of the water volumes entering the lake, the largest seen in modern times, it is necessary to discharge flood waters accordingly through that dam. Residents and property owners in the affected area have already being warned of the rising flood waters. The general public is asked to avoid the area if possible."

The report included the following extract:-

> "Then Cork City. It has escaped the worst so far, but the ESB is warning that it is going to have to release thousands of

tons of flood water from the Inniscarra dam later on tonight and it is warning people in the Lee Valley that there may be flooding downstream of the Inniscarra dam."

19.00: Mr. Mark Poland, Director of Buildings and Estates at UCC, called Mr. Prendergast for an update. He had not at that time read the second e-mail sent at 17.02. Mr. Prendergast appeared to have reassured him that since high tide has passed at 19.00 without a problem he didn't expect on campus flooding would occur. Mr. Prendergast agreed to check the campus at 21:00. At 20:45 Mr. Prendergast, having gone home earlier, (he did not know whether he had watched the 6 News) returned to UCC. The water was at least two metres down from the roadside on Georges Quay leading him to conclude that "grand, we are over it now".

21.00: Mr. Connaughton of UCC at the Western Gateway opened the sewage manhole in the basement of the building to divert flood water and commenced operating the sump pump manually.

22.00: Mr. Prendergast arrived at UCC having received a phone call to say that there was water in the Glucksman. By 22:30 or 23:30 the gallery had gone beyond saving.

239. Given the absence of evidence that ESB had ever agreed to provide those on its opt in list with warnings concerning the likely impact of the discharges on their buildings or property and had never so conducted themselves, this Court is satisfied that ESB complied with its assumed responsibilities in the two warnings it gave to UCC on 19th November 2009. It follows that the Court is satisfied that the trial judge erred in law and in fact when he concluded that ESB was in breach of the responsibilities which it had assumed in its failure to warn UCC of the discharges it intended to make and of the likely impact of those discharges on its properties.

240. Having regard to the responsibility assumed by ESB to those on the opt-in list, and its tacit acknowledgment that the warning it was obliged to give concerning discharges over 150m3/s had to be timely and meaningful, this Court is also satisfied that there was no basis in fact or in law for the conclusion of the trial judge that ESB had failed to comply with those obligations.

241. ESB's obligation to warn UCC of its intention concerning its discharges was only triggered on the 19th November 2009 when, earlier that morning, it had upped its rate of discharge to 160m3/s. Under the Lee Regulations there was no obligation on UCC to give that warning in advance of a discharge greater than 150m3/s, as was required in respect of a notification of an intention to spill. Neither was there any evidence that ESB had agreed to give a warning over and above that which was provided for in the Lee regulations. It is noteworthy that ESB had complied with its obligation to give those on the opt-in list prior notification of its intention to spill at Inniscarra on the 16th November 2009. Accordingly, there was no legal basis upon which the trial judge could have concluded that the warning given at 10.50 on the morning of the 19th November 2009 was not timely and was in breach of the responsibilities which had been assumed by ESB.

242. As to whether the warnings given on 19 November 2009 were meaningful such as to comply with ESB's assumed responsibilities to UCC, once again, this Court is satisfied that they were, and that the trial judge erred in law and in fact in concluding otherwise.

243. The evidence was that the warnings of the impending flood were communicated to those on the opt in list by Mr. Gerry Browne or Mr. Michael Shine. Mr. Browne advised those he contacted, a group that included UCC, that ESB was issuing a "flood warning" and also advised of ESB's intention to increase discharges from Inniscarra during the day. He did not merely notify UCC that ESB would be making discharges above 150m3/s. He warned of a flood risk. Mr. Michael Shine also advised those he contacted of the proposed increasing discharges as well as the risk of flooding. He identified the areas of risk at that time as including Inniscarra Bar, Lee Road and Carrigrohane.

244. Not only was the message that was communicated to UCC meaningful in terms of warning of the risk of flooding but what was also clear from the evidence was that it prompted an e-mail that was sent to all on an intra-University contact list under a subject heading "Inniscarra dam water release - increased risk of flooding". That e-mail warned all recipients of "the risk of flooding in low lying areas adjacent to the River Lee". It is common case that the Glucksman Gallery, which was later flooded, was located in that area.

245. The evidence also established that Mr. Paul Prendergast, a building officer at UCC, was aware of the warning which had been received from ESB with the result that he telephoned various members of the Buildings and Estates team to advise them of what had been notified by ESB. One of those contacted was Mr. Eamon Connaughton, the Western Campus Facilities Manager, who was responsible for buildings including the Western Gateway. Shortly before mid-day he e-mailed Mr. Prendergast with some photographs of he had taken of the water levels at a bridge outside the Western Gateway noting that the car park was within one metre of becoming flooded. He also expressed concern regarding the integrity of the bridge. Further, having noted minor condensation on the basement walls of the Western Gateway at mid-day, and concerned to protect two electrical transformers in the basement, he contacted a local supplier and purchased fifty sand bags and a sump pump lest the building be flooded.

246. It was also clear from the evidence of Mr. Prendergast, who had patrolled the UCC campus throughout the day that he was live to the risk of flooding to various area of the campus as a result of the warning communicated by ESB at 10:50. He also told the High Court how, as a result of the email he received, he had monitored the Cork City Council website concerning the risk of flooding. This had advised property owners that they needed to take steps to protect their properties due to possible flooding of Carrigrohane Road, the Mardyke, the Western Suburbs joining the River Lee and low lying areas of the city centre.

247. This Court is also satisfied that the clear import of the second warning issued at 16.16 was of an increasingly serious situation from a flooding perspective. UCC was advised that ESB would be increasing its discharges from the dam and that numerous further discharges would be made throughout the evening. That second warning referred to the fact that what was anticipated was a "large bad flood", a warning which in the opinion of this Court was not only meaningful but was more than adequate to discharge ESB's assumed responsibilities to UCC.

248. Both of the warnings had made clear that flooding was anticipated. That UCC was live to the risk of flooding was clear. What steps it decided to take to engage with the flood risk about which it had been clearly notified was a matter for UCC. It would appear that Mr. Prendergast considered it sufficient to patrol the campus and respond if and when flooding commenced. He did not, it would appear, consider it necessary to take positive action to protect any property until such time as the flood actually arrived. Indeed his evidence was that he had gone home shortly after 5 p.m. and was unable to confirm whether or not he had watched the news at 6 p.m. to update himself concerning the flood risk. He did not return to UCC until 20.45. Fifteen minutes later the Western Gateway, the site of the old greyhound track with a past history of flooding, was under water. That was also the location of the Glucksman Gallery where no precautions had been taken with respect to the risk of flooding.

249. As the trial judge noted in his judgement "Cork City had experienced serious flooding on multiple occasions in the past, a

notorious fact of which UCC could not but have been aware. The flooded premises were all situated in and about the area where had flooding previously occurred". Notwithstanding UCC's knowledge of these facts, the warning by the ESB that "a large bad flood" was anticipated and the warnings with which UCD was familiar from local authority websites and news broadcasts, it sought no additional information from ESB concerning the anticipated flood and, save perhaps for the actions of Mr. Connaughton, took no precautionary steps to safeguard its property.

250. That UCC, which had experienced significant flooding in the past and whose name was for that very reason on ESB's flood warning list, contended, as it did in the High Court, that it had received no meaningful warning even though advised amongst other things that there was a "large big flood" coming was, in the opinion of this Court, quite audacious. However, even more surprising perhaps is the fact that the trial judge accepted that ESB was in breach of the responsibility which it had assumed because it had failed to detail the impact that it considered the flood would likely have for UCC and its building stock. If the trial judge was correct as a matter of law that in order for the warning that ESB had agreed to provide to be meaningful it was required to identify which buildings or property it considered might be at risk, it would have to have been in a position to provide similar advice to each of the 60 residents or concerned parties on its opt in list, a monstrous responsibility that it is hard to imagine a body like ESB could possibly perform having regard to the enormous burden that it would place on its resources at a time of high alert at the dam. As the Lee Regulations make clear, the top priority for ESB during a flood period is proper management of the flood to avoid any risk to dam safety and all other factors and considerations are secondary.

251. This Court does not accept that ESB ever assumed responsibility to furnish those on the opt in list with any information or warning as to where flood waters or inundation might ultimately end up. Neither does it accept that in order for the warning which ESB agreed to give to those on its opt in list to be meaningful it was obliged to identify for those on its list where the inundation would end up and whether, in its opinion, the property of any particular individual or interested party was likely to be affected. Common sense would dictate that a flood period presents as an evolving situation. In order to comply with the type of warning described by the trial judge as meaningful, ESB, during a high alert period, would have to have made some assessment as of the risk of flooding to the property of each of the 60 downstream residents. Further, what is not at all clear from the trial judge's judgement is how any such obligation could be discharged in an ever-changing environment. The risk to each of these properties was going to change throughout the day. How often during the day would ESB have had to telephone the 60 persons on its opt-in list to meet the obligation as found by the trial judge? And, what if its predictions were wrong and vast sums had been expended by residents to protect their properties from a flood that never materialised?

252. The idea that it could be inferred from either the Lee Regulations or ESB's past conduct in warning downstream residents of discharges above 150m3/s, that it had assumed responsibility to those on its opt in list to give them something close to a customised flood risk advice service at a time when it was managing its dams in a Flood Period is, in the view of this Court, untenable and for the reasons earlier stated is satisfied that the warnings given by ESB to UCC on 19th November, 2009 fully complied with the responsibilities which it had assumed.

Findings of Fact made by the Trial Judge

253. Before moving to consider whether the trial judge erred in law in concluding that ESB owed a common law duty of care to warn UCC of the risk of flooding, the Court considers it appropriate to make reference to a number of findings of fact made by the trial judge which it considers were not supported by the evidence.

254. Insofar as the trial judge concluded that the warnings given by ESB to UCC were meaningless, that is not a finding supported by any credible evidence. Both messages furnished to UCC on 19th November 2009 made clear to UCC that it was at risk of flooding. In particular the e-mail of Ms. Kennedy was strong evidence that the risk of flooding was more than adequately communicated. In light of the evidence there was no basis upon which the trial judge could lawfully have concluded that the warnings given by ESB were of a "nonsense" variety.

255. Second, the trial judge's finding that the second warning did not convey anything different from the first warning was not supported by the evidence. The second communication clearly identified the escalating nature of the flood risk. The warning at that stage was of an anticipated "large bad flood", a description not included in the warning given at 10.50 a.m.

256. Third, the trial judge was incorrect in concluding that the warnings given by ESB to UCC gave no indication that its buildings were in danger. The reason UCC was on the opt in list was because it had purchased property that was prone to flooding. On the morning of the 19th November 2009 UCC was advised of a risk of flooding in areas which included property owned by UCC and in the afternoon was told that the flood would be "a large bad one". The only reasonable interpretation of both warnings was that UCC's buildings were at risk from the anticipated flood and in particular those buildings, such as the Glucksman Gallery, which were situated on low-lying areas of the campus.

257. Fourth, there was no evidence to support the trial judge's finding that the warnings given on the 19th November 2009 were anything other than routine. No evidence had been adduced as to the nature of any warnings provided by ESB to UCC during previous flood periods.

258. Fifth, the trial judge identified other "deficiencies" in the warnings. These were based on his conclusion that as a matter of law ESB had a duty to provide extraordinarily detailed warnings to all on the opt-in list. He refers to the fact that the warnings did not calibrate the discharge volume, did not differentiate with regard to volume and gave no indication of the level of inundation or where the discharges would end up. This was information of the type that Dr. Hughes had advised might be disseminated by an expert authority set up to manage flood emergencies. The finding by the trial judge that ESB, a hydroelectric operator, had failed in its legal responsibilities in not providing this type of customised alert service to 60 downstream landowners whilst managing what was tantamount to a flood emergency at its dam, was unsustainable on the evidence. Indeed the evidence was that the warnings that had been given by ESB to UCC were of the standard commonly provided by hydroelectric dam operators during a Flood Period.

259. Finally, the finding of the High Court judge that ESB should have advised those on the opt in list of the risk of "unprecedented flooding" or of the risk of "the largest ever flood" was not supported by the evidence which established that expressions of this nature were not in the vocabulary of authorities charged with managing flood emergencies.

Common Law duty of Care

260. In stating as he did at para 269 of his judgment that there were "three features in the case that cast on ESB a heightened duty to warn" the trial judge was, it would appear, referring to the law of negligence and common law principles. In that paragraph he distinguished what he considered to be ESB's common law duty to warn all members of the public of a risk of downstream flooding to its "heightened duty" to warn those on its opt in list of the risk of flooding to their properties.

261. In addition to the submissions earlier summarised, Counsel for UCC submits that the common law duty which the trial judge concluded is owed by ESB to all downstream residents to warn them of potential flooding is not all that burdensome. That obligation might be discharged by ESB contacting news outlets and news media concerning the risk of flooding as well as by publishing notices on a website and notifying agencies such as Cork county council, Cork City Council and the Fire Brigade. He also maintains that the trial judge correctly concluded as a matter of law that ESB owed a greater common law duty to those on its opt in list to warn them of anticipated flooding due to the existence of the following three factors, namely:-

(i) ESB had assumed the responsibility of giving warnings to those on the warning-list;

(ii) ESB was the only entity capable of providing information on discharges from the dams, and

(iii) ESB stood possessed of particular knowledge as a result of various flood studies it had earlier carried out.

262. Ultimately, relying on this heightened duty of care and ESB's assumed responsibilities to those on its opt in list, the trial judge concluded that ESB had been in breach not only of its assumed responsibilities but also its common law duty in the fourteen respects identified at para 276 of his judgment. From the nature of the deficiencies in the warnings identified it is very clear that many of these could only be attributable to breach of the common law duty found by the trial judge. That this is so is clear from the fact that in dealing with the responsibility that had been assumed by ESB the trial judge had gone no further than to hold that the warning to those on the opt in list had to be a meaningful and timely warning of a flood and it's likely effects.

263. It is to be inferred from the three factors identified above, which are stated to explain the "heightened duty of care" owed to those on the opt in list, that the High Court judge must have been satisfied that absent these factors any duty of care owed by ESB to downstream residents, other than those on its opt in list, concerning the risk of flooding, had been met by the information and warnings it had furnished to those bodies referred to at paragraph 47 above, and about which there was no complaint. That being so, it is appropriate to first consider whether the trial judge was correct as a matter of law to conclude that ESB was under a general duty of care at common law, to provide flood warnings to the public at large and thereafter consider the validity of his conclusion that due to the three factors earlier described it was under an even higher duty in respect of the type of warnings to be given to ESB and those on its opt in list.

264. Having considered the submissions of the parties and the authorities to which it was referred, this Court is not satisfied that ESB was under any duty at common law, to provide to all members of the public at risk of flooding from its dams, a warning concerning that risk such that its failure to do so would sound in an award of damages for those who did not receive such a warning.

265. For the purposes of supporting his conclusion that ESB was under a common law duty to warn members of the public about a potential danger such as a risk of flooding, the trial judge firstly relied upon an extract from *Clerk & Lindsell on Torts (21st Edition 2014)*, which he mistakenly stated was to be found out paragraph 4-11. The extract cited is in fact from a chapter on Product Liability and Consumer Protection and appears under subheading *"Failure to warn"* and is to be found at paras. 11 – 30 /31. More fully and accurately reproduced the extract relied upon by the High Court judge states as follows: –

> "Whether or not producing a dangerous product is negligent, failing to label it adequately or to provide sufficient warnings about it may well be….[negligent]. So a manufacturer of chemicals was held liable for failing to warn of the hazard of serious explosion when it came into contact with water; a similar conclusion was reached in the case of a flammable wall-coating which contained no indication of its combustibility; and there are numerous other illustrations…..
>
> Whether a duty to warn arises will depend on the circumstances, including not only the level of the danger, but also the practicality of issuing a warning and the obviousness of the danger to the reasonable user….(emphasis added)..
>
> In an appropriate case, a warning to retailers or other professional users, rather than to the ultimate consumer, may suffice. This is likely to be particularly important in the case of drugs and other complex products where the end-user may not be sufficiently qualified to take proper account of any warning given, and in other cases where warning each individual user would be impracticable."

266. Having considered the submissions of the parties on this aspect of the trial judge's judgment, this Court is not satisfied that the above statement of the law provides any support for his conclusion that ESB owed a common law duty to warn all downstream residents, and particularly those on the opt in list, of the risk of flooding and its likely effects. It is clear that what is under consideration in the aforementioned passage is the liability of those who produce dangerous products such as drugs, explosives or the like and sell them on to third party users who, without proper safety instruction and warnings, might foreseeably be injured. It hardly needs to be stated that the relationship between ESB and downstream residents is not comparable to those which exist between, for example, the manufacturer of a dangerous product and a potential purchaser. ESB is not producing or manufacturing any product which is potentially hazardous. It is dealing with the consequences of nature and during a flood period does nothing to worsen the flooding to which downstream residents would, absent its presence at Inniscarra, have been exposed.

267. It is perhaps worth noting that even in respect of hazardous products, the practicality of issuing a warning and the obviousness of the danger to the public are factors to be taken into account in considering whether or not a duty to warn should be imposed. However, since these considerations were not canvassed in the course of the High Court hearing and were not part of the trial judge's reasoning they will not be further considered

268. While the decisions in *Holbeck Hall Hotel Ltd. v. Scarborough Borough Council* 2000 All E.R. 705, *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* 1980 1 All E.R.17 and *Goldman v. Hargrave* 1966 2 All E.R. 989 recognize that an occupier's duty to their neighbour may, in certain circumstances, extend beyond abstaining from creating or adding to a source of danger, they do not, in the opinion of this Court, provide any support for the existence of the duty of care to warn as found by the trial judge, either to those on the opt in list or to the public at large.

269. This Court is satisfied that the jurisprudence is exclusively concerned with the extent of the duty to be imposed upon a landowner in negligence or nuisance in respect of damage that might visited upon their adjoining neighbour, and it is blindingly obvious that neither UCC, which is 13 KM downstream from Inniscarra, nor those on the opt in list can, for the purpose of the duty of care posited by these decisions, be considered to be neighbours of ESB. The same might be said in respect of the vast majority of other landowners not on the opt in list but who are also likely to be affected as a result of flooding.

270. The common law duty of care found by the High Court judge in this case is obviously one which would have to sound in an award of damages in favour of any party who suffered loss as a result of any breach of that duty. Accordingly, as matters stand, ESB

remains at risk of claims for damages from thousands of people living many miles away from the Lee dams who may claim, in any particular instance that the warnings and information provided by ESB to the flood agencies and those other entities referred to at para. 47 were not adequate. Likewise, ESB remains at risk of claims for damages at common law from all those on its opt in list who may contend that they have suffered loss due to flooding because they were not directly contacted by ESB and given the type of warnings described by the trial judge even in circumstances where it could be established that ESB had done nothing to to worsen the flood to which they would have been exposed had it not been operating its hydroelectric power station at the Lee Dams.

271. This Court is not satisfied that any of the authorities referred to in the judgment of the trial judge provide support for the existence of a common law duty of care on the part of ESB to warn those on its opt in list, downstream residents or the general public of any anticipated flooding. The fact that ESB might anticipate a risk of potential flooding and that it could, for example, cause damage to downstream residents, is not sufficient to create positive duties or obligations. Accordingly we are satisfied that there is no legal basis for any broader duty of care than that which arises on foot of ESB's assumption of responsibility. Its only obligation was to do what it had undertaken to do. Further, this Court agrees with the submission made on behalf of ESB that the recognition of a general duty to warn would be inconsistent with the statutory and regulatory framework for emergency planning, which identifies An Garda Síochána and the local authorities as the lead agencies for emergency response management.

272. It is far from clear precisely what the trial judge meant when he stated that there were particular features in this case that "cast on ESB a heightened duty to warn". Part of the difficulty arises from the fact that only one of the three features which he identifies at par. 269 of his judgment is specific to those on the opt in list, whereas the other features apply equally to downstream residents and the public at large. The Court wonders if what he meant was that absent these three features ESB, at common law, would not have owed any duty to UCC and/or other downstream residents to warn of the risk of flooding?

273. Regardless of what the trial judge had in mind when he reached the aforementioned conclusion this Court is satisfied that the fact that ESB agreed to notify a particular class of individuals of the risk of flooding in particular circumstances, provides no foundation for holding it liable at common law to that class of persons or any wider class.

274. Further, this Court does not accept that ESB's legal obligations arising from its assumption of the responsibilities earlier discussed could be heightened, if that is what the trial judge intended to communicate, by reason of any co-existing common law duty. If any such duty existed, a proposition that this Court rejects for the reasons earlier expressed, it would merely mean that ESB might be potentially be liable for a breach of two distinct duties. The extent of ESB's assumed responsibility remains the same, circumscribed as it is by the nature of the notification and warnings it had undertaken to give. Its assumption of responsibility to provide certain limited warnings simply cannot provide the plinth upon which it can be visited with a greater duty at common to provide different and more detailed warnings, as was the ultimate finding of the High Court judge.

275. Neither is the Court satisfied that the extent of ESB's assumed responsibility could be enlarged by reason of the fact that it had control of the dams and the discharges therefrom and knew the water levels at any particular time and the capacity of the dams to accommodate inflows. The Court is unaware of any legal authority to support the proposition that if there existed any common law duty to warn members of the public of a flood risk that such a duty might be increased, as was the decision of the trial judge in the present case, due to the fact that ESB was the only entity capable of providing information on discharges from its dams or stood possessed of information such as the actual discharge volumes and the results of flood inundation studies. Possession of information has never been, as was submitted by ESB, a touchstone of liability. (See *Yeun Kun Yeu* [1998] AC). In this regard it is also worth stating that as a matter of fact ESB was not the only entity capable of providing information on discharges. Its discharges were notified to the local authorities during flood periods. Further, the local authorities, being the bodies responsible for flood management, had full knowledge of the various flood inundation studies earlier undertaken by ESB. The same applies in relation to its knowledge gleaned from inundation studies earlier carried out.

276. This Court is accordingly satisfied that the trial judge erred in law in concluding that ESB was under a common law duty to warn UCC and others on its opt in list or indeed the general public of the risk of flooding from its dams at Inniscarra. ESB's legal obligations did not extend beyond the responsibilities it had assumed to those on its opt in list. Insofar as the trial judge concluded that ESB was in breach of those obligations he erred in law and in fact in the manner earlier advised.

Contributory Negligence

277. In light of the Court's decision on the appeal, this issue does not require to be determined. However, the Court gives its conclusion in case the matter proceeds to a further appeal and its assessment may be of assistance.

278. The High Court found that UCC was aware of previous significant flooding at or near every location of the buildings in issue in the proceedings. Information from the late 1990s onwards should have alerted it that many of its buildings were exposed to significant flood risk. The judgment lists a series of building projects in which advisers or planners or other persons made known concerns about flooding. It records that one particular firm issued a report on flood level assessment for the ERI building noting that the site was liable to flooding and recording that they had reviewed an ESB flood inundation study, and that the document was read by a senior member of UCC's Buildings and Estates team. The judge said that that put UCC on notice of the existence of at least one ESB inundation study that at least of one of UCC's advisers considered relevant to assessment of flooding at UCC's properties.

279. In September 2004, Mr. Barry of UCC's Civil and Environmental Engineering Department sought information from ESB regarding water levels and flows downstream of the Lee dams for the August 1986 flood and that pointed to an awareness in the Department of the reality of flood risk presenting which the judge says represented "a knowledge brought to the Buildings Committee in the form of the standing presence on same of a senior department member".

280. The judgment finds that there were 50 and maybe more instances identifiable in the evidence when UCC was put expressly on notice of flood risk at the buildings it constructed and/or acquired on the Lee flood plain. UCC contended that it had appointed leading design professionals to advise it in relation to the construction of its buildings and that that sufficed for it to escape liability in contributory negligence. The Court did not accept that as a sound proposition. These were UCC's buildings and it had responsibility to ensure that it took account of risks. UCC had information and gathered more knowledge about flood risk as its various building projects proceeded. UCC did not get advice from anybody to say that its buildings were free from fluvial flood risk.

281. The Court held in accordance with s. 35 of the Civil Liability Act that UCC was vicariously liable for negligence of its experts. In the *KBC* judgment at paras. 102-104, the judge here noted that Fennelly J. said that responsibility of a party for the negligence of a professional hired by it does not have a blanket rule of absolution. If the evidence showed that the errors were known to the client and overlooked, or were so obvious that they could be ignored, then there would be fault on the part of the client.

282. The judge concluded that the relationship between the experts on UCC's Buildings Committee and external experts hired by the

college, whose work was ultimately supervised by the committee, is not akin to the classic relationship of doctor/patient and solicitor/client. This was a professional group with experts in engineering and hydrology appointed to the committee because of that expertise and they were dealing with another professional group.

283. The Court concluded that there were fundamental errors at every level and they were obvious or should have been obvious to UCC, and in the circumstances, it had responsibility and that justified the finding of contributory negligence.

UCC's Submissions
284. UCC makes four fundamental points. First, it says that the High Court was in error in holding that UCC was responsible for its own professional advisers and that they were not the agents of UCC and so it was not and could not be vicariously liable in respect of any negligence on the part of the advisers as was found by the Court. Secondly, the Court was in error in regard to the role of the UCC Buildings Committee and its members. Thirdly, the Court should not have considered UCC to be a designer. Fourthly, the Court was in error in finding that there were 50 or more occasions from 1978 onwards when UCC was put on express notice of flood risk.

285. Section 34(1) of the Civil Liability Act 1961 is as follows:

> "34.—(1) Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the Court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant."

286. UCC cites the Supreme Court judgment of Fennelly J. in *KBC Bank of Ireland plc. v. BCM Hanby Wallace (A Firm)* [2013] 3 IR 759 where the judgment says at para. 81:

> "In a negligence action, such as the present, the section applies provided it is shown that: a) the defendant has been proved to be negligent; b) the negligence of the defendant caused loss or damage to the plaintiff; c) the plaintiff had failed to take care for its own safety (here for its property); and d) the plaintiff's want of care partly caused *i.e.* contributed to the damage which it suffered as a result of the defendant's negligence."

287. UCC submits that its professional advisers were not its agents and it should not have been held vicariously liable for their conduct. UCC protests that the issue of vicarious liability on the part of UCC for any fault of its professional advisers simply did not arise for determination in the High Court proceedings. If ESB had set out to make such a case, it would have had to be clearly identified. ESB did not plead in its defence a relationship of agency between UCC and its professional advisers so that vicarious liability would arise. The detailed list of issues produced by ESB dated 9th July 2014 "addressing every conceivable issue arising" did not include this issue. Neither was it raised in the list of factual issues answered by the Court at paras. 826-856.

288. UCC in fact engaged professional advisers of the highest calibre. They were "self-evidently independent contractors engaged to provide professional advice to UCC". ESB did not adduce any evidence to establish the agency as opposed to the independent contractor status of UCC's experts. Neither were UCC witnesses cross-examined on this basis. There was no request in discovery for material for materials directed to the relationship of agency.

289. UCC argues that the finding of agency was not justified in law or in fact. UCC cites authorities on the difference between an agent and independent contractor which are not in dispute and so well known that it is unnecessary to cite them. UCC refers to *KBC* again where Fennelly J. at para. 89 cites a passage from Jackson & Powell on 'Professional Liability' 7th Ed. 2012 at p. 211 as follows:

> "5–146 … In the context of professional negligence, a successful plea of contributory negligence by the defendant is less common than in other areas of negligence. This is because the parties often do not stand on an equal footing … If the defendant makes a mistake, it may be difficult to say that the client was negligent not to spot it or correct its effect, unless the client is expected to be wiser than his own professional advisers."

290. The principle is asserted by Fennelly J. at para. 104 of his judgment where he said that a person was entitled to rely on advice from his professional advisers and would not be negligent in doing so unless "the evidence showed that the errors of the appellant were known to the bank and overlooked or were so obvious that they could not be ignored".

291. UCC maintains that the evidence established that the professional advisers it engaged were independent contractors. Design teams were engaged through procurement processes. UCC's witness, Mr. Poland, said "you are looking to appoint the best consulting engineer or the best architect that you feel is out there to deliver your project for you". Following their appointment, the UCC professional advisers proceeded to behave in an independent manner and not consistent with being employees or agents of UCC. They did all the things one would expect, including taking responsibility for the project and engaging in independent decision making.

292. The role of the Buildings Committee was not to second-guess its own professional advisers; it had an oversight function at the global level rather than at the level of execution of the detailed work carried out by the experts. The committee was simply not in a position to carry out any such monitoring role of the detailed work. UCC says that it cannot be considered itself to be a designer and so there was no basis in evidence for the High Court to conclude that UCC was "a sophisticated property developer and designer" which it did at para. 1159.

293. UCC then turns to the High Court's conclusion that there were 50 and possibly more instances in which UCC was put on notice of flood risk at the buildings it constructed and/or acquired on the Lee floodplain. The appeal here is based, first, on the proposition that the evidence revealed awareness by UCC of tidal rather than fluvial flooding risk. Secondly, UCC relied on its own experts. Thirdly, it had installed flood defences as at the Tyndall Institute. Finally, only a number of the instances that are cited by the High Court actually involved prior flooding of buildings. The evidence was that the first river flooding that affected UCC's buildings was in November 2009.

ESB's Response
294. ESB points out that the appeal by UCC is limited to the specific matters mentioned above and that there are other grounds on which the Court found that UCC was guilty of contributory negligence. It did not have any effective measures to deal with the risk of flooding and the actual flooding that occurred. It was not prepared for any fluvial flooding as the judge found. ESB submits that UCC admits that it was unprepared. Since 2009, UCC had spent €2m designing and implementing flood defences which, with reasonable foresight, it could have done prior to the flooding of November 2009, as the Court found.

295. UCC had not identified any advice from anyone that its buildings were free from fluvial flood risk. It had not conducted a flood risk assessment in respect of its lower lying buildings. The Court found that UCC did not take reasonable measures to protect its property against water damage in light of the warnings it received, which it could have done by erecting temporary barriers or by moving sensitive and valuable equipment and property. The Court found that UCC had not responded adequately to the telephone warnings it received. Evidence revealed the inadequacy of the UCC response to information given by ESB including email communication as to flooding danger.

296. ESB pointed to its particulars of contributory negligence which contained an allegation that UCC built buildings and structures on lands that were a natural floodplain and that had experienced significant flooding in the past and that the construction of buildings and structures by UCC in or around the river in its floodplain exacerbated the effect of the effect of the flood.

297. UCC had local and historical knowledge over and above anybody else about flood risk and the history of flooding at its campus. The Buildings Committee had people appointed on the basis of relevant knowledge to oversee the work of the designers. While the general proposition is correct that the employer in a building contract is not liable for the acts and omissions of his professional adviser, an exception can sometimes arise and that it arises here.

298. ESB says that the judge's finding of contributory negligence does not depend on UCC being a designer.

299. In respect of the 50 items or more which the High Court held to have represented notification of the flood risk, the ESB emphasises the relevance of these points and dismisses UCC's attempt to discount their materiality.

300. For all thee reasons, ESB submits that this Court should reject UCC's contentions and find that the negligence of UCC was so grave as to constitute a *novus actus interveniens*/break the chain of causation, or in the alternative, was so blameworthy as to warrant a finding of contributory negligence greater than or equal to that found by the trial judge.

Discussion
301. This Court is satisfied that *novus actus interveniens* does not arise as a defence to the action and indeed ESB did not pursue this argument in its submissions.

302. It is appropriate to observe the relatively limited basis of the appeal by UCC.

303. The pleading question raised by UCC does appear to have been answered by the reference to the particulars of contributory negligence but this Court does not express any view on the substantive issue as to whether it might be contributory negligence to have built on a flood plain, in circumstances of presumed negligent flooding. In other words, if the negligence of ESB caused damage to UCC's buildings by flooding, does it follow that it is open to the defendant to say that the plaintiff should not have put its buildings on that part of its land? Problems of causation may well arise in those circumstances, on the logical issue of *causa causans* or causa sine qua non.

304. On the specific issue that does arise in the case, this Court is not satisfied that general knowledge by the members of the Buildings Committee or corporately by the college itself actually visits them with vicarious liability for the acts and omissions that the High Court found constituted negligence on the part of independent experts. The circumstances in which the general rule will be displaced as referred to by Fennelly J in *KBC* and by *Jackson and Powell* are rare and unusual. This Court accepts the submission that the college and its committee do not have the function of supervising the expert work of the advisers.

305. The Court upholds this part of the appeal also.

Overall Conclusions
306. Accordingly, having regard to the foregoing, the Court makes the following conclusions:

> I. The worst storm in the history of the Lee Dams brought heavy rains on the 19/20 November 2009 that swelled the waters of the River Lee and caused the flooding of UCC's buildings.
>
> II. The damage arose from a natural event. ESB did not cause the flooding of UCC's buildings; ESB did not release stored water from its reservoirs. The outflow was at all material times less than the quantity of water coming downriver into the Lee Scheme.
>
> III. The High Court held correctly that if there had been more space in the reservoirs, a lesser quantity of water would have gone downriver but it erred in holding that ESB had a legal duty to provide such space.
>
> IV. ESB did not have a duty in law to avoid unnecessary flooding, to keep the level of water in the reservoirs to TTOL or to make anti-flooding storage space available.
>
> V. ESB was not negligent in respect of warnings.
>
> VI. The claim by UCC also fails under the law of nuisance or the measured duty jurisprudence.
>
> VII. The High Court made a series of errors in coming to its conclusions on liability and contributory negligence.

307. The decision of the High Court must accordingly be set aside and the action dismissed.