AN CHÚIRT UACHTARACH
THE SUPREME COURT

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

Supreme Court appeal number: S:AP:IE:2018:000070
[2020] IESC ??
Court of Appeal record number 2016/92
[2017] IECA 82
High Court record number: 2012/129P
[2015] IEHC 958

BETWEEN

UNIVERSITY COLLEGE CORK

PLAINTIFF/RESPONDENT

- AND -

ELECTRICITY SUPPLY BOARD

DEFENDANT/APPELLANT

Judgment of Mr Justice Peter Charleton delivered on Wednesday 8th of July 2020

1. At paragraph 306 of his judgment, Ryan P summarised the conclusions upon which the Court of Appeal dismissed the finding of liability by Barrett J in the High Court against the Electricity Supply Board for the flooding of University College Cork's campus by the river Lee in Cork on 19 November 2009:

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 [target top operating level, 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.

2. It has not been demonstrated on this appeal that the High Court made any error of fact. The entire appeal has been dedicated to a lengthy debate on the law; of which riparian rights, the requirement that only reasonable use be made of water in a river and the entitlement of landowners through which it courses to benefit, is least relevant. Neither is liability under *Rylands v Fletcher* LR 3 HL 330, (1868) LR 3 HL 330, [1868] UKHL 1 apposite since, at all times, the ESB never released more water than was coming in to the two Lee hydroelectric plants at Carrigadrohid dam, 27 km west of Cork city, and 13 km from Inniscarra dam downstream, which is itself 14 km from Cork city. While liability for nuisance is a difficult fit for a case which concerns not the use and enjoyment of land, but actual damage through flooding, the central concern is whether liability for negligence may fairly and justly be extended to the owner of a dam. Where nothing was done to worsen the flow of a river during a month of widespread damage by natural flooding the following legal imperative, dissolving any potential liability, has been argued by the ESB: do not worsen nature.

Omissions

3. The first main point on appeal concerns the distinction between actions and omissions. This is not an omissions case. For half a century prior to the flood, the ESB had control over the upper stretches of the Lee and determined, from the point of view of the generation of electricity, the optimum level for the weight of water flowing through the turbines. In the High Court, at paragraph 190 and elsewhere, the trial judge found as a fact that the ESB held their activities out "throughout the proceedings" as contributing to flood management. In answering questions 66 and 67, the High Court noted that the ESB

had been involved in flood management, which included "*inter alia*, in various flood inundation studies, by inputting into emergency planning by public authorities, and e.g. through submissions to the Oireachtas and participation more generally in public debate by way of academic papers and participation at industry conferences." Even were that not the case, as a matter of law there is nothing in the process of managing two dams and two reservoirs, using water to power turbines at both, and managing levels in accordance with inflow and taking account of weather forecasts, that could come close to exemption from liability in negligence because of mere failure to act. Every hour of every day, the ESB is and was actively engaged in a process of control over a waterbody for its own profit. It is illogical for the ESB to claim that opening a sluice gate and releasing water could give rise to liability in tort but that failing to pull a lever that would have reduced levels to obviate later and predicted flooding would not. Both are part of the same process of control and management of a highly dangerous hazard.

4. While the law has tended to exempt from liability in negligence good Samaritans who do their best to rescue those in peril, but at the same time required those with training to act as reasonable members of whatever body to which they belong, generally speaking a tort is not committed by failing to act. That general law of no liability for omissions concerns the exemption from negligence for not acting where a person could intervene. That lack of responsibility does not apply where a defendant has an especial relationship that demands action. In the original account, a man going from Jerusalem to Jericho was set upon by robbers and left injured. While two passers-by failed to assist him, the third, who did, is described in the original narrative as his neighbour; Luke 10: 25-37. Naturally, he did his best and is not to be faulted for that. As a matter of law, notwithstanding that they passed by, the first two have no liability in tort. This is because they had no family or other relationship with the injured man, contributed nothing to the wrong done to him and did not control the pass which some historians now say was notorious for attacks by brigands. The good Samaritan exemption does not apply to negative potential tort liability should there be negligence where what is involved amounts to a close connection between the victim and the person who fails to intervene. While those circumstances may be difficult to define, where an existing relationship consists of an imperative to intervene, the general exemption from liability for negligence because of an omission will not apply. Criminal law and tort law are linked in the common origin of torts and crimes and in the role each play in the ordering of society according to acceptable norms. Criminal law channels personal impulses of retribution into a social system of trial and punishment, thus redefining offences so that they are seen as an affront to the community. Tort law re-orders society so that occurrences which affront justice are required to be paid for in damages where, according to a body of existing norms, it is right that the person responsible compensates.

5. Liability for manslaughter would not arise in the good Samaritan example had the man died and the first two passers-by been called to account. It is an entirely different matter if there is a close connection to the victim. Such a close connection to others can mean that an obligation of intervention, or of care, can arise. An example which arose in the context of manslaughter was where a man hired a prostitute for a wild party. She had

substance addiction issues and became ill but was effectively left to die in a corner rather than even the emergency services being contacted. In such a case, the organiser may be guilty of manslaughter because by his own actions he has established within the ambit of those to whom he owed a duty to take reasonable care a person who otherwise would be as much a stranger as the man passed by on the roadway. On this point see *R v Russell* [1933] VLR 59, *Ex P Parker* [1957] SR 326, *R v Clarke and Wilton* [1959] VR 645 and *R v Nixon* (1990) 57 CCC (3d) 97. In terms of tort law, it is the same principle. If a defendant has nothing to do with the plaintiff, and if the situation is not of the plaintiff's making, there can be no question of the law imposing duties to intervene and for establishing liability in negligence for any such failure. In *Kent v Griffiths* [2001] QB 36, the plaintiff called for an ambulance because she was having an asthmatic seizure. For no explained reason, and on the evidence there just was no excuse given, it took 40 minutes to respond. The issue in that case was as to the justice and reasonableness of extending liability in negligence to emergency services. As a starting point, Lord Wolfe at page 38 stated this general proposition:

> In the absence of a special relationship or assumption of responsibility, there is no duty to take steps to rescue a person from danger, however immediate and mortal the peril to him and however trivial the risk to the rescuer. Moreover, a rescuer who was under no duty to embark on the rescue incurs no liability to the rescued person except to the extent that the rescuer's acts cause damage beyond that which the rescued person would have suffered if the rescuer had not intervened.

6. The judgment gives the following authorities in support of this unexceptionable statement: *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 , 84-85, 87-88, 95, 102, 104; *The Ogopogo* [1971] 2 Lloyd's Rep 410 , 412; *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 , 1027, 1034, 1042, 1060 and *Capital & Counties Plc v Hampshire County Council* [1997] QB 1004 , 1032, 1037. According to Professor Fleming, however, in the modern law the principle of excluding liability on the basis that what is involved is a mere omission is very restricted. It does not accord with common sense or with the public policy behind the imposition of a duty of care to conflate a failure to reduce river flows, or as argued here, a failure to let out water earlier so as to lessen a predicted and probable flood, with any exemption from tort liability based on a complete lack of responsibility. The current editors, C Sappideen and P Vine, include the following passage in *Fleming's the Law of Torts*, (10th edition, Sydney, 2011) at paragraph 8.90:

> Only in situations of the purest non-feasance, does our modern law continue to disclaim any general duty of care. Thus, where the plaintiff is endangered from a source quite unconnected with the defendant, the latter is not required to come to the plaintiff's assistance, although it is in the defendant's power to remove the peril with little effort … A good swimmer on the beach is free to ignore the call for help from someone in danger of drowning; and one need not shout a warning to a blind person about to walk over a precipice. The common law is prepared to support altruistic action, but stops short of compelling it. This manifestation of excessive individualism is apt to evoke invidious

comparison with affirmative duties of good neighbourliness in most countries outside the common law orbit.

7. McMahon and Binchy, in Law of Torts (4th edition, Bloomsbury, 2013) at paragraph 8.01 put the principle even more starkly:

> Unlike civil law jurisdictions, the common law has historically taken a harshly individualistic position on the question of affirmative duties. The courts have recognised "a basic duty between doing something and merely letting something happen". There is no general duty to go to the assistance of another person who is in peril, even where to do so would involve no danger or real inconvenience to the would-be-rescuer. Thus, a doctor may pass a road accident with impunity even though he or she could give valuable assistance to the injured, and an adult may let a toddler drown in shallow water without lifting a finger to help the infant.

8. It may be that for certain categories of persons such as medical personnel, educated at State expense for the general good of the community, this statement could require reconsideration. But, it is not this case. This litigation is about the assumption by the ESB of control over an aspect of nature which previously followed the whims of the natural world but which is now harnessed for profit. In modern tort law, the duty in negligence is more properly expressed as a duty not to harm others, for which liability is readily imposed save where it is not just and reasonable to extend a duty of care into that area, and a duty to prevent harm of which the defendant is not the source, where such liability is to be extended only in particular circumstances. On appeal, this gave rise to considerable debate. The distinction as to omissions and as to acts is best drawn in the judgment of Lord Reed of the neighbouring Supreme Court in *Robinson v Chief Constable* [2018] 2 All ER 1041 at 1064 where he says:

> > Duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic characteristic of the law of negligence that liability is generally imposed for causing harm rather than for failing to prevent harm caused by other people or by natural causes. It is also consistent with that characteristic that the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which sometimes have been described as close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm.

9. While a different view might be taken on the facts as to the imposition of liability in *Robinson*, this analysis emphasises that situations do emerge, as in the ill prostitute at

the party example, where a shift in circumstances requires positive action even though the source of the harm complained of by the plaintiff originates from outside the defendant. Liability is potentially there in such situations precisely because the defendant has assumed a responsibility for dealing with the danger. This is not a case, as in *Cromane Seafoods v Minister for Agriculture* [2016] IESC 6; [2017] 1 IR 119 where the issue is the extension of liability in negligence into an area where it never before held sway and where different definitional elements of a different tort are sought, unsuccessfully, to be displaced; such as replacing liability in defamation with an issue as to care. Rather, the argument here is that it cannot be just and reasonable, according to the ESB, to impose liability because it is claimed that there is no responsibility to protect the inhabitants of Cork city from natural floods. The later decision of *Poole Borough Council v GN* [2019] UKSC 25 involved a summary by Lord Reed of the exception to the inert and duty-less defendant principle and the principle that public bodies should owe the same duties of care as private individuals where that is not inconsistent with their statutory duties:

> 64. *Robinson* did not lay down any new principle of law, but three matters in particular were clarified. First, the decision explained, as *Michael* had previously done, that *Caparo* did not impose a universal tripartite test for the existence of a duty of care, but recommended an incremental approach to novel situations, based on the use of established categories of liability as guides, by analogy, to the existence and scope of a duty of care in cases which fall outside them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessment of the requirements of public policy. Secondly, the decision re-affirmed the significance of the distinction between harming the claimant and failing to protect the claimant from harm (including harm caused by third parties), which was also emphasised in *Mitchell* and *Michael*. Thirdly, the decision confirmed, following *Michael* and numerous older authorities, that public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles. That is the basic premise of the consequent framework for determining the existence or non-existence of a duty of care on the part of a public authority.
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> 65. It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example

where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation.

10. Central to the imposition of liability here is that nothing done by the ESB at the Inniscarra and Carrigadrohid dams could in any way be classified a mere standing-aside from, or walking-past, harm generated by others. Of course, the source of the harm is the river Lee, its catchment area and the ground around the watercourses saturated by a summer of endless and dispiriting rain. But, the electricity company harnessed that system and under its licence, granted under section 14(1)(a) of the Electricity Regulation Act 1999, and by the public declarations it made, the ESB assumed dominance over nature. The argument for Cork University is that this situation obliged the ESB to take reasonable care. Of relevance to these proceedings is Condition 19 of the licence, which states that "The Licensee shall take all reasonable steps to protect persons and property from injury and damage that may be caused by the Licensee and shall comply with all applicable enactments when carrying out its Generation Business." Condition 1 defines the concept of a generation business as "the licensed business of the Licensee in the generation of electricity or…provision of Ancillary Services." The ESB's approach to dam safety and flood prevention mechanisms is comprehensively detailed at paragraphs 251 to 259 of the judgment of the High Court. The measures that the ESB had taken to this end included a 'Flood Control and Dam Safety Study,' and the establishment of an audit-style committee known as the 'External Dam Safety Committee' which recommended additional dam safety requirements as it deemed necessary. As an appellate court, this Court is entitled to take as primary findings of fact by the trial judge in the High Court that the ESB had weather predictions of the coming rain storm, knew about the condition of the ground and of inflows into the river system and that while they could have provided anti-flooding space in the reservoirs by earlier releases in the days leading to 19 November 2019 did not do so. In the High Court, the trial judge, faced with a bombardment of case decisions, aptly quoted the most relevant authority put forward by the ESB and pointed out the weakness in the citation of authority based on the idea of the mere bystander:

> 961. The bystander who sees a burning building and knows there are people inside foresees that if he awaits the fire brigade, rather than attempting a rescue, people may die. But the law has never imposed liability in negligence on a person who fails to act as the more courageous might. A moral code might censure his timidity; the law of negligence does not. (*Glencar Exploration plc v. Mayo County Council (No.2)* [2002] 1 I.R.84, Keane J., 138-139).
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> 962. Observation #21: ESB has made play of Keane J.'s observation in Glencar. However, it does not seem to the court an especially apt observation so far as the within proceedings are concerned. ESB is not some bystander. It controls two dams and associated reservoirs. It allowed reservoir-levels consistently to go beyond the level it itself calculated as optimal– *"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). On 19th November, 2009, this resulted in flood-damage to UCC that would have been less or non-existent had ESB's practice been to seek to maintain reservoir-levels at TTOL. No strict moral code is required to censure ESB's actions: the suppleness of nuisance and negligence suffices.

Statutory exemption due to power to generate electricity

11. The second main point on the appeal concerns the status of the ESB. Here, their argument is that because they have a duty to generate electricity, they have no duty to take reasonable care for the safety of anyone downstream from their hydroelectric plants on the river Lee. There is almost nothing to be said for this. Were the dams to show cracking, it is clear that there would be a duty to look to the safety of those likely to be affected by collapse. Indeed, the much-vaunted standard whereby the ESB kept to an ideal level for the generation of electricity, one higher level in the summer because usually of less rain in those months, and another generally lower in the winter because rain could be predicted within days, called target top operating level, TTOL, has another standard whereby the dams are not to be topped because overflow could undermine the stability of the barrier; MaxNOL or maximum normal operating level. It was the latter standard which was exceeded in 19 November 2019 and which led to the discharge of massive quantities of water. Mostly, apparently, these were a little less than what was coming into the dam systems from nature, or about the same. What is it about the statutory duty of the ESB which could allow that situation to come about when there had been no spillage of water when the Inniscarra dams were held above TTOL all the way from 6 November 2019? Plenty of electricity could be generated since TTOL was achieved and ultimately exceeded, if the helpful diagrams handed in on appeal are accurate, by up to close to three metres. Over the extent of the reservoirs, or even Inniscarra on its own, this was the retention of an unnecessary danger. The fundamentally correct approach by a court to a statutory duty, contended for here by the ESB, excluding liability is to analyse the legislation and to ask whether there is anything in it that demonstrates that the Oireachtas were intent on placing the undertaking in a special position outside of tort liability? No, is the answer. In the High Court, the trial judge concisely dealt with the point by way of answer to the ESB's proposition:

> 963. [61] Exercise of a statutory power does itself yield a duty at common law. A judge must consider whether a common law duty arises from facts and circumstances presenting in the context of the statutory framework (*Sandhar v. Department of Transport, Environment and the Regions* [2004] All E.R. (D.) 105 (Nov.), May L.J., para. 18).

Nature and the justice of extending liability to control

12. The third main point is about the imposition of liability. Since *Donoghue v Stevenson* [1932] AC 562 at 580 the law has developed so that it is no longer enough merely to be asking as to who should a defendant keep in contemplation when any consideration of the acts or omissions comes into question before a court. Rather, negligence and causation of damage are joined in areas where the law considers an extension of liability, with the question of whether the imposition of liability would be just and reasonable; *Glencar Explorations Limited v Mayo County Council (No 2)* [2002] 1 IR 84 at 154-155 per Fennelly J. There is no universal theory to cover all of the disparate situations which an increasingly complex society will generate, most especially where the ideal of competition as a legal system, and as an idea system, has tended to dissolve any easy answer based on the particular duty of individual State corporations. It has been correctly commented, *Fleming's Law of Torts*, 8.20, that there exists no "generalisation" which "can solve the problem upon what basis the courts will hold that a duty of care exists." While it is easy to find agreement that "a duty must arise out of some 'relation', some 'proximity', between the parties", still there must remain the problem that "what that relation is no one has ever succeeded in capturing in any precise formula." The original concept in *Donoghue v Stevenson* about neighbours, reminiscent of the Gospel story, developed in *Anns v Merton London Borough Council* [1978] AC 728 at 751, through the speech of Lord Wilberforce, whereby to establish a duty of care, firstly, proximity in the relationship between the plaintiff and the defendant had to be established, so that carelessness on the part of the latter would be likely to cause damage to the former, and, secondly, to ask "whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom" that duty was owed.

13. This Court adopted that approach was in *Ward v McMaster* [1988] IR 337. In a traditional analysis, McCarthy J considered the duty of care as arising from the proximity of the parties, the foreseeability of damage and the absence of any compelling exemption based on public policy. In *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617, the original test had been refined so that in considering the extension of liability regard should be had to precedent as a guide to whether the new situation would "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". This element of the test for imposing a duty of care is described in Fleming's The Law of Torts at page 155 as looking beyond the parties to the case and considering "the wider effects of a decision on society; the burden it would inflict no less than the benefit it would secure. In short, it recognises the public law and policy element in this area of private law." This is definitively reflected in *Glencar Explorations Limited v Mayo County Council (No 2).* There, Keane CJ stated the test. This has been invariably later quoted. There is no reason now to depart from it. It was described in *Breslin v Corcoran* [2003] 2 IR 203 at 208 by Fennelly J as "the most authoritative statement of the general approach to be adopted … when ruling on the existence of a duty of care". The *Glencar* test has the virtue of simplicity and was stated by Keane CJ thus:

> There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff.

14. While in the same case, Fennelly J correctly decried any approach to the analysis of the tort which started with whether the defendant lacked care in what was done, it is always correct that the starting point for novel cases should be whether in the first place a duty of care should exist.

15. There are various approaches to this test. Since the law should not detach itself from the fundamental powers of reason on which almost every legal rule was once based and since justice may properly be regarded as instinctive to the thinking of all sensible people, one test is that set out in several English cases, of which *Kent v Grffiths* is an example. There, the test set out is whether the "reaction of the judge to the facts" of the case "accords with the likely reaction of any well-informed member of the public"; paragraph 51. There, to expand on the facts already recited, an ambulance was called, the plaintiff depended on it, it took 40 minutes to arrive, she could if she had known called a taxi to get her to hospital or a clinic, the ambulance personnel had literally no excuse for not doing their duty: hence, liability despite the risk of diversion of resources into litigation and undermining the special position of emergency services and their duty to manage resources according to perceived need. While, in the era of populist democratic movements sometimes apparently swamping general good sense, any test based on public expectation could be attacked as irrational, since the purpose of the law of torts is the ordering of society for the benefit of all of its members, through the recovery of damages where harm was wrongly done, it nonetheless remains sensible to ask whether the "public would be greatly disturbed if the law held that there was no duty of care in this case?" In this case, in the High Court, at paragraph 1026, the trial judge correctly stated that:

> even if one sets aside the difficulty of identifying 'nature', the concept of pre-existing nature is artificial and does not represent the expectations or understanding of downstream residents, occupiers and owners, or, the court would hazard, of our modern society. Downstream residents, occupiers and owners do not typically, if at all, know what effect a natural event will have as the Lee Scheme intermediates between 'nature' further upstream and them. ESB, through the Lee Scheme, has become a major influence on what happens downstream; and it is a hallmark of our legal system that with control comes responsibility, here in the form of a duty of care vis-à-vis the safety of downstream persons/property

16. Turning to that duty to order society, some observations may validly be made as to the function and purpose of the law of torts. The nature of society is greatly dependant on how we choose to deal with non-criminal interactions between citizens. As distinct from the criminal law, which is retributive in nature and aims in large part to deter both what lawmakers have deemed criminal conduct and vigilantism, the law of torts functions so that those who are unjustly wronged are compensated for their losses where it is just and reasonable to do so. Speaking on the issue of insanity, Denning LJ highlighted difference in purpose between these two branches of the law in *White v White* [1949] 2 All ER 339:

> In my opinion, both on principle and authority the effect of insanity is to be regarded differently in the civil courts from what it is in the criminal courts. … innocent third persons may have been injured by the sufferer [of insanity]. He may have made contracts and broken them, or he may have committed civil wrongs, and all done at a time when he was unknown to be a lunatic, although he has since been found to be so. If he is a man of wealth or is insured, are not the injured persons to be compensated from his estate? If the matter were free from authority I would say they clearly are, because it is not a question of punishing him, but only of compensating them.

17. However, unlike the law of contract and other areas of what has come to be known as 'private law,' the overarching objective of the law of torts is largely accepted as wider than simply awarding compensation where civil wrongs have occurred. As one commentator notes: "arising out of the various and ever-increasing clashes of the activities of persons living in a common society… there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses and afford compensation for injuries sustained by one person as a result of the conduct of another." See Wright, "Introduction to the Law of Torts" (1942) 8 Cam LJ 238. The importance of the law of torts to a modern society which is ordered for the benefit not just of individual plaintiffs but so as to encourage good conduct and to compensate for defined wrongs is captured in Prosser & Keeton's *The Law of Torts* (5th edition, London, 1984) at pages 16-17:

> In cases of conflict, cultures that we choose to call primitive determined who should prevail with sword and club… but in a civilised community, it is the law which is called upon to act as arbiter. The administration of the law becomes a process of weighing the interests for which the plaintiff demands protection against the defendant's claim to untrammelled freedom in the furtherance of the defendant's desires, together with the importance of those desires themselves. When the interest of the public is thrown into the scales and allowed to swing the balance of for or against the plaintiff, the result is a form of social engineering… This process of weighing the interests in by no means peculiar to the law of torts, but it has been carried to its greatest length and has received its most general conscious recognition in this field.

18. While scholarship in the area of private law theory can generate different views as to the aims and the purpose of the law of torts, there is a consistent underlying note which shapes the law according to justice and for the betterment of society. This approach accords very much with the Preamble to our Constitution which has as a fundamental nation aim of all of our laws the establishment of "true social order". A comprehensive overview of the myriad theories that have been suggested across the common law world is unnecessary for the purposes of this judgment. However, three theories that purport to be universal theories applicable to the many areas of the law of torts are of relevance: Ernest Weinrib's corrective justice theory, Robert Steven's rights theory, and Richard Posner's economic theory; for a thorough analysis of these schools of thought, see James Goudkamp and John Murphy, "The Failure of Universal Theories of Tort Law" (2015) 21 *Legal Theory* 47-85. Drawing on the first of these theories, two models of the function of tort law in wider society, a dichotomy universally attributed to Aristotle's *Nicomachean Ethics*, dominate: corrective justice and distributive justice. Corrective justice is concerned with ensuring that individuals who have been wronged without justification by others can have the matter put right. It is, in many ways, transactional in nature: a plaintiff visitor is burned due to the negligence of a defendant in installing electricity in his home, and so he or she is entitled to an award of damages to an amount that seeks, at least as far as monetary compensation is capable, to put her in a position as though the incident had not occurred at all. Distributive justice is concerned with the distribution of burdens and losses, including risks, amongst members of a society. This approach may result in individuals and undertakings bearing the risk of harming others by their conduct even where they are not at fault for doing so.

19. These seemingly competing theories of the law of torts were considered in significant detail by the House of Lords in *McFarlane v Tayside Health Board* [2000] 1 AC 59. This case involved a married couple who were negligently advised that a vasectomy operation had rendered the husband infertile. The couple ceased all contraceptive practices, resulting in the wife undergoing an unwanted, certainly an unexpected, pregnancy. The couple sought damages, *inter alia*, for the cost of raising a child, though not planned, who did not have any disability or additional needs. It is curious in analysing this passage how the notion of what ordinary and right-thinking people would consider just again recurs as a touchstone for legal reasoning. Lord Steyn stated at page 82 that:

> It is possible to view the case simply from the perspective of corrective justice. It requires somebody who has harmed another without justification to indemnify the other. On this approach the parents' claim for the cost of bringing up Catherine must succeed. But one may also approach the case from the vantage point of distributive justice. It requires a focus on the just distribution of burdens and losses among members of a society. If the matter is approached in this way, it may become relevant to ask commuters on the Underground the following question: Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the years of his or her minority? My Lords, I am firmly of the view that an overwhelming number of ordinary men and women would answer the question with

> an emphatic "No…" The realisation that compensation for financial loss in respect of the upbringing of a child would necessarily have to discriminate between rich and poor would surely appear unseemly to them. It would also worry them that parents may be put in a position of arguing in court that the unwanted child, which they accepted and care for, is more trouble than it is worth. Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent up upon the birth of a healthy child, which all of us regard as a valuable and good thing.

20. This reasoning was later affirmed in the House of Lords decision in *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309. A further significant decision that considers the wider societal impact of the law of torts is *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455. This case involved a number of police officers who suffered psychiatric harm as a result of witnessing the events of the Hillsborough disaster. Previously, the House of Lords had held in *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 that the relatives of those killed in the tragedy were not allowed to recover damages for psychiatric illness they incurred as a result. This was the application of the principle restricting nervous shock to those present who were also connected to the tragedy. In refusing the relief sought, Hoffman LJ again referenced at page 510 that the ordinary person

> would think it unfair between one class of claimants and another, at best not treating like cases alike and, at worst, favouring the less deserving against the more deserving. He would think it wrong that policemen, even as part of a general class of persons who rendered assistance, should have the right to compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing.

21. Although, in principle, Hoffman LJ suggested that the police officers should have been allowed to recover for the injuries they suffered, permitting this would have created an unacceptable distribution of the risks and costs of negligence as between different classes of victims. Similar considerations as to the wider implications of decisions in the law of negligence can be seen in other jurisdictions. What matters is the imposition of liability not just on the basis that harm is to be predicted reasonably, but that liability should only be imposed where it accords with the view society holds of itself and of the duties and obligations that an organised community regard as just and reasonable. For example, in *Sullivan v Moody* (2001) 207 CLR 562, the High Court of Australia held at paragraph 42 that

> the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences

> would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms.

22. The courts in this jurisdiction have had to grapple with the role that the law of torts should play in society and with whether to approach cases from a corrective or distributive standpoint. In *Fletcher v Commissioner of Public Works* [2003] 1 IR 465, the plaintiff sought to recover damages arising out of an irrational fear that he had contracted asbestosis due to the negligence of his employer. Here, Geoghegan J endorsed the dicta of Hoffman LJ in White at page 503:

> if one starts from the imperfect reality of the way the law of torts actually works, in which the vast majority of cases of injury and disability, both physical and psychiatric, go uncompensated because the persons (if any) who cause the damage were not negligent (a question which often involves very fine distinctions) or because the plaintiff lacks the evidence or the resources to prove to a court that they were negligent, or because the potential defendants happen to have no money, then, questions of distributive justice tend to intrude themselves. Why should X receive generous compensation for his injury when Y receives nothing? Is the administration of so arbitrary and imperfect a system of compensation worth the very considerable cost? On this view, a uniform refusal to provide compensation for psychiatric injury adds little to the existing stock of anomaly in the law of torts and at least provides a rule which is easy to understand and cheap to administer.

23. In refusing relief, Geoghegan J noted that "pragmatic control mechanisms must be applied in actions for pure psychiatric damage and in many instances even in the interests of distributive justice." This Court held that, in accordance with the reasoning of Hoffman LJ in *White*, that awarding damages would result in great unfairness "as between employees exposed to such asbestos who may in fact suffer from great anxiety for the remainder of their lives but not such as could be characterised as psychiatric injury on the one hand and those who suffer from such anxiety as can be characterised as psychiatric injury on the other." The principles in *McFarlane* and in *Rees* were also accepted in this jurisdiction by Kelly J in *Byrne v Ryan* [2007] IEHC 207. In affirming the correctness of those cases, and analysing the judgments in *Fletcher*, Kelly J held that "on the recoverability of damages as a matter of principle or legal policy since the question has never heretofore been considered by courts in this jurisdiction. In making that decision the court is entitled to have regard to concepts of reasonableness and distributive justice."

24. In *Cromane*, the Supreme Court asserted at page 225 that "in the context of discretion as to the allocation of resources or as to the order in which problems might be tackled, any argued for existence of a duty of care may, depending on the context, be inimical both to

the wider duty owed within that statutory context to the community at large and also to the non-application of the law of negligence even where the decision maker acted beyond the powers conferred, unless that decision maker otherwise acted wrongfully by misfeasance in public office." In relation to vicarious liability, the Supreme Court made the following observation in *Hickey v McGowan* [2017] 2 IR 196 at page 258:

> Those who have control over an enterprise may not be able, as in prior times, to pretend to a knowledge or level of skill equivalent to their workforce, but are enabled to organise the manner of work and relations with those with whom it is engaged so that risks are reasonably anticipated and, through safety measures and training, are minimised. Of course, the absence of such engagement in foresight and prevention may of itself establish fault. The party, however, with the ability to assess risk and to guard against or insure against it will be the organiser of the work, usually an employer. In advancing the economic interests of the enterprise, a corresponding duty has arisen whereby those working for such an enterprise, as salaried individuals, and without the backing of capital, become as one with those who employ them. Tort liability thus pursues its part of the proper ordering of society because it incentivises an enterprise towards safety and away from wrongful conduct.

25. These considerations have also been present in relation to the application of the tort of negligence to the fields of policing, crime prevention and the prosecution of crime. O'Donnell J weighed up the various considerations at play in *LM v Commissioner of An Garda Síochána* [2015] IESC 81 at paragraph 14: "On the one hand, the public policy objectives in pursuing criminality are important and anything that could interfere with that task, and the resources necessary to perform it, is to be avoided. On the other hand, the public, and private, harm caused by police failure is very substantial." It can thus validly be said, echoing the comments in *Fleming's The Law of Torts* above, that considerations approaching those present in the domain of public law often arise in cases where a duty of care in the law of torts is pleaded. But, theory while important and which can help to solve keen issues as to when it is right to extend liability in negligence, should also be informed by the key notion to which the cited texts return: how are duties and liabilities rightly to be distributed from the point of view of the result as viewed reasonably not just from the point of view of an individual plaintiff, but also from the standpoint of the law as consistent and rational and as predictably reaching a just result? In the judgment of Clarke CJ and MacMenamin J, with which this analysis concurs, the assumption by the ESB of responsibility for the river, through dams and controls, is the basis of liability. Thereby, it is reasonable to extend liability in negligence for by so blocking and controlling the river, within the ambit of a duty of care modified by the need to produce electricity in accordance with the statutory duty of the ESB, come those persons downstream of the dams who might be affected by a failure to take reasonable care in the context of the modification of that duty by the coexisting statutory duty. Were that statutory duty not to be there, it might be arguable, albeit difficult to accept, that the sole duty of the ESB was to predict weather and modify outflow and retention to at all times prevent flooding. That was not the purpose of the dams and that is not the function

given to the ESB by the Oireachtas. But, nonetheless, in the context of being obliged to generate electricity, the reason for the State expenditure on these massive works in the first place, reasonable care must be taken to obviate flooding risks in a way consistent with the statutory duty.

A rational example

26. The wider societal impact of imposing a duty of care under the law of torts can be tested by this example. A family lives near a river. For centuries it has flooded and hence very few build by its shores. A private company comes in and takes charge of the river to generate power for a mill. There is a large mill pond. Flooding ceases because of their good management. Other people build homes by the river on the stated expectation encouraged by the mill company that part of what they do is to control flooding. The mill company get a weather forecast, likely to be accurate, and it should be noted by all judges that accuracy is not to be judged in fractions of millimetres but by the standard of reasonable men and women, that huge rains are expected. The pond can be reduced to keep the mill running while making space for the expected inflow, or at least a good portion of it. Instead of doing that, the mill company takes the attitude: well, we will not worsen nature and we won't improve it either. They say: all that could be involved here is an omission. How would ordinary and sane people react to not imposing liability on the basis of the assumption of this responsibility? Similar to the House of Lords' question in *McFarlane* and that of the England & Wales Court of Appeal in *Kent v Griffiths* as to how users of the London Underground or people or reason with full knowledge of the facts would react to liability being imposed in that case, it is important to pose similar questions concerning the reaction of ordinary users of the transport options in this jurisdiction. This approach was that of the trial judge in the High Court, where he commented thus:

> 1029. Is the 'do not worsen nature' threshold too low? ESB has been authorised to construct and operate the Lee Scheme for profit. This is a privilege conferred on it by the State. Its licence does not limit, or purport to limit, any responsibility it has at common law in respect of damage caused by passing more water than the natural inflow into the upper Lee. If the Lee Scheme released more water than would have flowed in the river Lee if the dams were not present, ESB would be strictly liable under Rylands and/or in nuisance. In other words the 'do not worsen nature' rule sets the lower limit of liability. It is a rule that derives from the building and ownership of a dam. It does not attempt to address the additional and distinct responsibility which attaches to harnessing and using river-flow in an industrial activity with the attendant water-control and management which that involves. It is a rule that does not reflect the development of the duty of care in the 20th century, or the rightful expectations of modern society.

Reasonable care

27. But, in all of this, the law of negligence has been consistent over eighty years as to its principles and the development as to fairness and reasonableness for extension of liability has not changed the core principle that it is reasonable care that must be exercised in circumstances where it is right that potential defendants have regard when the law regards it as right to consider particular people their neighbours. Where there is a duty of care, the first step, it is important to emphasise that what is demanded is reasonable care. That is the second step and the core test. Reasonable care is not what some person with hindsight and expertise says should have been done. In so much modern litigation, that standard of reasonable care, and nothing more than reasonable care, is what is missing from the contest of cases. It is not for experts to decide, or to substitute their paid view for that of those who know the area. It is only reasonable care that the ESB must exercise but, demonstrably in this case, that is what they failed to do. Causation of damage is inescapable for liability to be imposed but causation on its own does not establish liability. This judgment has discussed where principles of fairness and justice extends liability which seems to the opposite side of when considerations of justice and public policy should exclude liability.

28. Key to the argument made on this appeal by the ESB is that by imposing liability on the basis of reasonable care, there is no standard and thus no predictability as to when their conduct may infringe the law. Even in the context of specific regulations, for instance of road conduct by vehicle users, general duties to behave reasonably and carefully are applied. That is and was the standard before statutory regulations made as secondary legislation imposed, for instance, speed limits. But, even there, the duty to take reasonable care is not met if conditions require a lesser speed than the maximum proscribed. Here, the ESB argue for a do not worsen nature standard. This, it is contended, would give a rational and predictable standard and one which can be abided by with comfort. But, to do that would be to effectively overturn a half century where at times more or less water than natural flow is released. Furthermore, there are two connected dams and two reservoirs to be managed. What is required is that the ESB pay reasonable regard to forecasts, ground conditions and their primary function of generating electricity and plan to abate the impact of floods by taking reasonable measures. Having brought the river system under control, it is illogical to confer what would be a blanket exemption from that control by merely saying that all that needs to be done is not to worsen nature.

Case management

29. Finally, a comment becomes necessary. The adversarial system must be made to work by all sides in litigation. This trial proceeded over six months. That was unnecessary. Trial judges deserve help. When the High Court asked for the questions which would decide liability, about 220 individual numbered issues were put before the Bench. The parties

could not agree so the questions covered a lot of ground and the core issues were utterly swamped. That helped nobody. Clearly the resolution of the trial depended upon:

1. What statutory duty was on the ESB in the generation of electricity?
2. Whether that excluded liability in tort for negligence?
3. If there was a duty of care on the ESB, what modification of a duty entirely dependant on the maintenance of flood barriers was required?
4. What, therefore, was the standard of care expected of the ESB?
5. Was the storm and its consequences predictable on a reasonable basis?
6. If the storm was predictable, did reasonable care require that amelioration consistent with the duty to generate electricity result in spilling water from the dams in order to capture some of the water expected by the predicted very heavy rainfall?
7. If the answer is yes, to what degree would that earlier spilling of water have caused flooding?
8. Would that flooding been of the same or of a lesser degree than the flooding actually caused by the flood here complained of?
9. If that is so, that there would have been such flooding, what is the difference in damage between that actually caused and that which would have been earlier caused in order to alleviate the worst effects of the storm?

30. Since this trial, the Rules of the Superior Courts have evolved principles whereby no more than one expert witness on an issue may be called on each side. This trial was inundated by experts, as have been so many in the past. That should stop. As to principles of law, trial judges deserve clear help since legal principles are capable of easy summary since there are judgments, such as those above quoted, which encapsulate the legal principles. Trial judges are not helped, and the administration of justice is not aided, by the citation, as here, of a vast profusion of case law. In other jurisdictions, and here the Rules of the Superior Courts enables it too, time limits may be given to parties to present their case. Since the judgment of Denham CJ in *Talbot v Hermitage Golf Club* [2014] IESC 57 [2015] 3 IR 512 it has become imperative to manage difficult cases so that court time is not taken away in an unbalanced way from the general resource. That should be done by giving each party a limited number of days which they can use up as they wish rather than letting cases, as they say, take on a life of their own. See further *Defender v HSBC & Others* [2020] IESC 38.

Result

31. In the result, the liability of the ESB as established in the High Court is soundly based. Any issue as to contributory negligence by University College Cork is left to another hearing on appeal. In concurring in the result proposed in the joint judgments of Clarke CJ and MacMemanim J, the scenario which follows must be noted. Never again should a case be afforded as much time as diffuse views as to law and as to fact and a multiplicity

of experts demands. Control of time is for the court. Experts are there to assist and not more than one on an issue on each side. But, there remains both contributory negligence and the possibility of recalibrating damages. Reasonable care was what the ESB was required to exercise when taking charge of the River Lee by constructing two dams. Just because an expert claims the ESB could have done better does not mean that that is so because the principle of reasonable care may be instinctively foreign to expert analysis, a scrutiny that analyses an issue in hindsight and can very readily apply counsels of perfection.

32. It may be, no view is expressed, that the weather predictions, reasonably considered, could have meant that reasonable care may have required the release of waters that could have caused flooding earlier than the main flood. It may be that considerable damage would thereby have been caused. It may be that the measure of damages is the difference between what that would have been thereby caused and what actually happened here. As to what was reasonable care in the management of the dams, the duty to generate electricity is also relevant and there is no legal basis for expecting the ESB to stop production entirely even if that might have saved flooding in the expected storm. Lessening, consistent with duty, early release, mitigation of flooding, all of these are to be considered, from the point of view of a person of reason and that viewpoint is not necessarily the same as that of an expert.