



**THE SUPREME COURT**

**BETWEEN/**

**UNIVERSITY COLLEGE CORK – NATIONAL UNIVERSITY OF IRELAND  
PLAINTIFF/APPELLANT**

**AND  
THE ELECTRICITY SUPPLY BOARD  
DEFENDANT/RESPONDENT**

**SUMMARY OF ISSUES AND JUDGMENTS**

Today the Court delivers judgment in the above matter. There are three separate judgments. One is a joint judgment of the Chief Justice and Mr. Justice MacMenamin. Mr. Justice Charleton delivers a concurring judgment. Ms. Justice Dunne agrees with both the joint judgment and the judgment of Mr. Justice Charleton. Mr. Justice O'Donnell delivers a dissenting judgment.

These proceedings arose out of significant flooding which occurred to UCC on the 19<sup>th</sup> and 20<sup>th</sup> November, 2009. UCC alleged that the flooding was caused or contributed to by negligence and/or nuisance on the part of the ESB in its management of the Lee Dams. Those dams operate as part of a hydroelectric scheme.

The High Court found in favour of UCC. However, the High Court also concluded that UCC was guilty of contributory negligence and assessed the relevant culpabilities of the parties as 60% against the ESB and 40% against UCC. Both parties appealed to the Court of Appeal. That court allowed both of the appeals and found that the ESB was not negligent or guilty of nuisance and that UCC would not, in any event, have been guilty of contributory negligence.

Both parties were given leave to appeal to this Court. During case management it was decided that the question of whether the High Court was correct to find the ESB liable or whether the Court of Appeal was correct to find that it was not, should be decided first. If it were to be concluded that the ESB was not guilty of negligence and/or nuisance, then the question of any potential finding of contributory negligence against UCC would become irrelevant.

The majority judgments conclude that the ESB was, on the facts and the law, guilty of negligence. In those circumstances it was unnecessary to decide certain other issues arising in the case. The two key facts, as were found by the High Court on the evidence, were that a different management regime of the Lee Dams by the ESB would have reduced flooding downstream (including that which occurred at UCC) and that, in the light of the conditions which applied in the immediate run-up to the flooding and in the light of relevant weather forecasts, the ESB were negligent in not operating a different management of the Lee Dams. On the other hand, it was also clear on the evidence that,

at no relevant stage, was the amount of water exiting the Lee Dams greater than the amount entering those dams so that it could not be said that the management of the dams had made things worse. Rather, on the facts, the management of the dams might be said to have failed to make things better.

UCC relied on the first of those facts to make the argument in favour of the proposition that the ESB was negligent in failing to manage the Lee Dams in a manner which would foreseeably have reduced downstream flooding. On the other hand, the ESB relied on the second of those facts in support of its argument that its duty of care, or legal obligation, did not extend to managing the Lee Dams in a way which would reduce flooding below the level which would have occurred in any event.

The central legal issue, therefore, turned on whether the legal obligation of the ESB extended, in all the circumstances of the case, to an obligation to manage the dams, in at least some circumstances, in a manner designed to improve conditions downstream. There is a well-established strand of case law which, in more recent terms, has been described as addressing the distinction between an obligation to avoid doing harm as opposed to an obligation to confer a benefit. It has long been established that the circumstances in which a party may be found guilty of negligence because of a breach of the obligation not to do harm are more widespread than the very limited circumstances in which a party can be found guilty of negligence for failing to confer a benefit. The issue therefore, centred on whether the circumstances of this case came within one of the relatively limited types of situation where the law imposes a duty to confer a benefit (in this case the benefit which would be caused to downstream landowners and occupiers by ESB managing the dams in a way which would give rise to less flooding than would have occurred if the dams were not there). For the reasons analysed in the majority judgments it was concluded that a party, such as the ESB, who has a special level of control over a danger (even though not one of its own making) does, subject to certain limitations set out in the judgments owe such a duty of care. It is also concluded that the ESB was in breach of that duty on the facts of this case.

The Chief Justice and Mr. Justice MacMenamin set out their principal conclusions in that regard at paras. 16.2 to 16.5 of their joint judgment.

In a separate judgment, Mr Justice Charleton also upheld the High Court's reasoning. He said that there was no reason to doubt the findings of fact of Mr Justice Barrett. The defence of the ESB of 'do not worsen nature' did not apply when they had taken over management of a waterway system and had thus assumed responsibility for how that waterway functioned. No one would doubt that if, through carelessness, the dam collapsed, that ESB would be liable. But this was a case where the ESB had warning of a storm, knew the ground was sodden and could have released water earlier to make room in the two dam systems for the danger that was reasonably predicted.

To that, his judgment adds two caveats. Firstly, the duty under statute of the ESB is to generate electricity and their liability depends not just on managing the waterway but on taking reasonable precautions consistent with the need to create power. Hence, the ESB are not just mere managers of a flood system and this has to be taken into account. Secondly, faced with the very wet conditions, the ESB in releasing water earlier to cope with the forecast very heavy rain, may well have flooded UCD and Cork city to some degree. This would, on the evidence, it seems, have been less than the major flood caused. It was the difference in the damage of the two floods, the one necessitated by the forthcoming storm but which did not result in the ESB releasing water, and the one where the stored up water was released, that any future measure of damages would be assessed.

The central findings of Charleton J. are those in paragraphs 26, 27 and 28.

In his dissenting judgment Mr Justice O'Donnell, would have upheld the decision of the Court of Appeal. It was agreed by all members of the Court that there was a broad principle, which was subject to exceptions, that an individual did not owe a duty of care to prevent harm to another caused by the actions of a third party. It was also agreed that this case came within that broad principle. The flooding was caused the river Lee and not by any positive act of the ESB. There was also a consistent line of authority from other common law countries that hydrogenerating dam owners did not owe a duty of care to prevent flooding downstream, over and above the natural flood attenuating effect of the dams. Mr Justice O'Donnell did not consider that the case could be brought within any exception to the general principle, and which was applied in the common law authorities on dam liability. There was no compelling reason why the cost of the flooding to UCC should be shifted from insurers who had agreed to be responsible for that very risk, and placed upon the ESB and its customers. His principal reasons for disagreeing with the majority on this aspect of the case are set out at paras 150-152 of his judgment.

On that basis the majority decision of the Court is to allow UCC's appeal against the finding of the Court of Appeal that the ESB was not negligent. It follows that it will be necessary for the Court to conduct a further hearing to determine whether UCC can be said to be guilty of contributory negligence. The question of the quantification of the damages to which UCC may be entitled remains for decision in the High Court.