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Supreme Court of Ireland Decisions

Judgment

Title:	Cromane Foods Limited & anor -v- Minister for Agriculture, Fisheries & Food & ors
Neutral Citation:	[2016] IESC 6
Supreme Court Record Number:	307/2013
High Court Record Number:	2009 1374 P
Date of Delivery:	22/02/2016
Court:	Supreme Court
Composition of Court:	Clarke J., MacMenamin J., Laffoy J., Dunne J., Charleton J.
Judgment by:	Charleton J.
Status:	Approved
Result:	Appeal allowed
Details:	Dissenting judgment by Judge Clarke.

Judgments by	Link to Judgment	Concurring	Dissenting
MacMenamin J.	Link	Dunne J.	
Charleton J.	Link	MacMenamin J., Dunne J.	
Clarke J.	Link		Laffoy J.

An Chúirt Uachtarach

The Supreme Court

Record number: 2009/1374P

Appeal number: 307/2013

Clarke J
MacMenamin J
Dunne J
Laffoy J
Charleton J

Between

Cromane Seafoods Limited and

O'Sullivan McCarthy Mussel Development Limited

Plaintiffs/Respondents

and

The Minister for Agriculture, Fisheries and Food,

Ireland and

The Attorney General

Defendants/Appellants

Judgment of Mr. Justice John MacMenamin dated the 22nd day of February, 2016

1. The judgment appealed against raises rather deep questions. The issues raised relate both to the theory and practice of the concept known as "*operational negligence*". While I admire the elegance with which the High Court judgment seeks to address the evidence and the law, I would respectfully disagree with its conclusion. In fact, the circumstances in this case provide an apt case-history of the problems which can actually arise with the concept. I would uphold the appeal in regard to legitimate expectation, and concur with my colleagues, Clarke J., Dunne J. and Charleton J., in so concluding. Together with Dunne J. and Charleton J., I would also uphold the appeal on the operational negligence issue for reasons I now set out.

2. The unavoidable fact is that strong policy considerations arise in this appeal. One cannot deny that legitimate concerns are consistently expressed on how, in law, to identify means of redress for wrongful actions by the executive which detrimentally effect private individuals. Clarke J. eloquently makes the case for the concept of operational negligence in his judgment. No one would envisage a return to the era which preceded *Byrne v. Ireland* [1972] I.R. 241, where the State was, effectively, immune from suit. But what is necessary, is that changes in the law of negligence, and reformulations of the law on State liability, should be carefully and incrementally approached, with a clear view as to their long term consequence. There is always a concern that radical alterations in the law emerge within the narrow confines of one case which have unforeseen consequences. In some instances, such as the discovery of the snail in a bottle of ginger beer in the Wellmeadow Café in the Scottish town of Paisley, the consequences are, generally, for the public good (*Donoghue v. Stevenson* [1932] UKHL 100, [1932] AC 562). But, even in this instance, it is doubtful whether either the majority or minority of the House of Lords who deliberated on the appeal could have foreseen the exponential expansion in the law of negligence which followed.

Introduction

3. In fact, an unguarded inception of State liability for operational negligence, both in its conception, and its means of application, might potentially raise even more profound issues than *Donoghue v. Stevenson*. It requires little imagination to imagine

circumstances where the threat, either in prospect, or in retrospect, of an operational negligence claim, might be such as to stifle *any* administrative action in an area of potential controversy. There is undoubtedly, a strong public interest in ensuring that a proper balance is struck between private and public rights and duties. However, there is perhaps an even stronger public interest in ensuring government actually functions for the general public good, and that administrators do not consider themselves impeded from making any decision for fear of being immersed in a morass of litigation. It is not hard to conceive of operational negligence proceedings being brought in circumstances where millions (or perhaps billions) of Euro might be at stake as a consequence of an executive or administrative decision or action. There is no doubt that the courts and the law will be much occupied in the foreseeable future with the need for protecting the individual against wrongful executive decision and action. Such developments may come from either national or European courts or legislators. But, what is fundamentally necessary, insofar as possible, is that clear lines of demarcation and principle are identified in developing the law. Further, what is of prime importance is to ensure that a judiciary does not become a form of surrogate unelected government, vesting itself with the power to second-guess *prima facie* lawful government actions in areas of discretion which do not raise questions of *vires*. These are not small considerations.

Conceptual Difficulties of Operational Negligence

4. Even on first impression, the appeal before us illustrates the inherent risks in engaging in an "*operational negligence*" analysis of the decisions of a public authority which, on the face of things, was acting *intra vires*. How should a court of law, with all the luxury of hindsight, engage in this form of critique of the actions or inactions of the appellant Minister and his department? Such a process, as here, necessarily involves a *post hoc* analysis of a series of omissions to act. As we will see, time-span of the tort is unclear; arguably the Minister's failure to put himself in a position to comply with E.U. law, could stretch back over a decade prior to 2008, the year in which, I infer, the judgment holds the tort was actually committed. By 2008, a series of more proximate decisions, which are referred to later, were ones in which there were, simply a series of invidious choices between broad public and private interests. One might ask, how well equipped are the courts to engage in such a retrospective scrutiny, even before going on to consider how long such an "*inquiry*" (I use the word advisedly), might take in other instances. It is not hard to think of rather deeper and broader issues where the stakes are higher even than those considered here.

5. The High Court ultimately held that the tort here was committed in the year 2008. That is what the judgment says at a number of points. But taking that essential point as established, what was actually put into the equation was not one isolated act, wherein one might identify classical indicia of negligence, but, rather, something very much broader. The judgment necessarily contains a description of the complex background to what occurred pre 2008. Is the omission to act, over these previous 8 or 10 years, itself a tort of operational negligence? At points, the judgment seems to suggest that it is. It is said that the Minister, over a period of years, failed to carry out appropriate surveys on Castlemaine Harbour, so that baseline statistics would be available, so as to comply with E.U. environmental law. It is very hard to avoid the inference that this is all to be encompassed as part of the tort. Yet, elsewhere, the actual elements of the tort appear to be ministerial and executive actions, carried out within 2008, and all of which were, on their face, lawful, carried through on foot of statutory instruments, and intended to ensure that the State was, eventually, compliant with E.U. law. How then is a court to reconcile the paradox that, as a matter of *public* law, the impugned acts or omissions must be seen as lawful; but as a matter of *private* law they were not? How is one to assess the question of causation?

6. Some of these considerations underlie the objections which are to be found, both in academic and legal commentary, on the common law courts' embarkation on a journey

of uncertain destination, (and uncertain staging posts), beginning with *Anns v. Merton L.B.C.* [1978] AC 728. If a court is determining whether 'operational negligence' occurred, how does it balance the needs (and duties) of the State, responsible for the public interest, against the private interests of individuals? The common law recognises that clear distinctions (and consequences) derive from the difference between wrongful acts, (feasance), and omissions to act (non-feasance). This is a distinction which, although criticised, may, at least, be defensible at the level of principle on constitutional, political, moral, and economic grounds. Lest there be misunderstanding, I do not have the slightest concern that the law should continue to develop, as it must, but it is necessary that the judges themselves be cautious - as we urge others to be.

7. The concept carries with it, too, an inherent risk of elision between 'omission', often incapable of giving rise to legal liability, and an affirmative duty, which does. The case law, as it developed, has addressed a wide range of public and private concerns. It is difficult to see a consistent pattern. At times, the courts have, laudably and understandably, adopted a victim-oriented approach, whereby public funds may serve a welfare or protection purpose; elsewhere judges have adopted a more robust approach, taking account of the potential allocation of public funds, against a backdrop of concerns, expressed both in Ireland and elsewhere, as to trenching on the constitutional domain of the executive.

8. Statutory duties are mandatory in character. Other powers leave public bodies with the discretion or power of choice. In this appeal, we address a discretionary power. If a Minister is exercising a discretion, it is unclear by what legal standard are his or her discretionary actions, or inactions, to be judged. Are the courts to adopt some form of unreasonableness standard (as in *Keegan*)? Alternatively, perhaps courts should base the standard purely on the "*neighbourhood*" *Donoghue v. Stevenson* principle. These questions remain to be fully addressed, especially were it to be suggested that the lower standard should apply as to a range of justiciable government actions.

9. A further and equally fundamental conceptual difficulty lies in a frequent lack of distinction between 'policy' and 'operation', as enunciated in Lord Wilberforce's speech in *Anns*, but then sought to be applied elsewhere. It is difficult to distinguish between the two, where one may give rise to liability, and the other may not. This confusion may derive from the case law of the United States, and particularly what Fleming's learned authors wrote was a concept "*unwisely transplanted, as most writers think, from the very different environment of the U.S. Federal Tort Claims Act"* (cf. generally, Fleming's Law of Torts, 10th Edition, Law Book Company, 2011, Chapter 8). I focus now on the decision under appeal.

The Legal Authorities Relied on in this Judgment

Duff v. The Minister for Agriculure

10. The judgment under appeal hinges on the approach adopted by this Court in *Duff v. The Minister for Agriculture (No. 2)* [1997] 2 I.R. 22. Here, as elsewhere in legal history, one might comment that cases acquire a "*patina*" of having "*decided*" some principle of law, when on close-examination one finds the position much less certain.

11. In *Duff*, three members of a court of five (O'Flaherty, Blayney and Barrington JJ.), held for the plaintiff, in circumstances where this Court held the defendant Minister had made a mistake in law in granting a reference-quantity out of the national quota for development farmers whom he had promised to assist, causing the farmer-plaintiff loss and damage. However, Hamilton C.J. and Keane J. strongly dissented from this finding. It is necessary to enquire whether there was, in fact, a clearly established, principled, *ratio* which is of precedential value to operational negligence. Blayney J. agreed with the judgment of Barrington J. However, the third member of the majority, O'Flaherty J.,

formulated his decision on a quite different analysis, relying on legitimate expectation, and drawing explicitly on the principle of restitution. The question, which arises is as to whether certain passages from this judgment, now cited below, can be characterised as representing a clear ratio of the majority of the court in *Duff* on the question of operational negligence, rather than it being a judgment more positively informed by the principles of legitimate expectation? On the question of the exercise of ministerial discretion, Barrington J. held at p. 89 -90:

> *"As previously stated, the plaintiffs could have had no legitimate expectation that the law would not be changed. Neither could they have any right that the Minister would exercise his discretion under art. 3 of Council Regulation EEC/857/84 in their favour. But once the Minister had decided to give them a reference quantity out of the national quota the Minister had a duty, and they had a right to expect, that the Minister would implement this decision in a lawful manner. The Minister,* ***in breach of his duty and of their rights*** *attempted to implement his decision in a manner* ***which was unlawful****. As a result the plaintiffs did not receive the special reference quantities to which they were entitled and have, in consequence, suffered damage and loss."* (Emphasis added)

12. He continued at p. 90:

> *"The trouble is that the method which the Minister chose to provide for the development farmers was unlawful. He chose this method due to a mistake of law on his part. When he discovered his mistake, in the autumn of 1984, the situation had changed because the national quota had been divided up without making provision for the national reserve out of which the development farmers could receive their quota. It was now too late, or the Minister felt it was too late, to retrieve the situation. …"*

13. The judge added at p. 90:

> *"If, as appears to be the case, the plaintiffs have suffered loss and damage as a result of the Minister's mistake of law it appears to me just and proper in the circumstances of this case, that the Minister should pay them compensation."*

14. But, a close analysis of the judgments in *Duff* raises serious questions as to whether it could, even at the time it was delivered, have been characterised as a clear authority for establishing, in principle, a tort of operational negligence. I deal with later judicial doubts on the judgments below. While counsel for the plaintiff farmer did cite many of the then relevant legal precedents on negligence of public authorities, a careful reading of the entirety of Barrington J.'s judgment, in fact, indicates that it can more fairly be characterised as a judgment inspired by legitimate expectation. Indeed, in the paragraph immediately following the words "*compensation for their loss*", (above), that judge went on to say at p. 90:

> *"The principle of* ***legitimate expectation*** *is one of the fundamental principles of Community law. It provides, inter alia, that those who in good faith act under representations of agents of the State shall not be frustrated in their expectations."* (Emphasis added)

The judge did not go on to characterise the claim as being one of operational negligence, properly so called.

15. The learned authors of Hogan & Morgan's Administrative Law, 4th Edition, 2010, at paragraph 18.151, p. 1007, understandably comment guardedly on *Duff*:

> *"…[T]he plaintiffs appear to have succeeded on the ground of something like a negligent error of law in that the Minister had misunderstood the EC Directive which he was applying. This may be classified as a special case of operational negligence as opposed to the negligent exercise of a discretionary power. One might query, however, whether the sort of*

> *public policy defence which won the day for the State in Pine Valley Developments Limited v. The Minister for Environment applied here. Moreover, in as much as Barrington J. was suggesting that damages flow from a finding that the decision was ultra vires, he has been overruled".*

While accepting the authors' point that there may have been reluctance to allow a legitimate expectation against a statutory power as in *Duff*, it goes too far, I think, to describe the judgment as being one of 'operational negligence', without much further glossing. I add here that, insofar as E.U. law principles are concerned, the tort, as found in the judgment under appeal, ultimately, does not derive from a *Frankovich breach* of E.U. law, but rather the damage caused by the *implementation* of E.U. law after a breach thereof was identified by the ECJ.

16. One's concerns as to the precedential value of *Duff* are not allayed by subsequent judicial observations. What Fennelly J. said about the decision in *Glencar (No. 2)* [2002] 1 I.R. 84 at p. 150 are very much on point. He commented:

> *"I believe that the considered statements of the law made in Pine Valley Developments v. The Minister for Environment [1987] I.R. 23 remain the law, despite apparent inconsistency with some dicta in the majority judgments in Duff v. Minister for Agriculture (No. 2) [1997] 2 I.R. 22, which appear to treat liability for damages as automatically flowing from a mistake of law said to have been made by a minister. Pine Valley v. The Minister for Environment, though fully considered and applied in the High Court judgment of Murphy J. in that case (Duff), does not figure at any point in the judgments of the Supreme Court. I do not believe that it can have been intended to depart from such an important principle as that laid down in Pine Valley."*

17. It is difficult to avoid the conclusion that the rationale for the judgment now appealed is predicated on *Duff*, a judgment which, at its highest, was decided on its own facts. I do not believe it can be seen as a precedential authority for operational negligence. The judgment is not mentioned in the most leading recent textbook on Irish Tort law (cf. McMahon & Binchy, Bloomsbury, 4th Edition, 2013; nor, earlier, in Healy, Principles of Irish Torts, Clarus Press, 2006). Liability for damage does not automatically flow from a mistake of law said to have been made by a Minister. To my mind, there is now no precedential basis for finding that a concept of 'operational negligence', based on such a slim foundation, could constitute a cause of action giving rise to loss and damage, especially in the absence of any consideration in the judgment appealed of other important authorities, such as *Pine Valley* and *Glencar*.

Pine Valley

18. In the first of these, *Pine Valley* [1987] I.R. 23, this Court, held, unanimously, that where a Minister is exercising a public statutory duty, he or she will not be liable in damages, even for an *ultra vires* action, unless the exercise of the power involves the commission of a tort, or is actuated by malice, or unless the authority knew that it did not possess the power which it purported to exercise. A Minister, in reaching his or her decision to grant a licence, and acting *bona fide*, in pursuance of advice which they had been given by a departmental senior legal advisor, could not be guilty of negligence or negligent misrepresentation. At page 36 of the Report, Finlay C.J. adopted with approval the following propositions from the 5th edition of H.W.R. Wade, Administrative Law, at p. 673 as follows:

> *"The present position seems to be that administrative action which is ultra vires but not actionable merely as a breach of duty will found an action for damages in any of the following situations:-*
>
> > *1. If it involves the commission of **a recognised tort**, such as trespass, false imprisonment or negligence.*

> *2. If it is actuated by malice, e.g. personal spite or a desire to injure for improper reasons.*
>
> *3. If the authority knows that it does not possess the power which it purports to exercise."* (Emphasis added)

19. To this, Finlay C.J. added:

> *"I am satisfied that there would not be liability for damages arising under any other heading."*

20. I lay emphasis on the term "*recognised tort*"; Finlay C.J. thereby precluded any potential liability arising under any other heading of tort.

Glencar

21. I move then to further consider the later judgment of this Court in *Glencar* [2002] 1 I.R. 84. Many of the passages from the judgments of Keane C.J. and Fennelly J. are now so well known as hardly need repetition. They express the law applicable.

22. I instance here Keane C.J.'s judgment wherein he stated at p. 139:

> *"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, by Brennan J. in Sutherland Shire Council .v. Heyman and by the House of Lords in Caparo Industries Plc. .v. Dickman. 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 indefinable considerations …"* ([2002] 1 I.R. 84, at 139).

23. Very appositely to the instant appeal, Keane C.J. also went on to doubt the utility of a distinction between policy and operational actions of public authority. He said at p. 140 - 141:

> *"For the purposes of this case, it is sufficient to say that the mere fact that the exercise of a power by a public authority may confer a benefit on a person of which he would otherwise be deprived does not of itself give rise to a duty of care at common law. 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."*

24. Insofar as any of these observations were *obiter dicta* their authority was put beyond question by the judgment of Fennelly J. in this Court in *Breslin v. Corcoran* [2003] 2 I.R. 203 at p. 207. Can the concept of 'operational negligence', as identified in this case, comfortably fit within the framework of the established jurisprudence? In my view, it does not. On this alone, the appeal on this second operational negligence issue must necessarily succeed.

25. I am not persuaded that comparisons with Laffoy J.'s magisterial judgment in *Minister for Communications v. Figary Water Sports Development Company Limited* [2005] IESC 74, are apposite. In *Figary*, this Court, Clarke J., Laffoy J., and Charleton J., was not addressing the issue of operational negligence; but rather, a situation where there had been a breach of duty, including statutory duty, by the Minister, in circumstances where the Minister owed a specific duty to a very specific group. The application of statutory duty, the judgment held, could not be wholly divorced from the landlord and tenant relationship which existed between the parties. I would re-emphasise that, as I understand matters, the primary finding as to the *causa causans* in the judgment under appeal derived from the measures which the Minister took to remedy Ireland's failure to implement relevant Directives. Here, by contrast, it is difficult to characterise the tort, as described in the judgment, as a failure to implement E.U. law, giving rise to cause of action for the respondents. Insofar as the judgment makes other findings as to the pre-2008 situation, one might ask whether these are operational negligence, or the background to the negligence as found? For a tort, there must be some causation, not merely a situation.

26. At no stage was it argued in this appeal that *Pine Valley*, *Glencar*, or *Breslin*, were wrongly decided. A process of dis-application of authoritative statements of the law cannot be initiated through the back door. In fact, further concerns emerge, as now outlined.

Application to the Judgment under Appeal

27. I now turn to consider the manner in which the High Court judgment ([2013] IEHC 338) sought to apply the concept of operational negligence. It must be remembered, in fairness, this was in the context of that the High Court also held that there had been breach of legitimate expectation by the defendant. It is not unfair to comment that many of the indicia of legitimate expectation 'leaked in' to the identification of operational negligence, as expressed in the judgment under appeal. They are very different concepts.

28. The judgment describes the manner in which, during the early 1990's, the possibility of designation of Castlemaine Harbour as a Special Protection Area (SPA) was under consideration. There was the public notice, published in the Irish Times on the 7th April, 1993. This was issued from the National Parks & Wildlife Service of the Office of Public Works. Hypothetically, such a notice might be characterised as announcing an intention to classify only Castlemaine Harbour as an SPA. But, such a characterisation would be entirely misleading. One must look at the scope of the representation in order for there to be negligence. In fact, the notice went no further than to say:

> *"It is not envisaged that designation will restrict the usage pattern of* ***these areas*** *for activities such as* ***fishing, water sports, sailing and game hunting, or their use for shellfish culture."*** (Emphasis added)

This "*envisaging*" cannot be recharacterised as a tacit or implicit representation to the respondents. It related to a much broader range of activities than the mussel harvesters in Castlemaine Harbour. The full text of this notice is referred to in judgments of my colleagues.

29. To be clear, the notice did not refer only to Castlemaine Harbour. Rather, it in fact referred to 12 separate and distinct areas (including Castlemaine), stretching from Louth to Shannon, from Inner Galway Bay to Ballycotton. It was decidedly not, therefore, a notice which made reference *only* to the respondents' area of activity. Nor was its content confined to the activity of mussel harvesting. Similar observations would arise regarding any government notice issued at the same time, presumably to much the same effect. It is difficult to conceive how any of these works could be regarded as a representation or a statement upon which the respondents could rely for negligence

purposes. Here, and elsewhere, full context is all important. The words went no further than to say *"It is not envisaged".*

30. The difficulty in pinning down the rather mercurial content of operational negligence is discernable throughout the judgment, despite the thought provoking and comprehensive way in which the judge sought to approach the issue.

31. He describes the events after the 1993 notice, as follows at par. 41:

> *"What happened from then onwards, the annual allocation of seed collection authorisations and the constant refurbishing of the plaintiffs business gave rise to a* ***pattern of events*** *where the plaintiffs had good reason to rely upon the comfort given to them that there would not be a summary closure of their business without some* ***good scientific reasons*** *or without some consultation process before doing so."* (Emphasis added)

The emphasised words are each rather broad terms. One must look then to the meaning of 'pattern of events', and the 'good scientific' reasons as they arise in this case. One might also ask, did this paragraph describe the tort? If so, it was not represented, as such, in the Statement of Claim at the outset of the case.

32. This earlier 'pattern of events' culminated in, or was broken by, the judgment of the Court of Justice in December, 2007. This was, undoubtedly, a trigger-event. It is necessary now to consider, again, how the High Court judgment deals with the judgment of this Court in *Duff v. The Minister for Agriculture* [1997] 2 I.R. 22, in the context of the Court of Justice's finding that no assessments had been carried out, *inter alia,* in Castlemaine Harbour before granting harvesting authorisation to the respondents. The High Court judgment reads at par. 49:

> *"The carrying out of screening tests is all within the control of the Minister. In 2008 the Minister finds himself barred from exercising a discretion as a result of not having carried out an appropriate assessment before granting the seed authorisation, despite the fact that he did so in previous years and did so under a mistake of law on his part. That brings us right into a situation analogous to what happened in the Duff case (where the Minister was barred from exercising his discretion in relation to the milk quota because of a mistake of law). The mistake of law in the present case is more than just a pure mistake of law in the legal sense. It is a mistake of law in* ***how the Minister thought it was appropriate to manage the aquaculture business in a balanced way with protecting the environment; the mistake of law that we are looking at here has a relevance in terms of how the regime was managed. There was operational negligence in failing to carry out the regular scientific tests or monitoring that would have provided the baseline data to equip the Minister either to have a proper screening test or to have a fully informed appropriate assessment.*** *The delay could have been avoided if the Minister had not been guilty of* ***operational negligence, which was part and parcel of his mistake of law.*** *These matters are now translated into loss and damage of the plaintiffs in the same way as the farmers in the Duff case."* (Emphasis added)

33. The unavoidable inference here is that the tort of operational negligence was one of long term omission; one, moreover, where, over a period of many years, the Minister failed to carry out regular scientific tests or monitoring, which would have provided the baseline data. These omissions were characterised as part of the Minister's 'mistake, in law', which translated into loss and damage for the respondents. But, it is hard to see

where does the negligent "*cause*" begin, and over what did it occur. This description does not only deal with 2008. But, elsewhere, the clear intent of the judgment is that the failure arose because the Minister failed to act quickly in 2008 to remediate the respondents' position, as a consequence of the ECJ judgment. The High Court judge held, elsewhere in the judgment: "*The State were negligent and in breach of duty to the plaintiffs in delaying the re-opening of the said mussel seed fishery, in delaying carrying out tests to exclude environmental risks, and in allowing the plaintiffs to expend substantial monies on renewing their vessels."* This can only refer to 2008. One is left with a tort having the following ingredients: (a) neglecting to ensure assessment as and from 2000 onwards, (b) mistaking E.U. law consisting in, *inter alia*, (c) the Minister's error as to how it was appropriate to manage the aquaculture business; and (d) delay in re-opening after 2008. These are very broad headings indeed for a tort, lasting over many years. I question whether this constitutes a justifiable controversy at all.

Was the Tort a Series of Omissions or Positive Acts?

34. The passage just quoted also provokes other problems, derived from the criticisms of operational negligence itself. One might again legitimately pose the question, did the operational negligence here consist in acts, omissions, or both? Seeking to place operational negligence within the categories of tort law, there is a problem of identifying whether this was misfeasance or nonfeasance. Here, again, the tort, as described here, is impossible to pin down.

Timing

35. As pointed out earlier, even though the tort was held, in terms, to have occurred in 2008, the judgment criticises the failure of the Minister (or perhaps successive Ministers), in failing to carry out "*regular scientific tests, or monitoring*". The administrative *omissions*, however, clearly took place significantly before that year. One might legitimately ask, when did these tortious omissions commence, and what was their nature and content? There is a want of clarity in the evidence, in what act or commission allegedly caused damage to the respondent? One might infer that, prior to 2008, the Minister actually had regard to the respondents' private interests, over many years, by condoning harvesting, even at the cost of failed adherence to E.U. law. I cannot conclude the Minister's condonation of the activity, or omission to act in that earlier lengthy period of time, was a wrong committed *against* the respondents, when the situation was to their benefit?

36. There then arises a further unavoidable question, that is, whether, if the Minister had, in fact, acted between 2000 and 2008, the respondents would inevitably have incurred significant losses, by a similar necessary suspension of activity in Castlemaine Harbour, as occurred from 2008 onwards, in order to obtain appropriate baseline data? If the detailed surveys complained of were necessary to establish the baseline, one is only left to speculate as to how these surveys could have been carried out without exactly the same or similar cessation of activity in the harbour, albeit in earlier years.

The *Glencar* Principles

37. It is also useful to analyse and contrast the operational negligence concept, as realised, in the context of the '*Glencar'* considerations of proximity, foreseeability, standard of care, and what is just and reasonable. It is most fruitful to analyse the just and reasonable test first.

'Just and Reasonable'

38. The diverse nature of the statutory regime governing the activity of mussel harvesting in Castlemaine Harbour is described in Clarke J.'s judgment. It does not require further rehearsing here, other than again to emphasise its very complexity, including, as it did, the need to apply and implement the Common Fisheries Policy; the E.U. Habitats Directive; Candidate Special Area of Conservation ("cSAC"); Special Protection Area under the Birds Directive; Fisheries Acts, including the Fisheries

(Amendment) Act, 1997; and statutory instruments made, including the Mussel Fishery (Castlemaine Harbour) Order, 1979 (Exclusive Rights to Mussel Bed Cultivation); Sea Fishing Boat Licence issued under s.4 of the Fisheries (Amendment) Act, 2003, as amended by s.97 of the Sea Fisheries & Maritime Jurisdiction Act, 2006; Mussel Seed Authorisation (MS 35/08) granted under the Sea Fisheries & Maritime Jurisdiction Act, 2006; and an order opening the mussel fishery pursuant to s.15 of the Sea Fisheries & Maritime Jurisdiction Act, 2006. As well as this, a number of statutory instruments were promulgated, giving effect to the Birds Directive and Habitats Directive.

The Court of Justice

39. In the case cited earlier, the Court of Justice found, that the State's failure arose under Article 6(3) of the Habitats Directive, which provided that any plan or project likely to have a significant effect on an area of conservation should be subject to "*appropriate assessment of its implications for the site, in view of the site's conservation objectives".* The duty imposed upon the national authority was to "*agree to the plan or project, only after having ascertained that it will not adversely affect the integrity of the site concerned …".* The obligation was to carry out such appropriate assessment in advance of any consent to the plan or project. European Union law did not permit carrying out of an assessment while the project was in being. The purpose of the appropriate assessment is to ensure that, prior to consent, any risk of adverse effects could be excluded.

40. These principles were also articulated in the Court's decision in Case C-127/02 *Waddenzee*, which made clear that such assessment(s), must be carried out *prior* to approval being granted, and authority may be given only if the State authorities have "*made certain that it will not adversely affect the integrity of that site".* The Court held that there must be no reasonable scientific doubt remaining as to the absence of such effects. Additionally, it is necessary to identify what the "*conservation objectives*" of a site are.

41. Relevant also is the fact that in *Commission v. Ireland* [2007] ECR I-10947 (*Irish Wild Birds*), the Commission complained that Ireland had *"… systematically failed to carry out a proper assessment of those [aquaculture] projects situated in SPA's or likely to have effects on SPA's, contrary to Article 6(3) and (4) of the Habitats Directive."* The Court of Justice held at I – 11077, par. 240:

> *"It is clear that Ireland merely stated, without offering further explanation, that the Irish scheme for authorising mollusc farms, including the provisions on consultation, does in fact provide for detailed consideration of all aspects of an aquaculture development project before a decision is taken on authorisation."*

42. But, then the court held at I – 11077, par. 242, that its conclusion that Ireland had failed to comply with the Directive was:

> *"…supported by the fact that Ireland has not put forward* ***any specific scientific studies*** *showing that a prior, detailed ornithological study was carried out, in order to challenge the failure to fulfil obligations alleged by the Commission."* (Emphasis added)

What was necessary for compliance was for this State to have excluded the risk of aquaculture projects having a significant effect on the site.

43. The court held at I – 11077, par. 243:

> *"Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's*

> *conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects. …"*

44. In the light of these very explicit conclusions, one might well pose the question whether a finding of operational negligence in 2008 could be just and reasonable, having regard to the *Glencar* principles. Counsel for the State in these proceedings appositely, but with considerable understatement, described the "*complexity of the situation*" which the State faced in 2008 due to what was termed "*the changed understanding*" of the State's obligations under the Directives.

Negligence in 2008

45. It is necessary now to consider the measures taken by the State from 2008 onwards. The judge pointed to a series of meetings which took place. A number of working groups were assembled. Different departments and statutory bodies were consulted, including the Departments of the Environment, Heritage and Local Government, the Marine Institute, the National Parks & Wildlife Service and Bord Uisce Mhara. The DG Environment of the European Commission was also heavily involved. The task of carrying out an assessment was obstructed by the fact that there had been no conservation objectives identified. This delay, in turn, was due to the absence of available baseline data, which then had to be collated. Without this material, opening the mussel seed fishery was contrary to the State's obligations under the various Directives, as the European Commission made clear. But, the High Court judgment held, these steps were not enough, so far as the respondents were concerned, and too dilatory.

46. In Charleton J.'s judgment, there can be found a table provided by counsel for the appellant in these proceedings which identifies some 21 legislative events which took place and which affected, *inter alia*, this fishery, between the 29th November, 2007 and the 8th December, 2010. This included some 7 changes which either opened or closed the fisheries.

47. Disregarding any other issue as to whether a loss was actually sustained in each year, or by which respondent any loss was incurred, the mussel fishery in Castlemaine Harbour was open between the 5th October, 2008 to the 31st December, 2008, the 30th April, 2009 to the 14th May, 2009, 15th September, 2009 to the 23rd September, 2009, 29th April, 2010 to the 25th May, 2010, and the 30th August, 2010 to the 2nd December, 2010. In fact, the evidence established that these openings were achieved after negotiation with DG Environment, even though the conservation objectives were set, ultimately, only in December, 2010. The plaintiffs' claim relates to losses due to the closures in 2008 and 2010, when it is said starfish predation on unfished mussel seed during the late summer period of each year depleted the stock to especially low levels.

48. In the light of the foregoing, it must be doubted if it could ever be said that, as a matter of law, even if all the other *Glencar* threshold-steps were satisfied, it would, in the light of all this complexity on a national scale, nevertheless, be 'just and reasonable' to impose liability upon the defendant/appellant. Again, it must be emphasised that the judgment rested on the authority of *Duff*, and not on *Glencar*. One cannot simply ignore the broader context of the decision-making. Had *Glencar* criteria been part of the consideration, it is difficult to see how it would be "*just and reasonable*" to impose liability in 2008, in circumstances where the evidence and the facts as found, so clearly established that the Department and the Minister were, by then, having to closely focus on a series of national legal requirements imposed by the Directives and the judgments of the Court of Justice.

49. One turns to the other *Glencar* criteria. Put shortly, I do not think that the conduct of the Minister at any time amounted to a breach of duty of care. The description of what occurred prior to 2008 is too broad to constitute a justiciable controversy; absent more, I believe the description of the duties as devolving upon the exercise of the discretion, in 2008, is constitutionally untenable. The duty of care is addressed first.

Duty of Care

50. I do not believe a duty of care existed between the appellants and these respondents in 2008. The Minister's Department was undoubtedly aware of the Castlemaine situation, but it was also in the context of an awareness regarding all the other operations of a similar nature within the State. In the years 2008 to 2010 some 150 Natura 2000 Surveys had to be carried out by the State. The question of where national priorities lay, or who should receive resources, or where surveys should be carried out first; all were pre-eminently questions for the executive, even accepting meetings actually took place between representatives of the respondents and the Department between 2008 and 2010. But it is difficult to find that anywhere in the relationship there could be said to be a 'duty of care' or 'proximity', even if loss might have been foreseeable. It is said that the respondents' situation was within the knowledge or contemplation of the appellant. But, presumably, so too was the situation of the other operators. So too was the duty to comply with E.U. law, and the risk of having penalties for non-compliance. But it cannot be said that, in Lord Atkins words, the respondents were "*so closely and directly*" affected by the Minister's actions or omissions (whenever they occurred) that the duty to them took primacy, in 2008, over the duty to comply with E.U. law. If it be said the duty of care existed in the years prior to 2008, I am not persuaded the Minister committed an actionable wrong when the respondents were actually permitted to carry on their activities.

The Threshold for Negligence

51. In fact, the closely connected issue of standard of care presents as great a challenge as that of duty of care. It impacts on the entire time-span encompassed. First, it is questionable whether the law can comfortably accommodate a situation where operational negligence would involve a *Donoghue v. Stevenson* test. That threshold is a low one based, as Lord Atkins put it, on knowledge of the affect of actions or omissions on one's neighbour. But, to cite inaction between 2000 and 2008 raises an entire range of issues already touched on in this judgment, again including proximity and whether there was a duty of care at all. It is unclear if the actions of a Minister in an area of discretion are to be considered on the basis of the standards applicable in a professional negligence action, or, alternatively perhaps, on *Keegan* standards. All of these questions, seem to me, to present insuperable difficulties, at least in the instant case. As to a 'professional negligence' standard, there was no concrete evidence about what would have been the normally accepted procedure by a person in the position of the Minister. Were a *Keegan* test adopted, a court would have to hold that a Minister acted, or omitted to act, in a way no Minister could reasonably act. In short, applying a higher standard implies evidential deficits, and a misapplication of the law; applying a lower standard far too easily places a court in a position of being a surrogate decision maker in this area, an issue further explored below, especially bearing in mind the fact that, *prima facie*, the Minister was acting *ultra vires.*

The Statutory Instruments

52. I mention also the fact that at no stage prior to the case did the respondents challenge the statutory instruments under which the appellants operated. From the year 2008 onwards, these were promulgated in order to regularise the situation, and to render the position in Castlemaine Harbour in accordance with the law of the European Union. I find it difficult to conceive that a court could impose a legal duty in circumstances where the impugned actions of the State authority were actually carried out under law, and in order to implement a legal duty. There is an insuperable

dichotomy between the private and public dimensions of the actions of these State authorities, yet a further illustration of the conceptual difficulties which can arise.

Constitutional Questions

53. Consideration of the incidents of operational negligence, as described in the judgment, finally, leaves one with the concern that deep questions arise regarding whether, what was so characterised, whether before or after 2008, might trench on the role of the executive. As an illustration of this concern, and the intermingling of legitimate expectation and operational negligence, the High Court judgment describes the following, [2013] IEHC 338 at par. 52:

> *"The plaintiffs operated lawfully and were entitled to expect that this regime would continue and they had organised their business and expended considerable sums of money in this legitimate expectation. The "operational" negligence on the part of the State was* ***in failing to carry out proper scientific investigations or monitoring between 2000 and 2008 which would have provided base line studies for the prompt carrying out of an appropriate assessment so as to have permitted the timely reopening of Cromane Harbour for mussel seed collection (as in previous years).*** *The breach of legitimate expectation of the plaintiffs is that they were entitled to expect that in the normal way Cromane Harbour would regularly reopen annually for mussel seed collection because the Minister would operate such a regime of granting Aquaculture Licences and also managing the SPA and cSAC in Cromane Harbour and also in a lawful way."* (Emphasis added)

54. Two points arise from this passage. The first is the elision between legitimate expectation and operational negligence ingredients. This has been touched on. Second, the "*operational negligence*", referred to in this part of the judgment, was "*in failing to carry out proper scientific investigation or monitoring* ***between 2000 and 2008***" (Emphasis added). This is quite distinct from any finding that there was a dilatory approach from the beginning of the year 2008 onwards.

55. Later, and repeating a passage quoted earlier, the judgment characterises matters, in a passage quoted earlier, in a quite different way at par. 55:

> *"The defendants were negligent and in breach of their duty to the plaintiffs in delaying the reopening of the said mussel seed fishery, in delaying carrying out tests to exclude any environmental risks and in allowing the plaintiffs to expend substantial monies on renewing their vessel. …"*

This could only refer to 2008 onwards.

56. But, again at par. 55:

> *"The State did not operate the regime in an orderly way which would have allowed harmony between environmental protection and the plaintiffs continuing with their business."*

This quotation appears to describe a much longer period.

57. And later again at par. 56:

> *"The Minister was negligent in failing to operate the protection of the environment in a balanced way which would allow for protection of the aquaculture business. This arose from a) failure to carry out investigations, b) inconsistency in the activities permitted and c) allowing the plaintiffs to spend huge sums of money on renewing their vessel. The*

> *result is a glaring lack of a structured approach. There is a requirement on the part of the decision maker, who has the controlling decision making in relation to the plaintiffs' ability to earn their livelihood, not to make sudden, unmeasured, haphazard and arbitrary decisions; the process should be managed in an orderly way by regularly gathering information, so that all parties can organise their affairs in an appropriate way with minimum disruption."*

This description relates to periods both pre and post 2008.

58. It will be seen also that, here, the operational negligence is characterised as being an omission to operate the protection of the environment in a balanced way.

59. The concern on the passages quoted arise, not least, because of the political context, and perhaps a political and legal balancing exercise which the Minister performed, not just in 2008, but on the face of things, over the much longer preceding period. It is not suggested the Minister, or any of his predecessors, acted *mala fides* toward these respondents, or any of the other harvesters. The Minister committed no wrong to the respondents prior to 2008, during the time they were actually engaging in their business without interruption. It is unclear how this metamorphoses into an actionable wrong. No challenge was made to the statutory instruments under which the Minister acted. The underlying unanswered question lies in the extent and range of the tort, as well as whether an omission to act, in say 2003, was, at that time, a detriment to the respondents. There is, therefore, a disjunction between causation and damage.

60. The expositions of the claim of the "*later*" negligence illustrates the extent to which, the challenges the Department faced in 2008, was by then a truly national issue concerning a range of mussel harvesters in different parts of the country; rather than simply the respondents. It is impossible to put out of one's mind the sense that a court, which operates within different parameters and constraints from a Minister; was asked to assess matters and arrive at conclusions from evidence, which quite understandably was confined, and removed from broader national considerations; hence leading to a constitutionally questionable outcome. Actions in negligence cannot simply be based on a process of second-guessing administrative actions in an area of discretion.

61. This case does not concern statutory duties, but rather Ministerial discretion exercised in a particularly difficult situation. I accept it can be said that a situation evolved which might have been of the Minister's own making. But, in a tort action, a court is not asked whether the State, or its servants, might, in hindsight, have "*done better*". There must be, rather, an actionable wrong. The difficulties arise because one cannot say that at any randomly chosen time, perhaps in the years 2004 or 2005, it can be legitimately said the Minister was actually engaging in a *negligent* act by omitting to have the baseline survey conducted, and which was in a manner to the respondents' detriment. Inescapably, questions arise as to causation, the nature of the duties owed, and to whom such duties are owed. By way of contrast to obligations arising from a simple breach of statutory duty, there was here, at by 2008, if not well before, one overarching legal duty on the Minister, which was to comply with, and implement, E.U. law. This was the public duty which he had to apply from 2008, if not well before. The fallacy in this case is to seek to isolate or divorce some private duty owed to the respondents from the overarching public or State duty, which the Minister simultaneously owed.

62. I do not preclude the possibility that, in the future, the jurisprudence on State liability may develop or evolve further. But, this is a case where I think the law should not be developed, but rather applied. One simply cannot ignore legal authorities, such as *Pine Valley* and *Glencar*, and the fact that, in acting as he did in 2008, the Minister was acting on a matter of public interest where specific duties were vested in him, and the State. I would uphold the appeal, and reverse the judgment of the High Court. The

issue of damages does not, therefore, arise.

Judgment of Mr Justice Charleton delivered on Monday 22nd of February 2016

1. The facts are as stated in the judgment of Clarke J. From that statement of facts, those most salient to this judgment may usefully be recalled for the purposes of this judgment, which concurs with that of MacMenamin J. As in Clarke J's judgment, the plaintiffs/respondents will be referred to collectively as the fishermen and the defendants/appellants, being in reality the State, will be so named.

The background

2. All roads back from this litigation lead back to the decision of the Court of Justice of the European Union in *Commission v Ireland (Case C-418/04)* [2007] ECR I-10947, delivered on the 13th December, 2007. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. L206/7 22.7.1992, (The Habitats Directive), required that on the designation of a place as a special area of conservation (SAC), no activity could take place without an appropriate assessment first determining that such activity would not affect the integrity of the site. The Habitats Directive was transposed into Irish law by the European Communities (Natural Habitats) Regulations 1997 (S.I. No. 94 of 1997). Castlemaine Harbour, together with numerous other sites in the State, was notified to the European Commission as a candidate special area of conservation in accordance with the provisions of Article 4 of the Habitats Directive as transposed by the Regulations of 1997. Part of the drive to do this came from the Europe-wide campaign to identify and protect, by the year 2000, areas for inclusion in the conservation project known as Natura 2000. Candidate sites and sites accepted by the European Commission attract the same protection in Irish, and consequently European, law. Castlemaine Harbour had earlier been designated as a special protection area for birds (SPA) under Council Directive 79/409/EEC of 2 April, 1979 on the conservation of wild birds, as transposed into Irish law by the European Communities (Conservation of Wild Birds) Regulations 1985 (S.I. No. 291 of 1985). This designated four sites listed in its schedule but not including Castlemaine Harbour, but by the European Communities (Conservation of Wild Birds)(Amendment)(No. 2) Regulations 1994 (S.I. No. 349/1994), Castlemaine Harbour was added to the Schedule of the 1985 Regulations and thereby designated an SPA. Consequently, Article 6 of the Habitats Directive applied as and from the moment of designation. A reading of the text, in its ordinary and literal sense, meant that immediately upon designation, nothing apart from conservation work, in other words work to enhance the site as an SAC or SPA, could take place within its boundaries. Article 6.1 required the State to establish "conservation measures" for the site. Article 6.2 made it an obligation that the State "take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species". This is a matter important to the objectives of the Directive. Overall, each designated site in Europe came under the protection of Article 6.3 which reads:

> Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

3. Effectively, whether understood to do so or not, this Article requires everything apart from conservation work to stop. Pre-planned or commenced construction work may be excepted, but is not relevant here. To a degree, the absolute nature of the effect of

designation was clarified by the exceptions set out in the remainder of article 6. The exceptions demonstrate how complete the prohibition in Article 6.3 is. A negative assessment did not stop a plan or project within a designated site if it "must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature", provided there were compensatory measures to ensure the "overall coherence of Natura 2000". Where, and this was never the case in Castlemaine, a site hosted a priority natural habitat or species, the only justificatory reasons that might be raised for a plan or project not aimed at conservation, had to be related to "human health or public safety, to beneficial consequences of primary importance for the environment" or, if not these "to other imperative reasons of overriding public interest", agreed to by the Commission.

4. Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Case C-127/02) [2004] ECR I-07405, dealt with a reference for a preliminary ruling under Article 234 EC. The proceedings were concerned with the mechanical fishing of cockles in the Waddenzee. The Court of Justice of the European Union interpreted Article 6 in a literal manner, stating at para. 61, that every plan or project requires prior approval within a designated site, to determine if the proposal has any effect on that site. As the Court stated:

> [A]n appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

5. Thus the touchstone of either the continuation, or authorisation, of any activity on such a protected site, which is not for its conservation, is that the authorities must make "certain" that there will be no impact on its ecology. *Commission v Ireland (C-418/04)* followed that decision. The court rejected arguments by parties to those cases that activities which existed prior to designation could continue. In particular, and most relevant here, the negative potential effects of shellfish farming were accepted as having the potential to destroy feeding areas for birds. The finding of the Court was a reiteration of the law as set out in *Waddenvereniging and Vogelbeschermingsvereniging, (Case C-127/02)*. The national authorities, if followed, were only entitled to authorise activity on the site "if they have made certain that it will not adversely affect the integrity of that site." That was only possible where "no reasonable scientific doubt remains as to the absence of such effects"; see para. 243. None of this is or was, as Hanna J put the matter on page 29 of his judgment in the High Court, "the discretion of the Minister" or "the annual discretion" of the Minister. On the designation of a site there is no such discretion. It is clear that nothing impacting on a site can occur unless it is certain that it will not affect the integrity of the site. Nothing could be further from any notion of discretion.

6. Three facts which are salient to the legal analysis stand out. The State in good faith had designated approximately 140 of these sites without, first of all, terminating existing activities. Examples might range from turf cutting to mussel cultivation. It is the latter here. In the result, from December 2007, after the decision in *Commission v Ireland (C-418/04)*, emergency measures had to be taken to allow economic operators some latitude for the continuation of even limited business activity within the sites. This was done essentially by Irish public servants negotiating with the Commission. There was nothing about the actions of the State defendants in this case, which in any way

could be characterised as obstructive of the needs of the fishermen. On the contrary, the State witnesses, in the aftermath of that judgment, were attempting to balance the competing interests of compliance with European law over several important sites, about 40 of which were sea based, and the difficulties caused to many, including these fishermen. That is the first important fact. Secondly, the State had never made any unequivocal representation that the designation of the sites as SACs or as SPAs would not change their status and thus outrule harvesting or other business activities. The identification and designation of sites was, under the Directives, an obligation on all member states. The height of the public declarations made by the State in relation to twelve sites was that it was "not envisaged that designation will restrict the current usage pattern of … fishing, watersports, sailing or game hunting or their use for shellfish culture." The sites included Galway Bay, this site, Shannon Estuary, Cork Harbour, Shangarry, Ballymacoda, Blackwater Estuary, Tramore, Wexford Harbour, Sandymount Strand Dublin, Malahide Estuary and Dundalk Bay. Thirdly, the opening and closing of the mussel fishery at Cromane Harbour in County Kerry was done under a legal regime which required the making of delegated legislation for each such decision. Some comment is required on this since in the judgment of Clarke J, what is to be considered is not the existence of such statutory instruments but the overall policy behind, and the decisions which led to, their passing. Since the view taken here is that a statutory instrument is required to be removed from the legal landscape, before there can be any question of liability for negligence arising, some further statement is required of the background. A similar view is taken in the judgment of MacMenamin J.

Control of fishing

7. The mussel fishery in Castlemaine Harbour was only available as a mussel fishery when opened by the appellant Minister. The relevant opening dates were: 2008, from 5th October 2008 to 31st December; 2009, from 30th April to 14th May and from 15th September to 23rd December; 2010, from 29th April to 25th May and from 30th August to 2nd December. As set out in the judgment of Hanna J, acts of natural predation on mussel seed meant that the harvest on two years from 2008 and 2010 were disappointing, a circumstance the trial judge found would have been avoided by longer opening of the fishery during those two years. An important legal context in which this occurs was not argued by either side. Consequently, it is mentioned here only in passing and not with a view to giving a definitive legal ruling. Rights on the foreshore are limited as regards private citizens. With possible exceptions for grants prior to independence, the State controls the foreshore in Ireland; *Attorney-General v McIllwaine* [1939] IR 437. Without permission from the relevant department of State, work by way of dredging the sea bed within the limits of the exclusive competence of the State cannot take place. Thus, it was perhaps relevant in this case that what was enabled in the opening of the harbour at Castlemaine was an activity that did not seem to occur as of right but was only enabled through permission. Consequently, it is arguable that absent a finding that either permission had been given, or a legitimate expectation of such permission was engaged, any rights in respect of the use of the foreshore may not here have been present. That point can come to be important when considering whether the State has committed any tort in the closure of the relevant seabed and foreshore. The tort contended for in the judgment of Hanna J in the High Court is the loss of fishing and harvesting rights to the fishermen. It is not established that there ever was any such right. Consequently, any loss of a privilege granted year to year cannot be taken as an element of the tort of negligence.

8. Each of the four stages of mussel cultivation was subject to statutory control. In May 2008, the fishermen purchased a new vessel and this was licensed under s.4 of the Fisheries (Amendment) Act 2003, as amended by s.97 of the Sea-Fisheries and Maritime Jurisdiction Act 2006. To fish for mussel seed, the first stage in this operation, the fishermen needed, and in fact held, a mussel seed authorisation under section 13 of the Act of 2006. This entitled the taking of a limited weight of mussel seed. This was then transplanted as a first stage and, on natural growth in the nutrient rich waters, a further

transplantation took place, followed by harvesting. All in all, it is a process taking 2 to 3 years. The cultivation was authorised by an aquaculture licence held by the fishermen and issued under the Fisheries (Amendment) Act 1997. Since, however, the cultivation takes place in Castlemaine Harbour, the inlet where the mussels grow in their final stages must be open to harvesting work. Section 15 of the Act of 2006 empowers the appellant Minister to open the fishery. This is done by statutory instrument. Section 15 provides:

The Minister may to supplement the common fisheries policy, as he or she thinks proper, by regulations prescribe measures for the purpose of protecting, conserving or allowing the sustainable exploitation of fish or the rational management of fisheries that restrict, or otherwise regulate, fishing or fishing gear or equipment or the buying, handling, weighing, trans-shipping, transporting, landing, processing, storing, documenting or selling of fish. Such regulations may apply to any or all of the following:

> (a) fishing boats within the exclusive fishery limits or internal waters;
>
> (b) an Irish sea-fishing boat, wherever it may be;
>
> (c) any person engaged in buying, handling, weighing, trans-shipping, transporting, landing, processing, storing, documenting or selling of fish; and
>
> (d) nets and their usage during any time or season or at any place within the exclusive fishery limits or internal waters.

9. No issue has been raised to the effect that this statutory power did not apply to the opening of the fishery in Castlemaine Harbour. In itself, it is central to what follows that this section of the Act of 2006, gives the purpose and policy of the actions of the appellant Minister. It is for the "protecting, conserving or allowing the sustainable exploitation of fish" as well as the "rational management of fisheries" through a power enabling the appellant Minister to "restrict, or otherwise regulate, fishing". A separate question will arise as to whether any duty of care arose in decisions as to allowing or forbidding the use of Castlemaine Harbour for cultivation of mussels. This section does not in any way point to a duty towards those who may wish to fish within the territorial limits of the State's waters. Instead, a clear indication is given that in considering any restriction or regulation of fishing, under that particular section of the Act of 2006, the appellant Minister is entirely concerned with conservation considerations. As in the judgment of MacMenamin J, that becomes central to any issue of where a duty of care might lie should such a duty arise in the first place.

10. The following table was adapted from that provided at the hearing of the legislative measures whereby the fishery was opened or closed on particular dates:

S.I.	**Name**	**Date**	**Parent Act or Measure**	**Effect on Castlemaine Harbour and on other salt water fishery areas**	**This site**	**Effective date**
789/07	Mussel Seed (Prohibition on Fishing)	29/11/07	2006 Act	Prohibition on fishing (all areas)	Shut	30/11/07
162/08	Mussel Seed	04/06/08	2006 Act	Revokes	Open	09/06/08

	(Prohibition on Fishing) (revocation)			789/07 (opens fishery all areas)		
176/08	Mussel Seed (Prohibition on Fishing)	06/06/08	2006 Act	Prohibits fishing in Scheduled areas including Castlemaine Harbour	Shut	09/06/08
194/08	Mussel Seed (Prohibition on Fishing) (No. 2)	18/06/08	2006 Act	Closes entire fishery	Shut	01/07/08
347/08	European Communities (Control on Mussel Fishing)	22/08/08	Birds Directive	Revokes 194/08 Restricts fishing in Scheduled areas (i.e. SPAs including Castlemaine Harbour)	Shut	23/08/08
395/08	European Communities (Control on Mussel Fishing) (Amendment)	03/10/08	Birds Directive	Removes Castlemaine Harbour from schedule to 347/08 (opens fishery there)	Open	05/10/08
605/08	Mussel Seed (Prohibition on Fishing) (No. 3)	23/12/08	2006 Act	Closes entire fishery (incl Castlemaine Harbour)	Shut	31/12/08
108/09	European Communities (Control on Mussel Fishing) (Amendment)	24/03/09	Birds Directive	Minor amendment to 347/08	Shut	24/03/09
150/09	Mussel Seed (Prohibition on Fishing) (revocation)	22/04/09	2006 Act	Revokes 605/08 (opens fishery generally but still closed in SPAs under 347/08 except Castlemaine Harbour)	Open	30/04/09
186/09	European Communities (Control on Mussel Fishing) (Amendment) (No. 2)	07/05/09	Birds Directive	Reinserts paragraph (u) of Schedule in 347/08 (closes fishery in Castlemaine Harbour)	Shut	14/05/09
197/09	Mussel Seed	13/05/09	2006 Act	Closes entire	Shut	14/05/09

	(Prohibition on Fishing) (No. 2)			fishery		
341/09	Mussel Seed (Prohibition on Fishing) (No. 2) (Revocation)	25/08/09	2006 Act	Revokes 197/09 (opens fishery, but SPAs still closed under 347/08)	Shut	26/08/09
346/09	European Communities (Habitats and Birds) (Sea-Fisheries)	27/08/09	Birds Directive and Habitats Directive	Provides for Natura fishery plans and permits, confers various powers on authorised officers, creates offences etc.	Shut	27/08/09
379/09	European Communities (Control on Mussel Fishing) (Amendment) (No. 2)	21/09/09	Birds and Habitats Directives	Revokes 186/09 (Removes Castlemaine Harbour from Schedule to 347/08)	Open	15/09/09
554/09	Mussel Seed (Prohibition on Fishing) (No. 3)	22/12/09	2006 Act	Closes entire fishery	Shut	23/12/09
174/10	Mussel Seed (Opening of Fisheries)	29/04/10	2006 Act	Opens entire fishery (subject to 347/08)	Open	29/04/10
228/10	Mussel Seed (Closing of Fisheries)	24/05/10	2006 Act	Closes entire fishery	Shut	25/05/10
412/10	European Communities (Control on Mussel Fishing) (Amendment)	26/08/10	Birds and Habitats Directives	Deletes paragraph (u) in Schedule of 347/08 (removing Castlemaine Harbour from restricted list) (duplicates 379/09)	Shut	30/08/10
413/10	Mussel Seed (Opening of Fisheries) (No. 2)	26/08/10	2006 Act	Opens entire fishery	Open	30/08/10
572/10	Mussel Seed (Closing of Fisheries) (No. 2)	29/11/10	2006 Act	Closes entire fishery	Shut	02/12/10

592/10	European Communities (Control on Mussel Fishing) (Amendment) (No. 2)	08/12/10	Habitats Directive	Re-inserts Paragraph (u) (Castlemaine Harbour) into Schedule of 347/08	Shut	08/12/10

11. In effect, every opening and every closure of the mussel cultivation operation in Castlemaine Harbour was done through subsidiary legislation. Notwithstanding that the relevant statutory instruments remain in place, although spent in terms of force by the passage of time, the fishermen sought and obtained damages in the High Court for negligence in such operation. Yet, every such decision was done through an existing and still operative enactment. That cannot be right.

Statutory powers

12. The State as appellant has argued that it was not within the competence of the High Court to find negligence as against the appellant Minister, without first of all finding that the statutory instruments which controlled the fishery were invalid. There was no warrant, the State asserted, for the finding of Hanna J that a statutory instrument was negligently signed into law; it was either valid or invalid and while valid could not be characterised as a negligent action. Since a statutory instrument was law, albeit through a delegation of legislative power, the State contended that it operated as a bar to a negligence finding as to any decision or policy that lay behind it. A statutory instrument, on the State's submissions, could be found invalid because of the maker exceeding jurisdiction or because of a misconstruction of statutory powers or through a finding of abuse or, as an executive act, possibly where the reason for making it flew in the face of fundamental reason and common sense, thereby exceeding jurisdiction. Judicial review was the only remedy, the State contended; though this could be pursued as part of a plenary action. On behalf of the fishermen, it was contended that the statutory instruments in question were no more than the expression of executive action and as such were capable of being the expression of a negligent policy through what was called operative negligence. Damages could validly be awarded, counsel for the fishermen argued, because the object of their action in negligence and in negligent misrepresentation was the set or series of inactions that resulted in a failure by the appellant Minister to inform himself as to the environment in Castlemaine Harbour. It was also contended that mussel cultivation would not have affected the protected sites, overlapping SACs and SPAs, the consequence of which was to undermine the fishermen's livelihood; the statutory instruments in that context being a matter of history. Both sides on this appeal also had views as to the availability in this particular context of judicial review. For the State it was argued that quashing the relevant statutory instruments was possible; time limits on action in O.84, r.1 of the Rules of the Superior Courts, 1986 of 3 months, at this time 6 months, while requiring prompt action and probably resulting in the window of fishing being past by the time of trial were liable to recur and so could not be characterised as an exercise in mootness. Counsel for the fishermen, on the other hand, contended that judicial review time limits, whether under O.84 or through the same limits applying to plenary actions, rendered the effect of the statutory instruments part of the background only.

13. Hanna J dealt with this issue by first of all reciting the arguments for the fishermen at page 16 thus:

> The blanket ban was not a matter of law but rather of poorly informed decision making on the part of the Department because it did not have any scientific information available to it and was ignoring the signs from the information that it already had, that the adverse impacts from mussel seed fishing in Cromane were nil or negligible. Furthermore, there should

> have been a balancing exercise on the part of the decision makers, weighing on one side the impact on a person's constitutional right to earn a livelihood, as against the need to protect the environment. The evolution and the preparation of scientific information in 2010 were too slow and there was no good reason why the reopening should not have been allowed much sooner than it was.

The counter argument of the State was recited at pp. 17 to 18 of the judgment of the High Court:

> The defendants were not negligent or in breach of duty in delaying the reopening of the mussel seed fishery or in delaying carrying out of tests to exclude any environmental risks. The designation of the harbour as an SPA in accordance with the Habitats Directive is a matter of law and the plaintiffs are not entitled to rely on any representation as to its effect or to hold any legitimate expectation arising from any such representation and such representations are denied. The statutory instruments opening and closing the fishery in Cromane are pieces of legislation lawfully made enjoying the presumption of constitutionality until such time as a court says otherwise. The defendants ask how could a public official be liable for negligence or breach of legitimate expectation if it is simply complying with the law? In order for the plaintiffs to succeed in a claim for negligence they must show that there is an invalidity or unlawfulness in the statutory instruments which have been lawfully made and still enjoy the presumption of lawfulness.

14. At p.23 of his judgment, Hanna J places the passing of the statutory instruments as a matter of administration, stating that "the decision of the Minister to close Cromane Harbour was an implementation of policy rather than a policy decision." The trial judge did not specifically address any question as to the statutory instruments opening and shutting Castlemaine Harbour.

15. MacMenamin J finds it "difficult to conceive that a court could impose a legal duty in circumstances where the impugned actions of the State authority were actually carried out under law", paragraph 52, and that view should be supported. Article 15.2.1º of the Constitution confers the "sole and exclusive power of making laws for the State" on the Oireachtas and further declares that "no other legislative authority has power to make laws for the State." Subordinate legislation is enabled by Article 15.2.2º through provision "by law for the creation or recognition of subordinate legislatures" and for their "powers and functions". Legislation by regulation is regularly if not consistently provided for in legislation. This form of legislative delegation is part of a reality that "the framing of rules at a level of detail" appropriate to statutory instruments "would inappropriately burden the capacity of the legislature"; Maher v Minister for Agriculture [2001] 2 IR 139 at 245 per Fennelly J. Such powers as are delegated by primary legislation cannot be exceeded; *City View Press v An Comhairle Oiliúna* [1980] IR 381. Delegated power is limited because law making power is exclusively vested in the legislature, which alone is subject to direct democratic control by the people and hence "may not be surrendered"; *Laurentiu v Minister for Justice* [1999] 4 IR 26 at 63 per Denham J. The scope of a statutory instrument must encompass what a reasonable legislature would have envisaged in delegating such powers; *Incorporated Law Society of Ireland v Minister for Justice* [1978] ILRM 112. Similarly, restricted articles under the Health Act 1947 could be applied to medical preparations and not to non-medical products such as tobacco; *United States Tobacco International Inc. v Attorney General* [1990] 1 IR 394. *Cassidy v Minister for Industry and Commerce* [1978] IR 297 As Fennelly J explained in *Kennedy v Law Society of Ireland (No3)* [2002] 2 IR 458 at 468:

> The Oireachtas may, by law, while respecting the constitutional limits, delegate power to be exercised for stated purposes. Any excessive exercise of the delegated discretion will defeat the legislative intent and may tend to undermine the democratic principle and, ultimately, the rule of law itself. Secondly, the courts have the function of review of the

> exercise of powers. They are bound to ensure respect for the laws passed by the Oireachtas. A delegatee of power which pursues, though in good faith, a purpose not permitted by the legislation by, for example, combining it with other permitted purposes is enlarging by stealth the range of its own powers.

16. Respect by the judicial branch of government for legislation passed by the Oireachtas, is expressed within the terms of the Constitution by reserving to the judiciary the power to condemn laws which are repugnant to the Constitution; Article 15.4.1º. There has certainly to be a judicial power to condemn delegated legislation, since many decisions have commented both on the preservation of the national parliament in its exclusive law making functions and the requirement of vigilance that delegated legislative powers are not exceeded. Hence, judicial scrutiny over delegated legislation cannot be confined to a consideration of the conformity of statutory instruments with the Constitution; instead, it extends to the limits of jurisdiction of the body or person on whom that law making power is conferred. Hence, heretofore, the grounds upon which a statutory instrument might be condemned included whether a reasonable legislature could have contemplated whether the powers delegated in the making of subsidiary legislation might have been used for the purpose impugned; whether jurisdiction was exceeded and perhaps other grounds encompassing legislative competence in relation to reasonableness; most recently see *Island Ferries Teoranta -v- Minister for Communications, Marine and Natural Resources & ors* [2015] IESC 95. This analysis therefore differs from any view that a legislative policy may be condemned on what are essentially negligence grounds and that extant laws may be scrutinised in negligence grounds as to the policy behind same.

17. In the judgment of Clarke J, the view is expressed that the statutory instrument could not have been condemned and that therefore it is possible to legally impugn the policy behind it. Judicial review under O.84 of the Rules of the Superior Courts, 1986, is not an impossibility in this context. Nor is a plenary action, which is subject to the same time limits as to commencement; see *O'Donnell v Dún Laoghaire Corporation* [1991] ILRM 301. Judicial review is, in principle, a swift remedy for the resolution of conflicts between the administration and the rights and expectations of citizens and businesses. Central to the argument put forward by the fishermen was that by the time even the swiftest of cases could come up, the period within which fishing could have taken place would have already past. This cannot be an answer to a court condemning secondary legislation on negligence grounds. In any event, judicial review would have been open. It required an order of the appellant Minister to open the fishery for mussel cultivation in Castlemaine Harbour and a failure to open the fishery could have been subject to a pre-mandamus demand letter asserting rights, accepting that a differing view might be taken as to whether there were any rights to use the foreshore in this context. In anticipation of the recurrence of that event, an obvious fact on the ground, since the State has always had an insufficient level of data on bird species and the likely impact of mussel cultivation, a demand could have been made for the opening of the harbour in the following year; allowing ample time for litigation. Unlikely as it was that any such judicial review would be met by a mootness argument on behalf of the State, even where the issue was as to the jurisdiction to, or perhaps reasonableness of, affecting an opening of the harbour at the wrong time, this was a situation likely to re-occur and where the over-riding consideration of doing justice between the parties could profitably be argued to be more important. Hence, by the time of potential litigation, the issue was not moot.

18. As Barrington J adverted to in *Laurentiu v Minister for Justice* [1999] 4 IR 26 at 70, judicial respect for, and restraint in respect of, legislation is an aspect of the doctrine of the separation of powers. As he put it: "the rights of the citizen will be secure only if the legislature makes the laws, the executive implements them and the judiciary interprets them." In the context of this constitutional structure, eliding or bypassing delegated legislation and stating that either the thrust of the policy behind it was negligent, or that the necessity for the delegated legislation arose through neglect of duty, is to cross a

boundary. That may be illustrated in an example. While primary legislation is not subject to challenge on the basis of jurisdiction, since the Oireachtas has ample law-making powers, where constitutional rights conflict it is for the national parliament to make a reasonable reconciliation. What if the courts were empowered to bypass such a law and to substitute, as an exercise in policy, a separate and distinct view as to which right should be primary and consequently award damages on the basis that a balance had been ill set? Another example would be to award damages on the basis that the necessity for legislation arose because of neglect, seeing fit to ignore the terms of legislation specifically barring that remedy. Depending on the circumstances, the legislature interfering in current litigation would be a trespass on such boundaries in the other direction; *Buckley and Others v Attorney-General and Another* [1950] IR 67. Boundaries are there to be observed where the constitutional norm separates powers.

19. The courts may go thus far: primary legislation may be unconstitutional; secondary legislation may be unconstitutional and also may be beyond the powers conferred by the parent legislation; since also secondary legislation may be an expression of administrative fiat, it could be that an improper purpose would allow the overturning of such legislation since that would go beyond delegated powers, as would a decision expressed through secondary legislation which flies in the face of fundamental reason and common sense. There can be no warrant, however, for ignoring secondary legislation and stating that the policy behind it was negligent. This sets secondary legislation at nought. In effect, it might as well not be there at all. The existing authorities suggest that secondary legislation must first be condemned before there can be any question of any analysis of negligent policy, so-called.

Duty of care

20. Negligence, of itself, does not exist in a vacuum. It is a convenient way of expressing a tortious wrong which does not simply depend upon a failure to exercise reasonable care. Before one can even go there, there has to be an analysis of, and clear definition of, the duty of care which that negligent conduct is argued to be a breach of. The trial judge in his analysis combined the issues of duty of care with negligence in deciding that by failing to have regard to the entitlements of the fishermen in opening the harbour for a shorter time in 2008 and 2010, and in not earlier conducting the study which would have enabled the hitherto normal opening season, the appellant Minister caused them loss. At pp. 32 to 33 of his decision, Hanna J expressed the matter thus:

> One must look at the scheme by which the defendant operated the management of Cromane Harbour. So between breach of legitimate expectation and common law negligence in terms of a breach of duty, the plaintiffs say that the Department failed in its duty to them in how it operated the licensing scheme in the harbour. The relevant Department failed in its duty to the second named plaintiff in how it operated the licensing scheme in the harbour. The defendants were negligent and in breach of their duty to the plaintiffs in delaying the reopening of the said mussel seed fishery, in delaying carrying out tests to exclude any environmental risks and in allowing the plaintiffs to expend substantial monies on renewing their vessel. In behaving in such a manner the plaintiffs lost the limited opportunity of obtaining the required mussel seed to be used in connection with their mussel farming business, as a result of which they have suffered loss and damage. The State did not operate the regime in an orderly way which would have allowed harmony between environmental protection and the plaintiffs continuing with their business. The sequence of events points out what should have been a necessary state of knowledge on the part of the defendants, who nevertheless decided to sit on their hands and allow matters to carry on in what appears to be defiance of the clearly stated will of the European

> Court of Justice. Failure to comply with obligations with European law is relevant in flavouring the state of knowledge of what the parties understood as being their *modus vivendi* that came to a screeching halt in June 2008.
>
> The Minister was negligent in failing to operate the protection of the environment in a balanced way which would allow for protection of the aquaculture business. This arose from a) failure to carry out investigations, b) inconsistency in the activities permitted and c) allowing the plaintiffs to spend huge sums of money on renewing their vessel. The result is a glaring lack of a structured approach. There is a requirement on the part of the decision maker, who has the controlling decision making in relation to the plaintiffs' ability to earn their livelihood, not to make sudden, unmeasured, haphazard and arbitrary decisions; the process should be managed in an orderly way by regularly gathering information, so that all parties can organise their affairs in an appropriate way with minimum disruption.

21. Inherent in his decision is that if there is negligence causing economic loss or other damage, there is a duty of care to prevent this and that the failure to take reasonable steps in this regard founds a cause of action. MacMenamin J's analysis of the ingredients whereby liability had been found in this case, points up the difficulties in upholding the judgment of Hanna J. Much of this analysis seems to revert to the trial judge's earlier acceptance of an argument on behalf of the fishermen that the opening for mussel cultivation of Castlemaine Harbour during the spring and summer months was at the "discretion of the Minister". Upon the declaration of an SPA or SAC, in this case both kinds of protected site, and as earlier pointed out, the appellant Minister had no discretion. Instead, the protection of the environment was the only consideration open to him under Article 6 of the Habitats Directive. Timing is important here. The drive to open new areas of conservation under the European scheme known as Natura 2000, as the name implied, was to increase habitat and species protection in the run up to the millennium. In any question of negligence, the time when the acts or omissions that are to be called into question are to be analysed is at the time when whoever would be thereby affected, the neighbours on Lord Atkin's celebrated analysis; *Donoghue v Stevenson* [1932] AC 562 at 580. Here, those neighbours are claimed to be the fishermen; the persons towards whom the Minister is claimed by Hanna J to have owed a duty of carefulness. The time when perhaps there might be any question of negligence is when, knowing that there are fishermen working in the harbour, and knowing that Article 6.3 forbids all work in a site that has not previously been assessed as not affecting it, apart from conservation work, a site is designated. Was that not the year 2000? Hence, in this case there is perhaps a limitation issue as well; though, this has not been pleaded in defence by the State.

22. Negligence is "conduct falling below the standard demanded for the protection of others against unreasonable risk of harm"; C Sappideen and P Vines (Eds), *Fleming's Law of Torts*, 10th Ed., (Sydney, 2011) 7.10. It is impossible to analyse liability for the tort of negligence without not only examining what can be considered an unreasonable risk of harm, and what the relevant standard in guarding against that risk is, but also where that standard is demanded. The requirement to love one's neighbour is translated in Lord Atkin's dictum into a duty not to injure one's neighbour. That concept as originally defined was directed towards those "persons who are so closely and directly affected by" the actions in question that the defendant "ought reasonably to have them in contemplation as being so affected when" the defendant was directing his mind "to the acts or omissions which are called in question." The starting point to any legal analysis is to consider and decide whether a duty of care is owed by a particular defendant, towards the plaintiff who complains of that defendant's lack of care. Absent a duty of care, the actions of a defendant which cause harm to a plaintiff are not actionable. Further, until the existence of a duty of care is established, it is impossible to

elucidate what the standard is that the defendant is required to meet, a failure in which establishes liability towards the plaintiff. A duty of care does not exist in the abstract for every decision which may impact on the economic activities of others. The primary analysis must be on, whether in making decisions that could affect others, the decision maker was bound to have regard to the particular interests of the economic actors claiming prejudice to their interests.

23. That this is the starting point in any analysis of negligence was made clear by this Court's decision in *Glencar Explorations Limited v Mayo County Council (No 2)* [2002] 1 IR 84 at 154-155 in the judgment of Fennelly J:

> This approach, by making findings of negligence before determining whether a duty of care exists, risks reversing the correct order of analysis. Admittedly, it was the course followed in this court in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23, where it was held that the minister could not be considered negligent without pronouncing on the existence of a duty of care. The elements of the tort of negligence are the existence of a duty of care, lack of proper care in performing that duty and consequential damage. The lack of care which we commonly call negligence consists in commission or omission of acts. In order to be actionable, the acts or omissions must be such as will reasonably foreseeably cause damage to any person to whom the duty is owed. Mere causation is not enough. As a matter of principle, it seems to me that the failure to exercise due care can only be established by reference to a recognised duty. Then one can know what sorts of act are liable to cause damage for which one is liable … I agree, of course, with the Chief Justice that these findings of the learned trial judge cannot be disturbed on this appeal. I also agree with his view that the making of such findings did not mean that the trial judge was finding the respondent to be in breach of any duty of care owed to the applicants. For these reasons, the passage in question ceases to have relevance for the issues to be decided *(sic)* on this appeal.

24. Over decades, courts in this and other jurisdictions have grappled with the appropriate concepts whereby the imposition of liability may accord with the interests of justice and the function of the law of torts in ordering society so as to minimise harm and promote good relations between those who interact on the basis of a duty of care. As Fleming comments, *Fleming's Law of Torts*, 8.20, there is no "generalisation" which "can solve the problem upon what basis the courts will hold that a duty of care exists." While there is agreement that "a duty must arise out of some 'relation', some 'proximity', between the parties" there remains the problem that "what that relation is no one has ever succeeded in capturing in any precise formula." Respect for precedent and its application, apart from being an obligation rooted in the certainty which the legal system owes to litigants, offers a fixed basis upon which any analysis of the duty of care can rest. What was originally the concept in *Donoghue v Stevenson* 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. This approach was adopted by this court in *Ward v McMaster* [1988] IR 337 where McCarthy J analysed 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, a new test had been introduced requiring the situation to "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". When *Glencar Explorations Limited v Mayo County Council (No*

2) came for decision before this court in 2001, the various struggles which judges in various jurisdictions had grappled with were reformulated by Keane CJ into a test which has been invariably later quoted and which 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 is thus:

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

25. As to foreseeability, it has been often remarked that almost anything may be regarded as foreseeable. What is reasonable in such foresight is a matter for judicial assessment. As to duty, if the State has exclusive rights over the foreshore and if there has been no setting of legitimate expectation of continuance of use, can it be said, in the light of the decision of the former Supreme Court in *Attorney-General v McIllwaine* [1939] IR 437, that there is any such duty? As a concept, proximity has been described as "artificial" by Lord Oliver in *Alcock v Chief Constable of South Yorkshire* [1991] 3 WLR 1057 at 411. Perhaps what is reasonably foreseeable can generate fulfilment of the test of proximity? As Fleming remarks at 8.330, there is "no simple formula that determines duty; simplicity though desirable is not to be trusted … A matrix of policy and principle will always need to be considered in the light of the particular circumstances."

26. This appeal concerns an aspect of the liability of public authority. Perhaps because of the specific availability of the tort of misfeasance in public office, the rising tide of liability in negligence has not impacted where genuine questions of choice need to be made. The alternative is, as MacMenamin J points out, the creation of vague duties of care towards all who might be affected by public policy. As put in McMahon and Binchy, *Law of Torts,* 4th Ed., (Dublin, 2013) at 6.78 the functions of public authorities:

> … require them to have regard to a host of policies, interests and rights that potentially pull in different ways. If a duty of care were too easily imposed on public authorities towards all of those affected by their acts, choices and omissions, in some instances the authorities would be hamstrung, unable to discharge their functions with any confidence or creativity. Courts are conscious of this reality when addressing the duty of care.

Here, it is the function of the department of government responsible for the implementation of both a fisheries policy that sustains limited resources and compliance with obligations to the environment. The most important is a duty in European law. In this case, there can be said to be little or nothing to be argued in the realm of choice as between the expenditure on one option in preference of another, or the pursuit of a particular aim over another that constitutes policy. Choosing one rather than the other is a fundamental function of central and of local government. It is also an area of decision making that the courts are ill equipped to make. The courts should not trespass on it. Improper conduct can be impugned through judicial review or through an action on misfeasance in public office. That supposes that public officials had some kind of a choice. Here, there was no choice. Article 6.3 of the Habitats Directive required that nothing be pursued apart from conservation measures at Castlemaine Harbour unless that alternative, here of economic exploitation, was proven beyond doubt to have no impact on either the protected site or the protected bird species. To a degree, if there was arguably any choice here at all, it very hard one at that. The unchallenged estimate on this appeal was that approximately 40 sites were affected by the need to close until

any non-conservation activity was cleared through an appropriate assessment. So, which of these 40 was to be given priority? It is hard to argue that Castlemaine Harbour was in any stronger position for the allocation of resources than any other site. Further, concentration on that site would leave economic operators in other sites waiting longer. The response of the State parties was vigorous negotiation with the Commission to attempt to salvage whatever could be recovered for the benefit of users of the sites. That cannot amount to a misfeasance in public office.

27. Hanna J regarded what he saw as the failure to give priority to these fishermen over those in the multiple other sites affected by the decision in *Commission v Ireland (C-418/04)* and to implement, over a lightening-quick time frame as suggested by an expert witness, an appropriate assessment as operational negligence. This concept of operational negligence has not, to this point, been accepted in an Irish court. It is rightly rejected by MacMenamin J. Drawing a distinction between policy and operational errors so called is, according to Fleming at 8.400, one unwisely transported from "the very different environment of the US Federal Tort Claims Act." This distinction Fleming describes as "largely illusory". Were that to be adopted, and this judgment takes the view that it should not, certainly section 15 of the judgment of Clarke J in this case makes an attractive analysis; see particularly paragraph 15.11.

28. In a passage particularly relevant to this appeal, Walton (Ed), *Charlesworth and Percy on Negligence*, 12th Ed., (London, 2010) at 2.286, states:

> It is axiomatic that public bodies owe public law duties, enforceable by writs of certiorari, prohibition and mandamus, to give proper consideration whether to act in any particular circumstances and, if action is decided, to act within power. On occasion these duties have been seen as providing the basis for imposing a duty of care in private law. On this view the conduct of a public body must be unlawful and outside the ambit of any statutory discretion before it can come under a duty, actionable in damages, to a victim of its conduct. In particular, in *X (Minors) v Bedfordshire County Council*, Lord Browne-Wilkinson said that where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not for the courts, to exercise the discretion; nothing which the authority does within the ambit of the discretion can be actionable at common law. But if the decision complained of falls outside the statutory discretion it can (but not necessarily will) give rise to common law liability, this depending on issues of justiciability. So on this view the initial inquiry is into the question whether the conduct was within or outside power.

29. It is not necessary to analyse the decision of the House of Lords *in X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, save to note that at 739 Lord Browne-Wilkinson commented that the analysis of whether there is a common law duty of care as between a government authority and those affected by its actions "must be profoundly influenced by the statutory framework within which the acts complained of were done." What stands out in reading that case is the unpredictability of any of the outcomes in the joined cases in accordance with the principles enunciated. With the introduction of operational negligence, certainty of law is dissolved and public decision making becomes subsidiary to the views of experts at several removes from the pressures of government. The law has not so developed. The rationale for excluding the excise of discretionary powers is that where the statutory framework places the decision making power in the context of a choice between action on a particular issue, through the expenditure of funds that may also be needed elsewhere, or in the context of a choice between the allocation or resources insufficient to cover all needs, it is both a matter of policy and administrative choice. Further, it is also the reposing of trust by the legislature in administration and not in the litigation process. In that regard, administration should not have to look to prospective second-guessing by the courts, as this would trammel the discretionary power conferred. Instead, in any area of

governmental activity it would become possible to find an expert to say that a different policy might have enhanced any contended for benefit to litigants, or not taken same away and to construct, through operative negligence, a realm where a duty of care is inventively and artificially owed to all prospective beneficiaries of whatever allocation of resources may be made. To take an example: what would there be to stop a suit which claimed that property price inflation had not been prudently controlled, thus leading to loss in the very sector where those with such responsibilities ought to have realised there was a duty of care and failed to have foreseen a crash in house prices? That development is logically a practical outcome of the adoption of operational negligence. It would be impossible both conceptually and practically. It would involve the courts in arrogating a function which has not been given to the judiciary under the Constitution. A further point might be made. Negligence is not all encompassing. It has not swamped every other tort. If ill is broadcast of a person, the remedy is defamation. If a person is illegally arrested, the remedy is false imprisonment. If in public office, something is done which affects rights, the remedy may be judicial review in terms of overturning a decision in excess of jurisdiction or, if damages are sought, tort law requires that a claimant should prove misfeasance in public office. The authorities heretofore support the maintenance of those traditional boundaries. In the context here under discussion, the delimitation of remedies is particularly strong. In *Pine Valley Developments v Minister for Environment* [1987] IR 23 at 38, Finlay CJ stated the principle thus:

> I am satisfied that it would be reasonable to regard as a requirement of the common good an immunity to persons in whom are vested statutory powers of decision from claims for compensation where they act bona fide and without negligence. Such an immunity would contribute to the efficient and decisive exercise of such statutory powers and would, it seems to me, tend to avoid indecisiveness and delay, which might otherwise be involved.

In the same case, Henchy J at page 40 had stated:

> Breach of statutory duty may occur in a variety of circumstances and with a variety of legal consequences. Here we are concerned only with a breach of statutory duty in the making of a decision which has been committed by statute to the decision-maker. The weight of judicial opinion as stated in the decided cases suggests that the law as to a right to damages in such a case is as follows. Where there has been a delegation by statute to a designated person of a power to make decisions affecting others, unless the statute provides otherwise, an action for damages at the instance of a person adversely affected by an *ultra vires* decision does not lie against the decision-maker unless he acted negligently, or with malice ...in the sense of spite, ill-will or suchlike improper motive), or in the knowledge that the decision would be in excess of the authorised power: see, for example, *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158; *Bourgoin S.A. v. Ministry of Agriculture* [1985] 3 All E.R. 585. While the law as I have stated it may be lacking in comprehensiveness I believe it reflects, in accordance with the requirements of public policy, the limits of personal liability within which persons or bodies to whom the performance of such decisional functions are delegated are to carry out their duties.

30. The importance of the relevant statutory framework was emphasised in *Glencar Explorations Limited v Mayo County Council (No 2).* There, the decision to impose a mining ban was unlawful but no automatic entitlement to damages arose as a result. On no analysis of the relevant legislation did a county council in ratifying a draft development plan, owe a duty to those who held mining exploration licences. Fennelly J, quoting the statements above from the *Pine Valley* case, proceeded:

> I respectfully agree with those statements. I would add that the absence of the right to automatic compensation for loss caused by an *ultra (sic) vires* act can find further justification from the protection of individual rights afforded by the existence of the remedy of judicial review. While the sufferer of loss from a lawful but non-tortious private act is entirely

> without a remedy, a similarly positioned victim of an ultra vires act of a public authority, by way of contrast, has at his disposal the increasingly powerful weapon of judicial review. Thus, he may be able to secure, as in this case, an order annulling the offending act. In appropriate cases, a court may be able to grant an interlocutory injunction against its continued operation. I believe that the considered statements of the law made in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23 remain the law, despite apparent inconsistency with some *dicta* in the majority judgments in *Duff v. Minister for Agriculture (No. 2)* [1997] 2 I.R. 22, which appear to treat liability for damages as automatically flowing from a mistake of law said to have been made by a minister*., Pine Valley v. The Minister for Environment* , though fully considered and applied in the High Court judgment of Murphy J. in that case, does not figure at any point in the judgments of the Supreme Court. I do not believe that it can have been intended to depart from such an important principle as that laid down in *Pine Valley*.

31. In the pursuit of a remedy in damages, it may appear that negligence as a tort has submerged other existing remedies. Hence, those pursuing damages for defamation often plead that the publication of particular facts was done negligently and those claiming false arrest may also pose as an alternative, that facts were negligently assumed prior to arrest. Tort law, however, retains the precise definition of each wrong as giving rise to an entitlement to damages and this is not to be elided to an imprecise application of proximity or reasonable care considerations. The appropriate tort for a wrong committed in the course of an administrative duty is that of misfeasance in public office. That requires malice, as defined in this context, to be actionable. Hence, since the *Pine Valley* case the following statement of Finlay CJ from p.673 of that decision has been applied as the law:

> The present position seems to be that administrative action which is ultra vires but not actionable merely as a breach of duty will found an action for damages in any of the following situations:
>
> 1. If it involves the commission of a recognised tort, such as trespass, false imprisonment or negligence.
>
> 2. If it is actuated by malice, e.g. a personal spite or a desire to injure for improper reasons.
>
> 3. If the authority knows that it does not possess the power which it purports to exercise.

32. In this context, leaving any decision on the matter to an appropriate case, negligence might arise in the context of public administration, not through making a decision which allocates resources or pursues aims in a particular direction, but perhaps through failing to deal with the very task which the legislation has entrusted to the body, such as the administration of applications within a set time frame. In that regard Clarke J cites *Minister for Communications, Marine and Natural Resources v Figary Water Sports Development Company Limited* [2015] IESC 74. That case is, however, an example of how a duty of care can arise in an administrative body, there from a duty to process applications for regional funds under the relevant European scheme, and can be broken by simply deciding not to fulfil that duty. Of course, State parties can be negligent. The State can commit a tort. That, however, is not to incorporate a new concept into the law whereby the tort of misfeasance in public office may be by-passed through simply claiming in circumstances akin to those in *Glencar Explorations Limited* that a public body had been negligent in its approach. The correct analysis is confined to misfeasance in public office. Negligence as a concept would completely submerge that tort and replace it with an alternative analysis: could matters have been done better, was damage caused, were not the alleged injured parties close enough to the public

authority that they should have considered their interests? Instead, the elements of the tort of misfeasance in public office are what are available to those who feel let down by an official decision. Malice is clearly not present here on the findings of Hanna J. Furthermore, there is no question here of the appellant Minister knowing that he did not possess this power. Every power was statutorily based and every decision was expressed correctly through a statutory instrument.

33. The statutory matrix came from two sources: the powers conferred on the appellant Minister under the relevant legislation, firstly, and the obligations of the State under European legislation, secondly. The Sea-Fisheries and Maritime Jurisdiction Act 2006 confers power on the appellant Minister under s.13 to grant authorisations for fishing, qualified by time, species and area to be fished. Section 14 of that Act mandates the appellant Minister to implement the common fisheries policy. Section 15, under which the relevant regulations as to opening and closing of Castlemaine Harbour were made, is quoted above. Its purpose is to enable the Minister to supplement the common fisheries policy. The statutory purposes are set out in s.13 as "the proper and effective management and conservation and rational exploitation of fishing opportunities" and in s.15 as "protecting, conserving or allowing the sustainable exploitation of fish or the rational management of fisheries". Insofar as regulations made under s.15 might under ordinary circumstances be regarded as the exercise of a discretionary power as to how through restricting fishing, tackle, opening and closing seasons, dealing in fish and areas to be fished within the exclusive twelve mile competence of the Minister within our national waters, there is nothing in the statutory scheme which set up an obligation towards fishermen or any requirement apart from what could be regarded as the overall purpose of the sustainable and rational management of fish stocks.

34. On this structure of legislative imperatives and entitlements, one might do a tort analysis based on breach of statutory duty as giving rise to liability. That does not assist the fishermen. This is not a statutory scheme directed towards particular individuals or a class of individuals and nor is it a scheme which gives particular or special protection beyond its legislative aims in favour of an identified group. If any duty is owed at all under the Act of 2006, it is towards the furthering of the common fisheries policy of the European Union and the sustenance of fishing opportunities. Of itself, this must involve restrictions on untrammelled taking of sea stocks. Conservation is for the benefit of the community as a whole. Ministerial competence extends within the twelve mile national exclusive fishing zone and there and elsewhere for the purpose of furthering the fisheries policy worked out on a Europe-wide basis. This does not give rise to any statutory duty in favour of the fishermen. Even where that was not the case, as commented earlier in this judgment, there was no basis upon which any discretion can be exercised in favour of economic exploitation within an SAC or an SPA, since there can be no question of analysing the Habitats Directive as being concerned with anything other than the protection of the environment and species within the protected areas. There is no discretion vested in the appellant Minister to exempt either the fishermen or any other economic actor within the protected area. The duty of care is towards the wider community, expressed as the protection of the environment. Hence, there cannot be, and could not have been in this instance, any duty of care which might found an action in negligence.

34. It might also usefully be commented that such limited opening times, about which the fishermen complain, were brought about only through serious efforts on behalf of the respondent Minister in negotiation with the European Commission. What was achieved was more than the blanket ban that applied automatically as a matter of law because of Article 6.3 of the Habitats Directive.

Legitimate expectation

35. Only a brief observation is appropriate in relation to the judgment of Clarke J and the concurring judgment of MacMenamin J on legitimate expectation. As Fennelly J

remarks in *Glencar Explorations Limited v Mayo County Council (No 2)* at 162, the doctrine of legitimate expectation is related to that of promissory estoppel as it applies in matters of contract. Essentially, for promissory estoppel to apply, there must be "clear and unequivocal promise or assurance which is intended to affect the legal relations" between parties to a transaction which is understood as such, and before it is withdrawn the party to whom the representation is made, acts upon it in such a way that "it would be inequitable to permit the first party to withdraw the promise", that is to act inconsistently with it; McGhee (Ed), *Snell's Equity*, 32nd Ed., (London, 2010). While estoppel by convention can arise through acting upon "an assumed state of fact or law, the assumption being either shared by both or made by one and acquiesced in by the other" this is not a warrant for jumping to conclusions. The common bases upon which the parties act must, on objective assessment be "unambiguous and unequivocal"; Peel (Ed), *Treitel's The Law of Contract* 13th Ed. (London, 2011) at 3.094. There is nothing in the decision of this Court in *Courtney v McCarthy* [2008] 2 IR 376 to suggest any other test. Moving from private law into the field of a private expectation set up in consequence of a statement by a public authority, the harmony between legitimate expectation and promissory estoppel, or estoppel by convention, should be maintained. In no case is there any warrant for analysing any expectation as legitimate where it is not based upon an unambiguous and unequivocal declaration. As Clarke J states, at paragraph 10.7, that is absent in this case.

Damages

36. In the original action in the High Court there were two plaintiff companies. Cromane Seafoods Limited is a firm which buys seafood products and exports them. Whatever the nature of the memorandum of incorporation of this company, it had no direct relationship with the dredging of mussels in Castlemaine Harbour or their transplanting, nurturing and harvesting. It is not enough that both companies shared directors or had identical directors. The second-named plaintiff O'Sullivan McCarthy Mussel Development Limited held the relevant licence and the relevant aquaculture licence and the relevant permission in relation to the use of the harbour at Castlemaine and the foreshore. Hanna J assessed damages in favour of O'Sullivan McCarthy Mussel Development Limited at €275,000 and in favour of Cromane Seafoods Limited at €125,000. The trial judge held, essentially, that Cromane Seafoods Limited was entitled to that sum of damages by reason of the laws deriving from the unavailability of mussels from O'Sullivan McCarthy Mussel Development Limited. The trial judge stated:

> So, what is the loss? Apart from Mr. O'Sullivan, the Court was offered evidence on behalf of the plaintiff by Mr. Kevin Wynne, Chartered Accountant, who acts as the plaintiffs' accountant. For the defence, the court heard from Mr. Sean Bagnall, also a Chartered Accountant. Both of them dealt separately, as one would expect, with the two plaintiffs respective losses. As already noted, the defendants, through Mr. Paul McGarry, S.C. argued forcefully that the plaintiffs were not in the same position. The first named plaintiff was a buyer of mussels and could deal with any supplier, anywhere. The plaintiffs were at arms length from each other and this, in effect, extinguished sufficient proximity from the torts of the defendants to enable the first named plaintiff to recover damages. Earlier in this judgment, I recounted the discreet nature of the business conducted by the respective plaintiffs in Cromane Harbour. I also noted the fact that this ongoing modus operandi was, from the evidence which I have heard, well known to the defendants both in terms of the Department of Agriculture, Fisheries and Food and on the part of the "on the ground" Departmental officials. Cromane Seafoods Limited bought up the entire stock of the O'Sullivan McCarthy Development Limited's produce as well as others. The arrangements in Cromane Harbour were such that it is unlikely that any favourable arrangement would have been arrived at between the first named plaintiff and the second named

> plaintiff. It is verging on the unthinkable that, dealing as it did, with 'the other producers of mussels in Cromane harbour that the first named plaintiff would have been in a position to come to a "favourable deal" with the second named plaintiff. I am satisfied that, given the specific circumstances regarding the mussels fishing industry in Cromane Harbour, the plaintiffs were at all material times dealing at arms length. I am further satisfied that given the level of involvement and knowledge on the part of the defendants that the defendants knew or ought to have known that any damage to the local mussel industry caused by the closure of the harbour would impact, not alone upon the second named plaintiff, but also upon the first named plaintiff.
>
> The first named plaintiff is, in my view, in sufficient proximity, therefore, to recover damages for the reasonably foreseeable loss incurred through the abrupt closure of Cromane harbour in 2008 and, notwithstanding some degree of consultation, the late opening of same in 2010.

37. This finding must be corrected, despite there being no basis for liability. Whatever the potential argument for recovery in the case of the company having the relevant licences to exploit mussels and to grow them within Castlemaine Harbour, no possible argument for a connection based upon proximity or foreseeability could rationally bring the other company within the scope of any potential damages that might be awarded. That company could be in no special position in terms of the purchase of mussels and it is difficult to know what special arrangements would entitle a company to state that it lost in consequence of purchases being unavailable at less than market value from a related company. Further, there is no analysis of any attempt that might have been made to mitigate this loss through the purchase of mussels from other sources and the shipping of these to the main markets in France and elsewhere.

Result

38. The appeal should be allowed. Any analysis of liability in negligence must commence with the consideration of whether a duty of care exists between the plaintiff and defendant. Where the relationship is governed by statutory powers, the first point of analysis must be the legislative matrix. It must be shown that these powers expressly set up a duty of care to be exercised by the defendant in favour of the plaintiff or that such a duty of care arises by necessary implication. 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. This requires malice, in the sense of improper motive, or knowledge by the decision maker that the decision would be in excess of the delegated powers. Otherwise, public bodies may also commit recognised torts, including negligence. Here, there was nothing to suggest that the duty of the appellant Minister under the Sea-Fisheries and Maritime Jurisdiction Act 2006 gave rise to any duty of care towards these fishermen. On the contrary, the considerations in the legislation are expressly directed towards the conservation of fish stocks, their rational exploitation, the furtherance of the common fisheries policy and the consequent benefit towards the community. Even if that were not the case, no discretion arose once Castlemaine Harbour had been declared an SPA and an SAC. Under the Habitats Directive, article 6.3, the duty of the State was clear, which was to conserve the protected sites and to not allow any non-conservation activity until it was certain that it would not impact upon the environment and the species within. Hence, any amelioration in the decisions made as to the opening of Castlemaine Harbour, were negotiated from the European Commission by the appellant Minister as a concession. All this was done in good faith.

39. The analysis in this judgment precludes any award of damages from negligence based on an underlying policy which is expressed in the application of either primary or subordinate legislation to situations without that legislative justification being removed first of all through judicial review in the case of delegated legislative powers or by a declaration of constitutionality in the case of Acts of the Oireachtas.

40. There was no basis, in terms of the press statement relied on, as founding a legitimate expectation. There was no entitlement for anyone to conclude that it was clear and unequivocal that Castlemaine Harbour would not be shut by reason of the designation of much of that area as an SPA or an SAC.

41. Finally, damages should not be awarded to related companies on the basis of any analysis that a wrong was perpetrated against one of them which was felt by the other because they shared common directors.

Judgment of Mr. Justice Clarke delivered the 22nd February, 2016.

1. Introduction

1.1 The circumstances in which the State may be liable for mistakes on the part of officials or employees is a complex and sometimes controversial area of the law. That a mistake occurred in this case which had, at least, some impact on the plaintiffs cannot be doubted. The issue which this case raises is as to whether there is any proper legal basis on which it can be said that the defendants/appellants ("the State" unless the context otherwise requires when "the Minister" will be used) is liable in damages. I will collectively refer to the plaintiffs/respondents as "Cromane", unless the context makes it clear that it is only the first named plaintiff/respondent which is being referred to. The second named plaintiff/respondent will, when separately relevant, be referred to as "O'Sullivan McCarthy". In the High Court, Cromane put forward two bases on which it was asserted that it was entitled to an award of damages. First, it was said that it was possible and appropriate for the Court to award damages under the heading of legitimate expectation. Second, it was said that damages arose under the tort of negligence.

1.2 For present purposes, it is sufficient to note that the circumstances which give rise to these claims arise out of the implementation in Ireland of European Union environmental legislation. In the events that happened, O'Sullivan McCarthy was, for a period of time, precluded from continuing to carry on its business of harvesting mussels in Castlemaine Harbour as a result of the absence of necessary permission to carry on that activity after new measures for the authorisation of such activity in protected areas had come into force. Cromane has argued that the Minister was in breach of a legitimate expectation or, alternatively, was negligent arising out of the circumstances in which it was forced to cease its activities.

1.3 The trial judge (Hanna J.) found in favour of Cromane under both headings and made an award of damages in the sum of €125,000 in respect of Cromane and €275,000 in respect of O'Sullivan McCarthy. The State has appealed to this Court against that finding. In addition to raising questions as to whether an award of damages can properly be made either in the context of legitimate expectation or on the basis of negligence, the State has also appealed against the amount of damages awarded and also, as a separate basis of appeal, by asserting that damages could not, in any event, be awarded in favour of Cromane in respect of any losses attributable to that company.

2. The Issues

2.1 On that basis, there are four sets of issues at least potentially before this Court on this appeal. The first and second issues concern whether, in the circumstances of this case, it was properly open to the trial judge to make an award of damages at all under

the headings of, respectively, legitimate expectation or negligence.

2.2 In the event that both of those issues were to be found in favour of the State then clearly no further issues would arise. However, in the event that this Court were to uphold at least the principle of an award of damages under either (or, of course, both) headings, then the two separate issues which relate to the question of damages would require to be addressed. On that basis, the third issue concerns the calculation of damages by the trial judge (in that context it should be recorded that Cromane cross appealed on the basis that the calculation by the trial judge of the award of damages was inconsistent, it was said, with some of the judge's findings as to the evidence) and the fourth issue concerns whether it was appropriate, even if damages, in principle, were available to O'Sullivan McCarthy, to award any damages in favour of Cromane in respect of losses attributable to that company. In that latter context, it should be noted that the issue between the parties concerns the level of connection of Cromane with the alleged cause of action.

2.3 As already noted, the underlying issues which arise in these proceedings concern certain licensing functions of the State, and in particular the Minister, relating to the shellfish operations of Cromane. As will be discussed later in this judgment, O'Sullivan McCarthy is a separate legal entity which has a shareholding connection with Cromane. O'Sullivan McCarthy is involved in cultivating shellfish. Cromane was not, therefore, directly affected by any of the licensing issues which are at the heart of these proceedings, but claims to have suffered loss indirectly as a result of the inability of O'Sullivan McCarthy to supply shellfish because of the licensing difficulties to which I have referred. The separate question which arises in the context of Cromane is, therefore, as to whether, even if O'Sullivan McCarthy is entitled to successfully maintain proceedings for either or both of legitimate expectation or negligence, Cromane is likewise entitled, notwithstanding the more remote connection of that company to the events which give rise to these proceedings.

2.4 The background to this case is to be found in the developing legislative framework enacted at European Union level for the purposes of protecting the environment. In that context, it is necessary to turn briefly to that framework.

3. The EU Framework

3.1 Council Directive 92/43/EEC of the 21st May, 1992 ("the Habitats Directive") was concerned with the conservation of natural habitats and of wild fauna and flora (O.J. L 206 4/7 22.7.1992). In respect of activity which it was proposed should take place in a Special Area of Conservation ("SAC") as specified under the Habitats Directive, it was required that an appropriate assessment first be carried out to determine whether such activity would affect the integrity of the site.

3.2 The European Communities (Natural Habitats) Regulations 1997 (S.I. No. 94 of 1997) were introduced for the purposes of transposing the Habitats Directive into Irish law. As part of the gradual measures introduced for the purposes of implementing the Habitats Directive, various candidate SACs ("cSAC") were identified and notified to the relevant European authorities. Castlemaine Harbour was one such area identified.

3.3 It is also worth noting that, as will be discussed in section 5 of this judgment, in parallel with those developments, Castlemaine Harbour had earlier been designated as a special protected area for birds under the Irish implementing measures designed to transpose Council Directive 79/409/EC ("the Birds Directive").

3.4 In any event, the critical legal requirement which, as a result of those measures, applied to Castlemaine Harbour was Article 6.3 of the Habitats Directive which reads:-

> *"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."*

3.5 One of the questions which arose was as to whether that provision applied, or applied in the same way, in respect of existing activities which were being carried out in an area of conservation prior to its designation as such and, indeed, prior to the relevant European legislation or its Irish implementing measures coming into force. The relevance of that question to these proceedings is that, as will appear later in this judgment, the activities which Cromane was carrying on in the harbour were well established prior to the developments in European environmental and conservation law to which I refer.

3.6 The European Court of Justice ("ECJ") delivered two important judgments in relation to the interpretation of Art. 6 of the Habitats Directive in the mid-noughties. These were - *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) [2004] ECR I-07405 and *Commission v. Ireland* (Case C-418/04, ECR [2007] I-10947). The net effect of both of these decisions was to make clear that the regime specified in Art. 6 was required to be applied to activities which existed prior to the designation of an area as a SAC or cSAC. Furthermore, it was made clear that the requirement for an appropriate assessment of the implications of any such activity required that the relevant authorities had, prior to authorisation, to be satisfied that, in the words of the ECJ, "*in the light of the site's conservation objectives…no reasonable scientific doubt remains as to the absence of such effects*" (being adverse effects on the integrity of the site).

3.7 This interpretation of the legal position undoubtedly caused significant difficulties for the Minister and also, as a result, for Cromane. As will be clear from an account of the facts to which I will shortly turn, the Minister had provided various forms of permission which allowed for the continuation of Cromane's activities notwithstanding the coming into force in this jurisdiction of the regime under the Habitats Directive. However, no specific analysis or assessment had been carried out and, indeed, the necessary scientific work had not been engaged in so as to allow for an immediate assessment of the type which the ECJ held was required in order that activity be permitted.

3.8 As a result, it was clear that, as a matter of law, the Minister could not grant any permissions which would have the effect of allowing activity within the boundaries of the protected area unless and until an appropriate assessment had been carried out and such assessment satisfied the requirements identified by the ECJ, being that there was no reasonable scientific doubt as to the absence of adverse effects.

3.9 While efforts were made to deal with the situation which had emerged as a result of the decision of the ECJ in *Commission v. Ireland*, there can be no doubt that, at least to some extent, the existing commercial activities of Cromane were interfered with. There can also be little doubt but that the Minister was mistaken as to the proper interpretation of the Habitats Directive and its Irish implementing measures for it is clear that the Minister considered that it was possible to continue to provide appropriate licences for the existing activities of Cromane notwithstanding that they were to take place in a protected area and notwithstanding the fact that no specific assessment had been carried out. It is as against that background that the claim for damages in respect

of breach of legitimate expectation and/or negligence was brought. On that basis it is appropriate to turn to the facts.

4. The Facts

4.1 The trial judge found that, in general terms, the business currently being carried out by Cromane in Castlemaine Harbour had been in place since the 1970s. However, so far as the issues which are now before this Court are concerned, the relevant events commenced in the early 1990s. At that time, the possibility of the designation of areas as special protection areas was under consideration. On the 7th April, 1993, a public notice was published in the Irish Times by the National Parks and Wildlife Service of the Office of Public Works announcing the intention to classify Castlemaine Harbour as a special protection area. That notice stated that:-

> *"It is not envisaged that designation will restrict the current usage pattern of these areas for activities such as fishing … or their use for shellfish culture"*

It was also suggested in evidence that this statement was echoed in a Government Notice at the time. On this issue, the trial judge, at p. 14, found as follows:-

> *"… there was a representation made to the plaintiffs in both the government notice and the newspaper notice of 1993. There was comfort given. What happened from then onwards, the annual allocation of seed collection authorisations and the constant refurbishing of the plaintiffs business gave rise to a pattern of events where the plaintiffs had good reason to rely upon the comfort given to them that there would not be a summary closure of their business without some good scientific reasons or without some consultation process before doing so."*

4.2 Thereafter, the mussel fishing business carried on by Cromane proceeded without interruption until difficulties were encountered in relation to the permission regime which is at the heart of these proceedings. I will turn shortly to that regime. However, so far as the situation on the ground is concerned it is also necessary to note that in May, 2008, O'Sullivan McCarthy spent in excess of €1 million renewing a mussel cultivator, "Western Adventure" T246, in order to qualify for a new certificate of compliance under the Torremolinos Protocol of 1993 relating to the Torremolinos International Convention for the Safety of Fishing Vessels 1997 as provided for in European Council Directive 97/70/EC, as amended, and as transposed into national law by the Fishing Vessels (Safety Provisions) Regulations, 2002 (S.I. No. 418 of 2002).

4.3 It should also be noted that there were various communications between Cromane and/or O'Sullivan McCarthy, on the one hand, and State agencies, on the other hand, which it is said led to the State generally being, at least in broad terms, aware of the commercial activities being conducted in Castlemaine Harbour. The trial judge also accepted that the Department of Agriculture, Fisheries and Food has at all times been fully aware of what was described as the *modus operandi* of Cromane and that there was, at all times up to the matters complained of, a close and good working relationship with the Department including "on the ground" operations through the offices of departmental officials. In this regard, the trial judge accepted that the Department was "*well aware of the workings and operational activity in Cromane*" and that the Department "*knew, through constant contact and face-to-face communication in Cromane through its officials how the plaintiffs (and others) carried on their business*."

4.4 Further, the evidence before the trial court, which was accepted by Hanna J., was to the effect that attempts to import mussel seed from elsewhere in the country proved unsuccessful and that, given the location of their fishery grounds, such alternative supply was not viable.

4.5 In respect of the assessments which were required to be carried out before the

harbour could be opened, the High Court found that the carrying out of screening tests was within the control of the Minister. Hanna J. accepted the evidence of Dr. O'Connor, expert witness for Cromane, that if there had been a screening test carried out this project would have been "screened out as having no adverse consequence on the environment". Dr. O'Connor gave evidence that he could have undertaken the appropriate analysis within two months, which analysis, the High Court found, should have been done quickly in 2008.

5. Licensing and Permissions

5.1 As set out in the judgment of the High Court, Castlemaine Harbour has been a Special Protection Area (SPA) since 1979 in accordance with Council Directive 79/409/EEC ("the Birds Directive") as amended. In 2000, a wider area of protection, a Candidate Special Area of Conservation (cSAC), was opened under Council Directive 92/43/EEC ("the Habitats Directive") as amended. As it comes within the remit of both of these Directives, the site is known as a "Natura 2000 site". As a consequence, the harbour is closed annually for a period of time to allow for stock conservation, and authorisation of the Minister is required to obtain mussel seed.

5.2 Apart from the protection afforded to the harbour under the Natura 2000 scheme, appropriate licences must be granted to O'Sullivan McCarthy in order that they may engage in their commercial activities, such as the bottom cultivation of mussels, in this area. Secondly, it is required that Castlemaine Harbour be "open" for the purposes of these aquacultural activities. The opening and closing of the harbour in this regard is governed by Statutory Instruments made by the Minister which will be outlined in more detail in due course.

5.3 In fact, in relation to individual licences, O'Sullivan McCarthy was licensed to engage in bottom cultivation of mussels at two sites in Castlemaine Harbour (301A and 301B) in accordance with a ten-year aquaculture licence granted under the Fisheries (Amendment) Act 1997 and a Molluscan Shellfish (Conservation of Stock) permit which allows them to move seed to farm the mussels. It also has a sea-fishing boat licence (number 141805994) issued under the Fisheries Acts 1959 to 2006 for its boat Western Adventure II. O'Sullivan McCarthy is involved in fishing and transplanting mussel seed to the aquaculture site licensed at Castlemaine Harbour.

5.4 Traditionally, O'Sullivan McCarthy obtained mussel seed from an area within the bay. From there, it placed the seed in the nursery ground for further development for a period of six weeks. The mussel seed collection activities usually lasted for a period of twenty days during the summer months. As noted by the trial judge, these were almost invariably non-consecutive days as they were determined by tidal and weather conditions. After that, the seed was taken from the nursery ground and then put into other areas (one shared area under the Fishery Order Licence and two other areas within the SPA where O'Sullivan McCarthy had exclusive rights under Aquaculture Fishing Licenses) where it was left for a period of two years for later harvesting.

5.5 Up to the determination of the ECJ in *Commission v. Ireland* on the 13th December 2007, Cromane carried out these commercial activities within the harbour on a regular basis. However, following the determination of the ECJ, a decision was made not to open the harbour for mussel seed fishing activity during the summer months in 2008. In this regard, an overview of the Statutory Instruments regulating the opening and closing of the Harbour will demonstrate the access, or lack thereof, extended to Cromane in order to operate within the Harbour.

6. Statutory Instruments

6.1 An overview of the Statutory Instruments regulating the opening and closing of the harbour and the permissions required to operate therein is necessary at this point. In

essence, a sequence of S.I.s was introduced by the Minister to open and close the harbour for mussel fishing each year. There were some 29 Statutory Instruments outlined in the Book of Statutory Instruments as prepared by the State, but it is not intended to refer to all of those instruments here. The focus will be on the relevant Statutory Instruments purporting to regulate the opening and closing of the harbour for Cromane's purposes, and those relevant to the operation of their activities.

6.2 Closure of the harbour began, for these purposes, on 30th November, 2007, with S.I. 789/2007, also known as the Mussel Seed (Prohibition on Fishing) Regulations 2007. Two Statutory Instruments were then introduced to take effect from 9th June, 2008. The first, S.I. 162/2008 revoked S.I. 798/2007 which theoretically opened the fishery. However, the second, S.I. 176/2008, imposed a prohibition on fishing for mussel seed within the areas described in the schedule thereto, which included, inter alia, an area in Dingle Bay described at paragraph (u) of the Schedule, and comprising an area which included Castlemaine Harbour.

6.3 It would appear that in 2008, the harbour was not opened for fishing until 5th October, by which time the season for mussel seed fishing had passed as serious damage had been done to the mussel seed by predators such as starfish and green crabs.

19.2 In 2009, the situation was different. The fishery was opened for mussel seed collection on 30th April by S.I. 150/09 and remained open until 14th May.

6.5 However, another statutory instrument was introduced in 2009 which is relevant to the Court's analysis. The European Communities (Habitats and Birds) (Sea Fisheries) Regulations 2009 (S.I. 346/09), commenced on 27th August, 2009, provided for the issuance of so-called Natura permits, which added what Cromane describe as an "extra layer of regulation" in terms of the operation of their commercial activities within the harbour. As this S.I. was commenced after Cromane had obtained the requisite mussel seed in 2009, it did not impact on their operations that year.

6.6 However, in 2010, the regulatory landscape was as follows. In fact, S.I. 174/2010 opened the fishery on the 4th of May and it remained open until the 25th of May that year, which was within the season for obtaining mussel seed. However, Cromane did not gain access to the fishery until August that year when it was opened for a second period of time, by which time the mussel seed had been seriously damaged. It emerged in argument before this Court that what had prevented Cromane from operating their activities in May that year was, in fact, that a Natura permit was not obtained by them until August 2010. Cromane state that they applied for such a permit as soon as they learned that it was required, and argue that this extra layer of authorisation was but part and parcel of their case and that the lack of essential scientific information available to the Department, in essence, lead to the imposition of a regulatory scheme that was poorly informed and, consequently, in breach of their rights. However, it was strongly disputed by the State that this was ever part of Cromane's case. Ultimately, it did emerge in Cromane's argument before this Court that the matter of the Natura Permit scheme and any purported connection with the absence of monitoring and scientific tests of the fishery site had not specifically arisen before the trial court.

7. Interim Measures

7.1 As noted, the determination of when the harbour was open or closed, for present purposes, was regulated through a series of Statutory Instruments made by the Minister under the legislation as outlined in the previous sections of this judgment. However, certain interim measures are also relevant. For example, Cromane refers to a letter from the Minister to Cromane on 2nd July, 2008, stating as follows:-

> *"It is the environmental issues associated with the Natura 2000 sites that have caused the delayed opening of the mussel seed fishery in Cromane. In order to comply with the requirements of the Habitats and Birds Directive, baseline data for the area must be collected and then an appropriate assessment carried out on the area based on this data."*

The letter further stated that:-

> *"The interim approach is being finalised at the moment with a view to presenting it to the European Commission in the near future. Any re-opening of the Mussel seed fisheries in 2008 will be dependent on the Commission agreeing to the management/interim approach proposed."*

7.2 In light of these matters, it is necessary to set out what actually occurred on a year by year basis after the difficulties arising from the decision of the ECJ first arose.

7.3 In essence, as Hanna J. described the matter, concerns arose in the Department of Agriculture and Fisheries and in the Department of the Environment as to whether there was a risk of adverse environmental impact in the areas of the SPA arising from the gathering of the mussel seed. Following the determination of the ECJ, it was decided not to open Castlemaine Harbour for mussel seed fishing activity in 2008 as would normally occur during the spring/summer months. Between late August, 2008, and 9th September, 2008, various statements were made by the Minister to Cromane to the effect that the harbour remained closed for mussel seed fishing. Ultimately, as outlined in the previous section of this judgment, Castlemaine Harbour was not opened by the Minister for mussel fishing until 5th October, 2008. By then, the season for mussel seed fishing had passed, and predators such as green crabs and starfish had seriously damaged the mussel stock. As a result, O'Sullivan McCarthy was without any stock of mussels from 2008 for maturation on their licensed sites.

7.4 In 2009, the "relaxation" of the regulations pertaining to the closing of the harbour occurred from the 30th of April, 2009, to the 14th of May, 2009, within the season for mussel seed fishing, so that Cromane had sufficient opportunity to gain access to the fishery.

7.5 However, in 2010, although the relevant "relaxation" of the regulations closing the harbour for commercial mussel fishing operations occurred at the appropriate time, the difficulty in accessing the fishery stemmed from the "extra layer of regulation" imposed under S.I. 346/2009, which introduced the requirement for a Natura Permit in order to gain access to the harbour, and the fact that one was not obtained by Cromane until August of that year. As noted earlier, it was stated in argument before this Court that the Natura permit was sought and obtained as soon as Cromane became aware that such was necessary.

8. The Relationship Between Cromane Seafoods Limited and O'Sullivan McCarthy Mussel Development Limited

8.1 Cromane and O'Sullivan McCarthy are two separate corporate entities that have worked closely together for a period of years. They also have a common shareholding, and Castlemaine Harbour is the centre of their operations. O'Sullivan McCarthy sells all of its harvested mussels to Cromane. However, Cromane does have other suppliers in the Castlemaine area.

8.2 The State argued that Cromane and O'Sullivan McCarthy have chosen, for business reasons that have presumably served them over the years, to organise their relationship inter se in the manner they have done, that is to say, using two companies with separate legal personalities and accounts. Quite simply, it is said that Cromane is a downstream purchaser of goods from the party with whom the State dealt, namely O'Sullivan McCarthy. The State submits that any dealings it had with Mr. O'Sullivan or Mr. McCarthy were had with them as directors of O'Sullivan McCarthy.

8.3 In essence, it is stated that Cromane purchases shellfish and fish for wholesale from O'Sullivan McCarthy and from others holding Aquaculture Licences situate at Castlemaine Harbour. O'Sullivan McCarthy engages in the cultivation and wholesale of molluscs.

9. Causation and Damages

9.1 In all claims for damages it is usually necessary to establish liability (for example a breach of contract or a tort), causation (a causal link between the cause of action established and some consequence or consequences) and quantum or amount (being a valuation of the amount of damages which it is necessary to award). In the ordinary course of events it is normal to first address questions which relate to the liability of a party to pay damages at all before going on to consider causation and the amount of those damages or, indeed, issues which might affect how those damages should be calculated. However, there are some cases where an alternative approach may make more sense. For reasons which I hope will become apparent, this case is, in my view, such a case.

9.2 I have already identified some of the issues which arose on this appeal under the broad damages heading. One of those issues concerned the losses claimed in respect of 2010. As already noted, that year was the third year after problems emerged concerning Cromane's business. It is clear that Cromane was unable to carry on its business in the first year (2008) and while, therefore, there remain significant disputes between the parties as to the manner in which the trial judge went about the task of calculating the losses attributable to that year, there can be no doubt but that, if liability is established, O'Sullivan McCarthy (but not necessarily Cromane) is entitled to such damages as they might be able to establish in respect of 2008. Again, it is common case that O'Sullivan McCarthy was able to conduct its business in the ordinary way in the second year (2009) so no question of damages in respect of that year arises. There is, however, a question about the third year (2010) to which I now turn. It is clear that the trial judge awarded damages in respect of losses attributable to an interference with O'Sullivan McCarthy's business in that year. That O'Sullivan McCarthy did not carry out its ordinary business during the normal season for 2010 is not in dispute. However, in the course of questioning by the Court at the hearing of this appeal, it became clear that, to use the language which was applied to the situation on the ground at that time, the harbour was, in fact, "open" during the normal time when harvesting would have occurred in the year in question. It may well be that there was another licensing or permission difficulty which prevented O'Sullivan McCarthy from actually conducting its commercial activities during the relevant period in that year. As already noted, it was said at the hearing of the appeal that a Natura 2000 permission or licence may also have been required and may not have become available until well after the period during which relevant activity was to take place.

9.3 However, having carefully reviewed the evidence which was given before the High Court, it does not seem to me that the trial judge had any evidence before him to explain the precise legal basis on which it was not possible for O'Sullivan McCarthy to carry out its activities in 2010. It cannot have been because the harbour was "not open" for the harbour was, in fact, "open", in the sense in which that term was used, during the relevant period.

9.4 The reason why this is of very great significance is that without having a clear finding of fact as to the legal reason why activity did not occur in the year in question, it is impossible to assess whether any of the alleged failings on the part of the Minister (whether breach of legitimate expectation or negligence) could have been responsible for the inability of O'Sullivan McCarthy to conduct its activities that year. I can well see that, from a colloquial point of view, and from O'Sullivan McCarthy's perspective, it may not have mattered very much as to which licence or permission was absent for, from a

commercial point of view, the only thing which was likely to have really mattered to O'Sullivan McCarthy was whether it could carry on its business or not.

9.5 However, from the point of view of a claim in damages, the precise legal reason why O'Sullivan McCarthy was unable to carry on its activities in that year is crucial. To take but a simple example, there was little or no evidence as to the criteria which needed to be met in order to obtain a so-called Natura 2000 licence or in relation to the facts necessary to establish an entitlement to such a permission or licence. Even if it could be established that the Minister was in breach of legitimate expectation or negligent in failing to have ensured that the necessary scientific work had been done to enable a proper assessment to be carried out so as, in turn, to enable a valid permission to be given, there could well have been other reasons why, in any event, O'Sullivan McCarthy did not, at the time in question, qualify for the necessary licence or permission. There was insufficient evidence tendered on this point. If it were, for example, to be the case that there was some reason, wholly independent of the necessary scientific assessment, why O'Sullivan McCarthy could not have carried on its activities in the third year, then there would be no arguable causal link between any alleged failure on the Minister's part and O'Sullivan McCarthy's inability to carry on its business in that year, for even if the Minister had secured the availability of the necessary scientific information to meet the requirements of the Habitats Directive so as to allow O'Sullivan McCarthy's activity to be authorised, they would not have been able to carry on that activity anyway for some separate and independent reason.

9.6 Whether there was such an independent reason, or whether the reason why O'Sullivan McCarthy did not have all of the necessary permissions were truly based on the same problem concerning the absence of an adequate scientific assessment, we just do not know, for this issue was not addressed in the High Court, there was no evidence on which the High Court judge could have reached any conclusions in that regard, and there is no basis on which this Court can now be expected to make assumptions about the reasons.

9.7 In that context, it must be recalled that the onus of proof in respect of damages (including causation) lay on O'Sullivan McCarthy. It was for O'Sullivan McCarthy to establish the precise legal reason why it was unable to carry on its activities in any relevant year in respect of which damages were claimed and to establish any factual basis for suggesting that there was a causal link between any of the alleged failures on the part of the Minister and that inability. There just was no evidence presented at the trial from which any sustainable conclusion in that regard could be reached. I am, therefore, satisfied that, in any event, and irrespective of the situation which might properly be said to arise either in respect of legitimate expectation or negligence, no claim for loss in respect of 2010 can be sustained, for there was no evidence from which it could legitimately or sustainably be concluded that there was a causal link between any such alleged failure on the part of the Minister and the inability of O'Sullivan McCarthy to conduct its business in that year.

9.8 It follows that this case must be confined to the claim in respect of 2008. The reason why it seemed to me to be appropriate to address this question first was that there was at least the possibility that somewhat different considerations might apply to the issue of whether the Minister might be said to be liable (and in particular liable in negligence) depending on whether one was assessing damages arising in 2008, on the one hand, or 2010, on the other hand. This is so not least because the manner in which the Minister and his officials responded to the problem which emerged was arguably a much more significant potential issue so far as the third year is concerned but is of much less significance so far as the first year is concerned, for the closure in that year occurred at a time very soon after the judgment of the ECJ in Commission v. Ireland

and at a time when the Minister and his officials had had a very short period to respond.

9.9 In the light of that finding, I will leave over the question of the criticisms made on behalf of the Minister of the manner in which the High Court carried out the assessment of damages in respect of the first year until I have set out my views on the proper legal analysis of O'Sullivan McCarthy's claim that it is entitled to damages in respect of that year under either heading. I will also leave over an assessment of the position in respect of Cromane for, as already noted, the issue which the case made on their behalf raises relates to the fact that the effect on the business of Cromane of the licensing regime was indirect rather than direct. However, in order properly to address the legal issues which arise under that heading it is necessary to identify the legal basis (if any) on which a claim under either legitimate expectation or negligence might be sustained at all. I propose to turn first to the question of legitimate expectation.

10. Legitimate Expectation

10.1 First it should be acknowledged that, as Fennelly J. noted in *Glencar Exploration plc v. Mayo County Council* (No.2) [2002] 1 I.R. 84, the jurisprudence in the area of legitimate expectation continues to evolve. The views which Fennelly J. expressed in that case were described by him as provisional but they have come to be accepted as providing at least the broad outline of the law in this area. At pp. 162-163 of his judgment in that case, Fennelly J. said the following:-

> *"Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavored to formulate seem to me to be preconditions for the right to invoke the doctrine."*

10.2 More recently, O'Donnell J., writing for this Court in *Lett & Company Limited v. Wexford Borough Council and ors* [2014] 2 I.R. 198, [2012] I.E.S.C. 14, expressly adopted the tests identified by Fennelly J. in *Glencar*. I should also add that there has been a debate for some time as to the question of whether damages can be awarded in a claim where it is established that there is a breach of a legitimate expectation. For reasons principally connected with the fact that the matter had not been fully argued, O'Donnell J. was reluctant, in Lett, to express a definitive view on the issue, but he did cite the judgment of McCracken J. in *Abrahamson v. Law Society of Ireland* [1996] 1 I.R. 403 in which it was stated that the courts would endeavour to obtain a benefit in respect of which a legitimate expectation arose "or to compensate the applicant… by an award of damages…". It is, I think, fair to say that, while not definitively decided, the tendency in the more recent case law has been to recognise that, at least in some cases, an award of damages for breach of legitimate expectation may be permissible. However, it will be necessary to consider that question in this case only if there is a breach of legitimate expectation in the first place.

10.3 It is also worth noting that in my own judgment in the High Court in *Lett (Lett &*

Company Limited v. Wexford Borough Corporation and ors [2012] 2 I.R. 198, [2007] I.E.H.C. 195), I suggested that the case law established, in addition to the positive elements which must be met in order for a legitimate expectation to arise as set out in the three tests identified by Fennelly J. in the passage from *Glencar* to which I have referred, that there were also negative factors whose presence might exclude a legitimate expectation. In that context, at para. 29, I said the following:-

> *"The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in Wiley v. The Revenue Commissioners [1994] 2 I.R. 160 , it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in Hempenstall v. Minister for Environment [1994] 2 I.R. 20, legitimate changes in executive policy to take place."*

I do not see any reason to depart from those views at this stage. However, it is inevitable that the starting point has to be to consider whether the criteria identified by Fennelly J. in *Glencar* have been met.

10.4 In summary, those criteria are first that there must be an appropriate promise or representation, second, that it must be addressed to an identifiable group of persons creating a relationship between that group of persons and the public authority concerned, and third, that the expectation created by the promise or representation in question must be such that it would be "unjust to permit the public authority to resile from it". It is hardly a surprise that Fennelly J. started with the question of the promise or representation itself, for it is necessary to identify what it is that the public authority said or did (or, perhaps, in an appropriate case, refrained from doing or saying) that amounted to what Fennelly J. described as a "promise or representation" as to how it would "act in respect of an identifiable area of its activity". Therefore the starting point must be an analysis of the actions or statements attributed to the Minister in those circumstances. I will shortly turn to that analysis.

10.5 In passing, it should be said that, while it will almost always be necessary to look at the representation or promise to identify the person or persons to whom it might be said to have been directed, it may be, at least in respect of some of the matters relied on in this case, that that issue would not prove unduly problematic, for those persons were a definable group which was engaged in commercial activity within the areas which were proposed to have special status conferred upon them, and whose activities might, therefore, have the potential to be interfered with by the introduction of the Habitats Directive and its implementation. Thus, the second leg of the test may not pose particular difficulties on the facts of this case. The third leg of the test, however, is more problematic, for it is necessary to identify the precise nature of the promise or representation made and, indeed, the circumstances in which it came to be made, in order to determine whether it would be unjust to allow it to be resiled from. There can, therefore, often be a close connection between the question of whether there truly was a representation or promise (as opposed to a vague indication) and whether it would be just to permit the relevant public authority to resile from same.

10.6 It must be recalled that Cromane relies on certain specific matters as amounting to the representation or promise in this case. It is necessary to identify these and to analyse whether they can properly be said, either individually or cumulatively, to amount to the sort of representation or promise which would meet the first leg of the criteria identified by Fennelly J. in *Glencar*.

10.7 As noted earlier, the only representation which it can be said was expressly made by the Minister to Cromane was to the effect that "it is not envisaged" that there would be any restriction on traditional activities. That statement was made in April, 1993, and was in the context both of developing European environmental legislation and also in the context of the process leading to the identification of areas within Ireland which would be designated for the purposes of that European legislation. It could not be said to amount to a clear commitment on the part of the Minister that there could never be any adverse consequences. What the consequences were going to be of the designation of an area for European environmental purposes was a matter of European law.

10.8 As events unfolded, it became clear that the Minister did not have the legal authority, as a matter of European law, to allow for the uninterrupted continuance of traditional activities in protected areas unless and until an appropriate assessment had been carried out. The Minister had no discretion in the matter. The Minister was bound by European law as interpreted by the ECJ. The Minister could give no greater assurance than that, in the then view of the Minister, it was not envisaged that there would be problems for traditional activities. But the question of whether there would be such problems was not a matter within, as it were, the Minister's gift. It was determined by the proper application of European law. Such an indication by the Minister does not, in my view, amount to the type of representation which meets the criteria identified by Fennelly J. in *Glencar*. It is neither precise nor is it of a nature which could, in any event, be delivered by the Minister, for it was not within the Minister's power, as a matter of European law, to insist that there would be no interference with traditional activities.

10.9 For those reasons, I am not satisfied that it was legitimate to entertain an expectation, based on the sort of comments made in 1993, that European law might not, nonetheless, interfere with traditional activities.

10.10 Next, reliance is placed on the fact that, as found by the trial judge, the ongoing activities of Cromane were carried out to the knowledge of the Minister and on the basis of annual legal measures put in place by the Minister which facilitated the so-called opening of the harbour. However, as was noted by this Court in *Wiley v. The Revenue Commissioners* [1994] 2 I.R. 160, the fact that there may have been an error in the past cannot create a legitimate expectation that that error will be continued into the future. The fact that the Minister was mistaken in his view that traditional activities, of which the Minister undoubtedly knew, could continue provided that the Minister put in place the appropriate legal measures, and was also in error about the fact that those legal measures could be put in place in conformity with European law without carrying out an appropriate assessment, cannot create a legitimate expectation to the effect that that situation would continue.

10.11 While there undoubtedly was significant expenditure, and while the incurrence of expenditure on foot of a representation may form part of the Court's assessment in determining whether it would be appropriate to allow a public authority to resile from a representation made, expenditure will not be relevant if there was no legitimate expectation in the first place.

10.12 Finally, before leaving this aspect of the analysis, it is worth commenting on one of the representations which was made on behalf of local producers to the Minister after difficulties had been encountered arising from the decision of the ECJ. It was said to the Minister that he was disregarding local interests and jobs by reason of an unproven risk to the environment. Unfortunately from the perspective of those local producers, that is just what the Minister was required to do as a matter of European law. As interpreted by the ECJ, a permission for activity in a protected area can only be given when there is an appropriate assessment. An appropriate assessment requires that, on a scientific

assessment, risk be excluded. The Minister was required, therefore, as a matter of European law, to be concerned not with unproven risk but rather with proven absence of risk. Until a sufficient analysis had been carried out to justify a finding that absence of risk had been proved, the Minister was precluded, as a matter of European law, from giving any permission which would have allowed for the continuance of mussel farming in the harbour. Given that legal position, it is impossible to see how any party could have entertained a legitimate expectation that the Minister would permit unlawful activity.

10.13 On that basis, I am not satisfied that the actions of the Minister and his officials could be said to amount to the sort of representation or promise which can, even potentially, give rise to a legitimate expectation. It follows that it is unnecessary to reach any definitive view as to whether a pure claim for damages for breach of legitimate expectation can be maintained. In the High Court in *Atlantic Marine Supplies Ltd & Anor v. Minister for Transport & Ors* [2010] I.E.H.C. 104 I came to the view that such a claim could be made. I remain tentatively of that view, but like O'Donnell J. in Lett, I would prefer to leave it until a case in which the issue fairly and squarely arose and was decisive for the result to come to a definitive view on the issue. It might, for example, be the case that a proper review of the underlying principles and their application might lead to the conclusion that, while damages may be claimed in some cases, there may be circumstances where damages would not be appropriate for various reasons of policy. In that context, it might be necessary to consider whether the finite resources which may be available under a particular statutory scheme could, in substance, be required to be at least in material part diverted to those who might successfully bring a legitimate expectation claim where the overall effect of such a decision might be to require that those resources were allocated in a way other than in accordance with the statute concerned. If it is not possible, by legitimate expectation, to require that a particular decision be made in a particular way, for to do so might be to infringe on the proper exercise of a statutory decision-making role, then there may be cases where the award of damages may do much the same thing.

10.14 However, I would leave these issues to a case in which those questions squarely arose. For the purposes of this case, I am satisfied that there was no sufficient and clear representation or promise made to the effect that there would be no potential impact on commercial activity within the proposed areas and, therefore, the claim in legitimate expectation must fail. To that extent I would, therefore, allow that aspect of the Minister's appeal. It follows that Cromane's claim in damages must then be considered on the alternative basis proposed, being that of negligence. For the reasons already identified I am also satisfied that the claim concerned can only relate to losses attributable to the first year. Against that background, I now turn to the question of negligence.

11. Negligence

11.1 One of the curious features of the law of negligence is the extent to which it is, on the one hand, routinely and mundanely applied without any great controversy in a large number of cases on a daily basis but, on the other hand, has generated, at the level of high principle, perhaps more debate than any other issue of controversy in the common law world. The vast majority of negligence actions pass off without any direct reference to the law of negligence at all. This is, doubtless, because the routine application of the law of negligence to the sort of circumstances in which it is most commonly invoked is wholly uncontroversial, so much so that the parties and their advisors do not even need to discuss how it might be applied. The contentious motor accident case hardly ever turns on a debate concerning the parameters of the law of negligence except in unusual cases such as *McComiskey v. McDermott* [1974] I.R. 75 where this Court had to consider an injured navigator in a motor rally car and the extent of the duty of care owed by the driver of that car to his navigator. Ordinarily, contentious motor accident

cases turn on the facts as to how the accident happened, the injuries actually suffered by the claimant and questions concerning the appropriate compensation for such injuries.

11.2 On the other hand, it would, in my view, be fair to characterise the legal debate concerning the proper scope of the law of negligence over the last century or so as being a search for a coherent scheme which also worked in practise. I remain unconvinced that the search has been successfully concluded. Why is it necessary, in the context of this case, to address these issues? The reason is that the claim of negligence in these proceedings is not one of those routine types of claim where the parameters of the law are so well established and well known that it need not be mentioned. Rather, this case requires an analysis of where the boundaries of the law of negligence lie in order to determine whether liability may arise. It is inevitable, therefore, that at least to some extent it is necessary to return to some of the issues which have been the subject of long-standing debate and which concern the scope of the law of negligence.

11.3 As a starting point, it might well be appropriate to attempt to analyse why this area has given rise to so much difficulty and so much debate in almost all common law jurisdictions. Can I suggest that perhaps part of the true underlying difficulty stems from the fact that we live in a highly interactive world where each of our fortunes are constantly affected, sometimes trivially, sometimes significantly, by decisions made or actions taken or avoided both by ourselves and by many others on a daily, or even hourly, basis? One of the lessons which the modern area of mathematics which has come to be known as "chaos theory" has taught is that in a highly interactive model very tiny variations at one point in time can make huge differences in conditions at another point in time and often in a far different place. The theory is often associated with the title of a talk given by one of the fathers of that area of mathematics, Edward Lorenz, at the 139th meeting of the American Association for the Advancement of Science in 1972 which appeared under the title "Does the flap of a Butterfly's wings in Brazil set off a Tornado in Texas?"

11.4 I do not, for a moment, suggest that many (or perhaps any) lawyers have had chaos theory specifically in mind as they search for solution to the elusive question of a principled approach to the law of negligence. However, I do suggest that lawyers and judges have intuitively understood one of the underlying lessons which chaos theory has taught us. The messy world of human beings involves a hugely dynamic system in which we constantly interact with each other in ways great and small. In such a situation it is inevitable that many actions or inactions have a myriad of consequences, some trivial, some potentially significant. A set of traffic lights breaking down on a busy commuter route will inevitably cause some level of traffic chaos. For most, the consequence will be a small irritation and perhaps an apology to a (hopefully) understanding boss, co-worker or client. To some, the consequences may be more severe. A missed flight which had to be rebooked at significant expense. A missed interview and a lost opportunity to obtain a job. Anxiety and tension which might trigger illness or a row with colleagues or friends which might have lasting consequences. The list could go on and on.

11.5 While it might be an exercise in reverse engineering, it is appropriate to recall that the underlying principle of almost any area of redress in law is to attempt to put a party back into the position in which it was before any wrongful act occurred. But the range of potential consequences of a minor lapse can be so wide, so disparate, so disproportionate to the extent of the lapse and, as one moves away from direct to consequential or indirect knock-on effects, so difficult to analyse, it is hardly surprising that judges have been concerned to ensure that some limit has to be placed on the extent of legal liability for lack of care and, indeed, the scope of that duty of care itself.

11.6 However, the undoubted acknowledgement that there has to be some limit does not provide any easy answer to the question which has troubled the jurisprudence for many years, which is as to where that limit should be placed or, perhaps, even more fundamentally, by reference to what type of principle or overall approach should we assess where those limits are to be placed in particular types of cases.

11.7 Those broad questions arise in two ways in the circumstances of this case. The first is as to the general overall approach. The second is more particular and concerns the application of that overall approach in the particular context of the fact that the defendant in this case is a public authority. I will turn shortly to a consideration of each of those questions in order. However, the fact that the defendant in this case is a public authority leads to one further general observation.

11.8 I have already sought to identify why it might be said that the question of finding an appropriate means of imposing a limit on the scope of the law of negligence has proved problematic. However, there is, at least potentially, a second aspect of that general problem which comes into focus in the circumstances of this case. The general problem stems from the fact that the range of consequences of any individual act can potentially be so extensive that some limitation must be placed, however difficult it may be to define that limitation. The second issue is that there may be particular circumstances where there is an additional reason for not imposing potential liability, being that there are important countervailing factors of policy which lean against the creation of the prospect of liability in certain types of cases. The undesirability of causing disproportionate interference in the orderly operation of public (and indeed at least arguably certain important private) functions can be an important factor which must be taken into account. If judgements require to be made with a backward glance towards the risk of being sued for negligence then the judgement-making process may be impaired to the detriment of all. There is at least an argument that this may provide, in certain cases, a justification for excluding liability when it might otherwise arise. Against that very general background, I turn first to the question of 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 The next major development can probably be said to have occurred in *Anns v. Merton London Borough Council* [1978] A.C. 728, which reaffirmed the proximity or neighbourhood principle but also added a second question which required the Court to consider whether there were any reasons which ought to negative or to limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it might give rise. While *Anns* was applied in this jurisdiction, Keane C.J., in *Glencar* expressed the view that it was not clear that there had been an unqualified endorsement of *Anns*. In *Glencar*, 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 It might, however, be said that 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?

12.4 There has been, at least to some extent, what has been described by academic commentators as an incremental or gradualist approach to defining the boundaries of the duty of care by reference to the evolution of the existing circumstances in which a duty of care has been found to exist and by reference to its application by analogy to new circumstances.

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. Before turning to that specific question, it is appropriate to briefly deal with how the jurisprudence of the European Court of Human Rights ("ECHR") has dealt with questions concerning the exclusion of state or public authority liability in the context of the common law duty of care.

13. The Convention on Human Rights

13.1 In this context, the first significant case which arose before the ECHR was *Osman v. United Kingdom* [1999] 1 F.L.R. 193. However, the ECHR returned to the matter in *Z v. United Kingdom* (2002) 34 E.H.R.R. 3, in which the Court accepted that it may not have properly understood the relevant principles of the common law when giving judgment in *Osman*. The House of Lords, in the underlying proceedings which gave rise to *Z*, being *X v. Bedfordshire County Council* [1995] 2 A.C. 633, had struck out a negligence action against a local authority for failure to prevent abuse of children. It was held that an action of that type failed the 'fair and reasonable' requirement specified in *Caparo*. In *Z*, the ECHR accepted that the development of the law concerning the duty of care which stems from *Caparo* involved the application of what it described as the 'fair, just and reasonable criterion' as an intrinsic element of the duty of care. On that basis, the ECHR accepted that the law did not "disclose the operation of an immunity". On that basis, the Court concluded:-

> *"In the present case, the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in*

domestic law".

13.2 It is, however, clear that the existence of an immunity rather than the possibility that, on proper analysis, a particular type of cause of action may fail because of the absence of the fair and reasonable test, might well have given rise to concerns as to compatibility with the European Convention on Human Rights. Those authorities seem to me to at least have the capacity to inform the proper approach to considering whether state or public authorities can properly be excluded from liability.

14. The Position of State or Public Authorities

14.1 It must be recalled that one of the more significant trends in many areas of law in relatively recent times has been an extension of the circumstances in which the State itself or its agencies or public bodies can be exposed to legitimate legal action. It is, of course, the case that very many actions taken by public authorities have a real and substantial effect either on the population generally or on particular sectors or sections who may be affected by relevant decision making. Almost any policy decision will have an effect, whether positive or negative, on some group of persons. However, as the authors of McMahon and Binchy, *The Law of Torts*, 4th Ed., (Dublin, 2013) point out at para. 6.78 "*If a duty of care were too easily imposed on public authorities towards all of those affected by their acts, choices and omissions, in some instances the authorities would be hamstrung, unable to discharge their functions with any confidence or creativity*."

14.2 Precisely for that reason, courts have frequently found either that there was insufficient proximity between a public decision or action and a particular consequence or have held that there were sufficient countervailing factors which made it inappropriate to impose a duty of care on a public authority in particular circumstances.

14.3 However, in my view, courts should be careful not to be overprotective of public authorities. In one of the majority judgments in this case, MacMenamin J. makes a point similar to that identified by McMahon and Binchy in the paragraph from *Law of Torts* just cited. I do not disagree with the suggestion that courts, in defining the duty of care to be imposed on public authorities, need to exercise care to ensure that the proper exercise of public power in the public interest is not stifled. Likewise, I do not disagree that courts, in considering any possible expansion of the law concerning the duty of care, need to be cautious and adopt an incremental approach so as to minimise the risk of unintended consequences. However, it seems to me that those concerns can be addressed within the confines of the third criterion identified in *Glencar*. What leans against the imposition of a duty of care in certain cases involving public authorities is the countervailing factor derived from the fact that the actions of the public authority concerned may involve questions of policy, discretion or adjudication which are to be determined in the public interest and whose exercise in that manner should not be stifled.

14.4 However, it does not seem to me to follow that every act or omission of a public authority which takes place in the course of the exercise of public power can necessarily be properly characterised as involving the determination of policy, the exercise of a discretion or an adjudicative power. Within the overall context of the exercise of public power, certain actions are purely administrative. The consequences of extending a duty of care in respect of those purely administrative actions may well be far removed from the consequences of extending a duty of care to decisions involving policy, discretion or an adjudicative role. It follows that the weight to be attached, as a countervailing factor, against imposing a duty of care in respect of such purely administrative actions must be much less. It further follows that there must be cases where, therefore, appropriate scrutiny must lead to the view that there would not be a sufficient countervailing factor to justify excluding a duty of care, on a proportionate basis, in respect of such purely administrative acts.

14.5 Why, without good reason and the presence of an appropriate countervailing factor, should public authorities not be liable for the consequences of their actions in exactly the same way as anyone else? It may well be that, in practice, it will be a lot more likely that an appropriate countervailing factor will be found to be present in the actions of public authorities precisely because of the public nature of the functions to which those actions relate. But in the light of the need to guard against giving the State an immunity or, indeed, excessive protection, it seems to me that it is appropriate that a court carefully scrutinise any restriction sought to be imposed on the potential liability of a public authority to ensure that it is justified and proportionate in the light of the public interest sought to be protected. That is not to say that, after appropriate scrutiny, there may well be an entirely appropriate basis, stemming from the public nature of the activity concerned, which would justify treating a public authority differently from a private person. But the Court should scrutinise the circumstances of the case to satisfy itself that there truly are countervailing public interest factors sufficient to provide a legitimate basis for excluding a duty of care which might otherwise arise.

14.6 The fact that, as in *Glencar*, the public authority was carrying out a function designed for the public benefit (in that case the adoption of a development plan) may very well provide such a justification which would withstand scrutiny. Likewise, the position of adjudicative bodies which was considered in *Beatty v. Rent Tribunal* [2006] 2 I.R. 191, may provide an appropriate justification. Other examples could readily be given.

14.7 It must, in that context, be recognised that the sort of actions or functions frequently carried out by public bodies or officials may differ very significantly both in their nature and as to their effect from actions or functions carried out by private persons or bodies. It is inevitable, therefore, that whatever general approach is adopted for the purposes of defining the limits of the duty of care, the application of that general approach in practise is likely to differ as between public and private persons or bodies at least when public entities are carrying out functions which are peculiarly within the public domain.

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.

14.9 But there are functions which public authorities carry out which have no easy parallel in the private sphere.

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.

14.13 I should also express my agreement, at least in general terms, with one of the observations made by Charleton J. in the course of his judgment in this case. There is, as Charleton J. points out, a risk that an excessive expansion of the law of negligence may come to, as it were, "swamp" other torts. It would make a nonsense of the carefully worked-out parameters of various other torts if a party were to find it easy to get around those parameters established in case law for the boundaries of the tort in question by simply bringing a claim in negligence. However, it seems to me that there is a solution to that problem. It must be assumed that there are legitimate policy factors which inform the parameters of all torts. The fact that the courts have defined the limits of the tort of misfeasance in public office in a particular way must be taken to stem from an analysis of the competing entitlements of those affected by the wrongful acts of public officials or bodies when exercising legal powers, on the one hand, and the need to ensure that such legal powers can be reasonably exercised for the public good, on the other. Torts such as misfeasance in public office have their boundaries and limitations precisely because, over the years, courts have come to the view that balancing factors, such as those which I have identified, require that liability be confined within the boundaries of the tort as thus defined. That analysis clearly gives rise to what might, in the context of the jurisprudence on the scope of the duty of care, be said to amount to a "countervailing factor". If there is a good reason, in accordance with existing jurisprudence in respect of another tort, for limiting the scope of that tort in a particular way, then there would equally be likely to be a similar good reason or countervailing factor which would limit the duty of care in a similar way.

14.14 When analysed in that way, it does not seem to me to be likely that negligence could readily be used to get round the limitations which the law has carefully put in place in respect of other torts, for those very limitations themselves derive from an assessment of countervailing factors which would need to be taken into account in assessing the duty of care.

14.15 I should say in passing that I agree with MacMenamin J. that it is difficult to characterise with any precision the legal basis on which the plaintiffs succeeded in *Duff v. Minister for Agriculture* (No.2) [1997] 2 I.R. 22. It is true that the decision of this Court in that case has been the subject of academic commentary and discussion in subsequent cases which, it might be fairly surmised, suggest that the decision is something of an outlier. I agree that it cannot be taken to be an approval for the concept of operational negligence (a concept to which I will return in the course of this judgment).

14.16 This much can, however, be said. *Duff* is a case where liability was placed on a State authority (the Minister in that case) in circumstances where the Minister in question had, because of a mistaken view of the law, put himself in a position where he could no longer deal appropriately with the dairy farmers who had lost out on milk quota. The Minister had allocated Ireland's national quota without making provision for those who had availed of other schemes put in place by the same Minister which had encouraged them to invest in dairy farming in a manner which led to significant loss when it proved impossible to allocate sufficient quota to them. The Minister's difficulty did not concern a policy decision as to the allocation of the national milk quota as such, for it would have been very difficult to see how any liability could have been imposed for such a pure policy decision. Rather, the Minister's liability stemmed from dealing with the national quota on the basis of a mistaken view of the law which put him in a position where he was no longer, as a matter of EU law, able to accommodate the plaintiffs. There are, at least, some parallels between the circumstances which underlay the claims in Duff and those which underlie the claim in this case. That being said, the undoubted difficulty with characterising the precise legal basis on which it can confidently be suggested that a majority of this Court found in favour of the plaintiffs leads me to the view, in common with MacMenamin J., that it is difficult to derive great assistance from *Duff* in resolving the undoubtedly difficult issues which arise in this case.

14.17 I would conclude this section by simply reiterating that a court should be careful, in applying the basic requirements of proximity, forseeability and absence of countervailing policy factors not to do so in a way which excludes liability on the part of state authorities in an unjustifiable and disproportionate way which operated on a materially more generous basis than that which would be applied in the private sphere.

15. Application of Principles

15.1 It is important to start by attempting to identify precisely what it is that it might be said that the Minister did wrong. I have already set out the reasons why the Minister was obliged, as a matter of European law, not to permit the continuance of Cromane's activities until there had been an appropriate assessment which justified giving any necessary permission. Therefore, there could not have been a duty, as such, to refrain from closing the harbour until an appropriate assessment had been carried out. The Minister had no legal power, as a matter of European law, to open the harbour in the circumstances which had arisen. To the extent that the harbour could be opened, it was only permissible in accordance with the interim measures agreed with the European Commission. Any wider permission given by the Minister either to Cromane, or, indeed, anyone else, would have been a breach of European law.

15.2 It is for that reason that I do not consider that the issue raised by both MacMenamin and Charleton JJ. in their judgments in this case concerning the question of whether it is permissible to seek, as it were, to go behind the relevant statutory instruments without first considering whether they can be quashed, properly arises. In the circumstances which had arisen by 2008 to 2010 there could have been no legitimate basis for quashing those statutory instruments, for the Minister was obliged, as a matter of European law, to take the position which he did. In passing, I should note that if I had considered the issue of the continuing validity of the statutory instruments to be relevant, it would have been necessary to have regard to cases both from this jurisdiction (such as the judgment of Henchy J. in *Burke v. Minister for Labour* [1979] I.R. 354) and the United Kingdom (see the judgment of Lord Sumption in *Bank Mallat v. H.M. Treasury* (No. 2) [2014] A.C. 700) which undoubtedly seek to distinguish between secondary legislation of general application and measures which, although secondary legislation in form, amount in substance to an individual decision relating to permissions and the like. While the issues which required to be determined in those cases differ materially from the issue which might have arisen in this case, and while, therefore, those cases are undoubtedly not directly on point, nonetheless the fact that courts have

consistently regarded individual decisions which are taken in the form of a statutory instrument in a different light from secondary legislation of general application might well have affected the proper analysis of the approach to the statutory instruments in this case had I considered that such an analysis required to be conducted for a proper resolution of the case.

15.3 In those circumstances, it seems to me that the real question is as to whether the Minister might be said to have owed a duty of care which required him to ensure that an appropriate assessment was carried out at an earlier stage. There are a number of issues which might arise in relation to such a contention, not least the question of whether loss might have occurred in any event but only in a different year. It will be necessary to return to some of those questions in due course. But for present purposes, in attempting to identify whether there is a duty of care at all, I will assume that any such problems might be overcome. The question which arises in relation to the duty of care is as to whether it can be said that the Minister owed a duty of care to put himself into a position where it would be possible, as a result of the assembling of sufficient necessary data, for him to carry out an appropriate assessment so as to consider whether it would be lawful to permit the continuance of Cromane's activities and to do so at a time which would, had the relevant assessment led to the appropriate conclusion, have allowed those activities to continue uninterrupted. We know, of course, why the Minister did not procure the carrying out of the necessary scientific work. The Minister had a mistaken view of the law under which it was felt that it was permissible to allow traditional activities to continue. On that basis, the necessary underlying scientific work which would have allowed for an appropriate assessment had not been carried out. However, we know that, when an appropriate assessment was ultimately carried out, it did prove possible to meet the standard required and to permit a recommencement of Cromane's activities. It seems clear, therefore, as a fact, that had an appropriate assessment been carried out at a much earlier stage, permission could and would have been given for the continuance of the relevant activities.

15.4 The real question on the duty of care, therefore, comes down to this. In the light of developments in European law, did the Minister owe a duty of care to those who, to his knowledge (and up to then with his permission), were carrying out activities in protected areas, to ensure that he had appropriate survey(s) and other scientific evidence available to enable a decision to be made for the purposes of considering whether to permit the continuance of traditional activities and, should appropriate evidence be found to be present, to allow those activities to be authorised?

15.5 Put in that way, the potential duty of care certainly meets the test of forseeability. It was clearly foreseeable that the absence of sufficient scientific information would not allow an appropriate assessment to be carried out and that there would be likely to be a consequential interruption in the ability of those engaged in traditional activities to continue with their business. Also those persons are a relatively finite group. They are those who were engaged in such activities, in the various areas in the country which were to, or were likely to, have special protected status conferred on them. Furthermore, as pointed out elsewhere in this judgment, some comfort had been given to those carrying out such activities. They were, therefore, reasonably in the Minister's contemplation. In my view the proximity test is, therefore, likewise met.

15.6 For the reasons which I have already sought to analyse, it seems to me that the proper way to approach the question as to whether a public authority, such as the Minister, may then have a duty of care imposed is to first consider whether a duty of care would be imposed on a private individual in an analogous circumstance and then to consider whether there is any sufficient countervailing factor which could provide a proportionate basis for not imposing a like duty on a public authority.

15.7 It is important to emphasise that the question which is now being addressed is as to whether a duty of care, in the narrow sense in which I have sought to define it earlier in this judgment, can properly be said to arise in the circumstances of this case. The question is not, as it was in *Glencar*, as to whether a public authority owes a duty of care in relation to implementing a public duty such as the formulation of a development plan in (as was the case in *Glencar*) or in making an actual decision on whether, as a result of an appropriate assessment, it is permissible to allow activity in a protected area, such as might have arisen in other circumstances connected with this case. Rather, the question is whether a duty of care exists to ensure that the Minister is put in a position to make a proper legal decision in the first place.

15.8 The underlying facts, as found by the trial judge, are these. First, the Minister was well aware, through his officials, that there were traditional activities of a commercial variety being carried on by various operators including Cromane. Second, the Minister was clearly aware, in the light of the indication given that it was not envisaged that those traditional activities would be affected by designation, that there was a potential issue which might arise concerning whether the business and property interests of those carrying on such traditional activities might be interfered with. The Minister was, therefore, fully aware that any failure to place himself in a position to make a sustainable decision, one way or the other, on whether to allow such activities to continue had the potential to have a significant effect on those carrying on such activities. In my view a private party, placed in as analogous a position as it might be possible to envisage, would undoubtedly have a duty of care to those who were likely to be foreseeably and proximately affected by their activities. They are persons who ought reasonably to have been in contemplation.

15.9 It is also of particular importance to recall that the issue which was ultimately determined by the ECJ in *Commission v. Ireland* had been brewing for some time. Doubtless the Minister took advice on the matter and doubtless there were arguments both ways as to whether the position adopted by the Commission, on the one hand, and Ireland, on the other, were correct as a matter of European law. However, it must or should at least have been clear to the Minister for some significant period of time prior to the decision of the ECJ that there was a risk that the view expressed by the Commission would be found to be correct and that, if that should prove to be the case, an immediate problem would be posed arising from the absence of any sufficient scientific analysis to enable permissions to be granted. It follows that, at least from the time when the prospect of proceedings against Ireland being taken by the Commission were first mooted, it was clearly foreseeable that, in the event that the Commission were proved to be right, a small and defined group of operators (being those who were carrying out traditional activities in protected areas) would suffer losses by temporary closure even if it should ultimately prove possible, after an appropriate assessment, to permit the recommencement of those traditional activities.

15.10 I do not consider that the fact that there may be a number of persons in a particular category necessarily affects the application of the proximity test. The pedestrians who may be said to be within the proximate and foreseeable duty of care of a motorist driving down a busy city street may be quite numerous. But they are clearly defined. They are the people whom one might reasonably expect could be injured in the event that the motorist drives negligently. Likewise, the people who might suffer from a failure on the part of the Minister to put himself in a position to make a sustainable decision on whether traditional activities could, as a matter of European law, continue, were equally clearly defined and were, as it happened, at least to a very large extent, actually known to the Minister or officials in his department.

15.11 To say, therefore, that the forseeability and proximity tests are not met in the circumstances of this case would, in my view, be to afford the State a degree of

immunity or exclusion which would not be afforded in a comparable private situation. For the reasons which I have already sought to analyse I would, therefore, regard such an approach as inappropriate and would find that the forseeability and proximity tests are met on the facts of this case.

15.12 It is next necessary to consider whether there is any good reason why the fact that a public authority was concerned should lead to finding that there is a countervailing policy factor of sufficient weight to justify the exclusion of a duty of care. It is important to note that the duty of care which I have characterised does not involve any policy or discretionary considerations or adjudicative roles. It is not concerned with the allocation of resources or the making of statutory decisions. Rather, it is a duty to take reasonable steps to ensure that the Minister would be in a proper position to make a decision under European law and any relevant Irish measures.

15.13 In the light of that analysis, I should turn first to a general observation about some of the criticism which MacMenamin J. directs towards the judgment of the trial judge. I do not necessarily disagree with much of that criticism. There may well have been a lack of clarity as to the precise duty of care or negligence which led the trial judge to find in favour of Cromane. There may, to an extent, have been occasions where concepts more appropriate to legitimate expectation claims strayed into an analysis of the claim in negligence. I should not, therefore, be taken as being in full agreement with the reasoning of the trial judge as to the manner in which he found that there was a duty of care and that it had been breached. This judgment is, however, concerned with identifying whether it is appropriate to impose the rather specific duty of care which I have sought to identify. That duty of care did not extend over any prolonged timeframe for it commenced when the Commission formally took the position that Ireland was in breach of its obligations under European environmental law. The comments of MacMenamin J. concerning the lengthy time span over which it would be necessary to review the acts of the Minister and, indeed, the fear of hindsight creeping in to a post hoc analysis of the actions of the Minister seem to me to have little application in assessing a duty of care of the precise type which I have identified.

15.14 As a preliminary to the commencement of proceedings against Ireland, the Commission was, of course, required to furnish a reasoned opinion as to why it was said that Ireland was in breach of its obligations. As appears from the judgment of the ECJ, there was a range of issues raised by the Commission concerning Ireland's compliance with the directives in question. There was, as is usual practice, correspondence which predated the reasoned opinion. Given the range of issues, a number of reasoned opinions were, in fact, sent by the Commission to Ireland with the latest of same being dated the 11th July, 2003. From that time onwards it must at least have been clear to the Minister that the Commission had not been persuaded by Ireland's arguments and was of the view that Ireland was in breach of a range of obligations including the one concerning appropriate assessment which is at the heart of this case.

15.15 The Commission is not, of course, always right in such matters. Any Member State who disagrees is free to argue their case before the Court of Justice. But a reasoned opinion from the Commission is not in the same category as speculation or even an allegation by a private individual. It represents the considered view of the body which, under the Union treaties, is charged, amongst other things, with ensuring that Union law is properly transposed and implemented in Member States. The duty of care which I suggest requires to be analysed is, therefore, one which arises in a specific timeframe and operates against the backdrop of a formal contention on the part of the Commission that an appropriate assessment (requiring, necessarily, appropriate scientific data) would be required to allow for the continuance of traditional activities.

15.16 On the same topic, I should also add that I do not necessarily disagree with

MacMenamin J. that a specific duty of care might not be said to have arisen in relation to the actions of the Minister in the period after the judgment of the ECJ in *Commission v. Ireland*. Clearly, in the situation which had by then arisen, Ireland was on the back foot and it was, doubtless, necessary to make many decisions concerning the allocation of resources necessary to allow an appropriate assessment to be carried out. However, given that I have, for reasons already advanced in this judgment, taken the view that Cromane's claim in respect of the 2010 season cannot be sustained in any event, it does not seem to me that questions about the actions taken by the Minister between 2008 and 2010 arise at all and, therefore, the question of whether the Minister might have owed a duty of care during that period does not seem to me to be relevant.

15.17 That leads to a consideration of what, in my view, is the central issue concerning liability for negligence in this case, which is an issue on which I must, respectfully, disagree with the majority. I should emphasise that, for reasons which I will set out, I do not think it is either necessary or appropriate for this Court in these proceedings to determine whether the concept of operational negligence which has developed in the United Kingdom and has been applied in some circumstances in other common law countries forms part of the law of Ireland. However, it is necessary to at least commence any proper analysis by a consideration of that concept.

15.18 A distinction in the law of the United Kingdom between operational negligence (for which the State may be liable) and decisions made by the State involving policy matters (for which liability may not be imposed) was initially developed in the House of Lords *in Dorset Yacht Co Ltd v. Home Office* [1970] A.C. 1004 and *Anns v. Merton* LBC [1978] A.C. 728, in the latter of which cases Lord Wilberforce sought to distinguish between policy and operational decisions. Later, in *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473, Lord Keith, considering the justiciability of policy decisions, stated that policy decisions were "unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of scarce resources or the distribution of risks."

15.19 However, the leading authority on the circumstances in which the discretionary nature of public decision-making may preclude the existence of a duty of care is the decision of the House of Lords in *X (Minors) v. Bedfordshire CC* [1995] 2 A.C. 633. In *Bedfordshire*, Lord Browne-Wilkinson stated that the first consideration must be "is the negligence relied upon negligence in the exercise of a statutory discretion involving policy considerations: if so the claim will *pro tanto* fail as being non-justiciable." A second question set out by Lord Browne-Wilkinson in this context was "were the acts alleged to give rise to the cause of action within the ambit of the discretion conferred on the local authority?" In order so to determine, a court would have to consider whether the decision was "so unreasonable that no reasonable authority could have made it." However, this latter aspect of the test has been criticised for purporting to introduce a reasonableness test in relation to whether a duty was owed, rather than forming part of a consideration of any applicable standard of care. The authors of *Clerk and Lindsell on Torts* (21st Ed., 2014), at para. 14-08, suggest that it is arguable that the test did not form part of the ratio in *Bedfordshire* at all since, as was pointed out by Lord Hutton in *Barrett v. Enfield LBC* [2001] 2 A.C. 550, the claims in *Bedfordshire* were ultimately struck out on grounds of justice and reasonableness and not ambit of discretion, and therefore Lord Browne-Wilkinson's speech did not preclude a ruling that a duty could be owed even if the decisions were within the ambit of discretion.

15.20 Further differences emerged in *Phelps v. Hillingdon LBC* [2001] 2 A.C. 619 where Lord Slynn stated that the fact that the acts in question were "carried out within the ambit of a statutory discretion is not in itself a reason why it should be held that no claim in negligence can be brought."

15.21 In the more recent case of *Connor v. Surrey County Council* [2011] Q.B. 429,

Laws L.J., on reviewing the authorities, summarised the relevant principles as follows at para. 103:

> *"(1) Where it is sought to impugn, as the cause of the injury, a pure choice of policy under a statute which provides for such a choice to be made, the court will not ascribe a duty of care to the policy-maker. So much is owed to the authority of Parliament and in that sense to the rule of law. (2) If a decision, albeit a choice of policy, is so unreasonable that it cannot be said to have been taken under the statute, it will (for the purpose of the law of negligence) lose the protection of the statute. While this must, I think, point to the same kind of case as does the Wednesbury rule [[1948] 1 KB 223](#) (since only a Wednesbury perverse decision will be out with the statute), Wednesbury is not made a touchstone of liability for negligence in such cases: the immunity arising in (1) is lost, but the claimant must still show a self-standing case for the imposition of a duty of care along Caparo lines and he may be unable to do so. (3) There will be a mix of cases involving policy and practice, or operations, where the court's conclusion as to duty of care will be sensitive to the particular facts:*
>
> *'the greater the element of policy involved, the wider the area of discretion accorded, the more likely it is that the matter is not justiciable so that no action in negligence can be brought': per Lord Slynn, in Barrett's case [[2001] 2 AC 550](#) , 571."*

15.22 It is clear that the trial judge in this case was satisfied to apply the concept of operational negligence and was also satisfied that it had been established that operational negligence occurred. It is also clear that while, as noted above, the concept has been accepted to an extent in the United Kingdom, it has been the subject of some academic commentary (not all favourable) and criticism from the courts of other common law jurisdictions. Part of that criticism stems from the fact that many decisions may, in reality, involve a mixture of policy questions and operational matters.

15.23 The authors of Charlesworth and Percy on Negligence, 13th ed., (London, 2014) at para. 2-307 described the commentary and criticism in the following terms:-

> *"A distinction between policy matters and operational matters was initially developed in the House of Lords, and was then taken up in Canada, New Zealand, and (to a limited extent) Australia. But doubts also were expressed, with the distinction being described as 'difficult' and 'unhelpful'. The core objection, articulated in the US Supreme Court in US v Gaubert [111 S Ct 1267 (1991)], is that discretionary acts involving choice or judgment are not concerned exclusively with policy-making or planning functions, and that day-to-day decisions regularly require judgment as to which of a permissible range of courses is the wisest. As was pointed out by Lord Hoffman in Stovin v Wise, virtually any activity by a public body involves making decisions about priorities and resources. The policy/operational distinction did not provide a reliable guide as to where a dividing line ought to be drawn."*

The description of the doctrine as "difficult" or "unhelpful" come from the Australian decisions in *Pyrenees Shire Council v. Day* (1998) 192 C.L.R. 330 and *Romeo v Conservation Commission of the Northern Territory* (1998) 192 C.L.R. 431.

15.24 However, it does not seem to me to be necessary, for the purposes of this case, to enter into a detailed consideration of the applicability or otherwise of the law on operational negligence in this jurisdiction and, indeed, if it be applicable, what its boundaries are. It seems to me that the question which arises can properly be

addressed within the confines of the "countervailing policy factor" aspect of the test identified by this Court in *Glencar*. As noted earlier, that factor may, in practise, be more likely to exclude a duty of care in cases involving the State. That factor will be particularly present where the action that is being taken by the State or its agencies or officers involves policy, discretion or adjudication to a significant and material extent. The reason for that is obvious. It is inevitable that policy choices involve benefits (or at least less harm) for some, and harm (or at least less benefit) for others. The consequences of making a particular choice may well be foreseeable. The persons who may benefit or lose may be readily identifiable. But the making of policy choices and their implementation are at the very heart of democratic government. To limit the proper working of the democratic process in making those policy choices by imposing a duty of care would endanger proper policy making and would, in all likelihood, prove almost impossible to operate in practise. Those who suffer as a result of a policy choice would doubtless always complain that it was made without sufficient care or regard for their interests. But by what standard of care is the judgment which led to the relevant policy choice being adopted to be assessed? There are, therefore, very sound reasons why courts would strongly lean in favour of excluding a duty of care under the "countervailing policy" leg of the test identified in *Glencar* where, to any significant extent, a relevant public decision or action can be said to be materially influenced by policy or discretionary considerations.

15.25 Likewise, the nature of other public roles, such as adjudication on legal obligations or benefits, may provide a basis for identifying a sufficient countervailing factor which may lean against the imposition of a duty of care. Those who are charged with adjudicating must, in the public interest, be free to carry out their task without having to keep a close eye on a possible claim in negligence, for to do otherwise would undoubtedly impermissibly skew the adjudication process.

15.26 But there are some public decisions or actions which do not involve any significant policy, discretion or adjudication element at all. This may be so even though the scheme or statutory structure within which the particular activity takes place may itself involve questions of policy. A very good recent example can be found in the decision of this Court (Laffoy J.) in *Minister for Communications, Marine and Natural Resources v. Figary Water Sports Development Company Ltd*. [2015] I.E.S.C. 74. One aspect of that case involved a claim that the State was liable for the way in which it had administered a claim for a grant. Obviously there might well have been many questions of policy involved in a decision as to whether to grant aid in the circumstances of the case. The scheme involved did not confer an absolute entitlement to aid in any particular circumstances. However, the relevant agency failed to progress the claim in a proper manner such that the plaintiff lost out on any chance of securing grant aid. Laffoy J., writing for this Court, held that the State was, in those circumstances, liable for the loss of chance even though the Court significantly differed from the view taken by the High Court as to the proper approach to the calculation of damages.

15.27 The lack of care on the part of the State identified in *Figary* did not involve any material question of policy. It simply related to the administration of a scheme even though the scheme itself was, of course, heavily influenced by policy. *Figary* is, in my view, an example of the fact that the countervailing policy limb of the *Glencar* test will be much less likely to avail the State as a defence where the lack of care alleged does not involve, to a material extent, questions of policy and discretion or, indeed, as in *Beatty*, questions of adjudication.

15.28 If it was said that the Minister, in the circumstances of this case, had, by reason of a lack of care, come to a wrong decision concerning the actual grant of a licence or permission then very different considerations might well apply.

15.29 However, the duty of care asserted in this case is one which is confined to a matter which lies well to the implementation or administrative rather than policy or discretion end of the spectrum. It is said that due to a mistake of law on the part of the Minister (even after what transpired to be the correct view of the law was formally identified to the Minister by the European Commission), no steps were taken to ensure that scientific and other information and data was available to enable an appropriate assessment to be carried out. This is not an issue which is even a mixed question of administration and policy. If, for example, the Minister had put in place measures to acquire some level of scientific information but it had been found by the courts, whether in this jurisdiction or in Europe, that the Minister was mistaken as to the level of information which was necessary to make an appropriate assessment, then there might be questions as to whether a duty of care extended to the decision as to the precise type of information to be collated.

15.30 Likewise, if the Minister had to make a policy decision as to how to allocate resources and thus prioritised the collection of scientific information and data in some areas over others, it might be appropriate to characterise such a determination by the Minister as being towards the policy end of the spectrum. I accept that the boundary between purely administrative matters and matters which may amount to a mixed question of policy or discretion and implementation or administration may not always be very easy to define. But in this case I am satisfied that the allegation of negligence falls squarely on the administrative side of that boundary. There was no question of policy which impacted on the Minister's decision. The Minister simply got it wrong in taking the view that traditional activities could be authorised to continue without an appropriate assessment.

15.31 In particular, the Minister got it wrong by failing to put in place measures to secure the appropriate scientific data to enable an appropriate assessment to be carried out long after it had become clear, by reason of the position adopted by the Commission, that there was, to put it at its mildest, a significant doubt as to whether the Minister's position was correct.

15.32 The failure of the Minister was in omitting to take any steps towards assembling the necessary scientific data to allow an appropriate assessment to be carried out at least after his position had been significantly questioned by the Commission. A similar failure by a private individual in an analogous situation would, in my view, be likely to lead to the Court imposing a duty of care and finding that private individual negligent in failing to comply with the duty of care in question. I can see no sufficient countervailing factor to suggest that a state or public authority, in the circumstances of this case, should be any the less liable.

15.33 On that basis, I cannot agree with the conclusions of the majority. MacMenamin J. speaks of the balancing exercise which the Minister felt called upon to perform. On that basis it is suggested that the fallacy in Cromane's case is to seek to isolate a private duty from the over-arching public or State duty which the Minister owed. However, it seems to me that the duty of care which I suggest should be held to lie on the Minister does not derive from any balancing exercise at all and does not involve any aspect of the undoubted over-arching public duty which the Minister was obliged to perform. Against what can it be said that the Minister was balancing when he decided not to assemble the necessary scientific information and data (despite the Commission's reasoned opinion) prior to the decision of the ECJ? What over-arching public duty would have been in any way impaired by the collection of such data? There is no evidence to suggest that the failure to assemble the necessary data was based on any decision involving policy, discretion or adjudication.

15.34 Because, for the reasons already identified, I do not think it is either necessary or

desirable in the context of this case to come to a concluded view as to whether operational negligence, in the sense in which that concept has developed in the courts of the United Kingdom, forms part of the law of tort in this jurisdiction, I will not use that term. However, it seems to me that it is possible for a state authority to be liable in respect of the tort of negligence when, in respect of a purely administrative part of its function not involving, to any material extent, questions of policy, discretion or the like, it is in breach of a duty of care in accordance with *Glencar* principles to a person to whom that duty is owed. Where such negligence is alleged, the important countervailing factor which often operates to the exclusion of a duty of care in cases involving policy, discretion or adjudication will be missing, and will provide no sufficient and proportionate justification for the exclusion of a liability which might otherwise be said to arise in the event that the tests of forseeability and proximity were met.

15.35 For the reasons already advanced, I do not consider that the failure of the Minister to collect the appropriate data in this case involved any question of policy, discretion or adjudication. Subject to one final factor to which I will shortly turn, it seems to me to follow that it is appropriate to impose a duty of care on the Minister such as that which I have sought to identify and to find that the Minister was in breach of that duty of care even though my reasons for coming to that conclusion may differ somewhat from those of the trial judge. Before touching on that final factor, I should briefly comment on the views expressed by MacMenamin J. concerning the applicability of constitutional issues to the analysis in this case.

15.36 The concern which MacMenamin J. expresses is that the creation or recognition of a species of negligence in the form of operational negligence might trench on the constitutional role of the executive. There may well be issues which could arise under that heading in the event that the courts in this jurisdiction were to consider a concept of operational negligence which closely modelled itself on the United Kingdom jurisprudence. However, the form of administrative negligence which I have sought to identify is precisely defined by reference to situations where there is no material or significant element of policy, discretion or adjudication. In those circumstances, it does not seem to me that the constitutional concerns expressed by MacMenamin J. affect the conclusions which I have reached.

15.37 One final factor needs to be assessed. It is, of course, the case that the Minister was under no absolute obligation to grant any particular licences or permissions. In such a case there will almost always be significant questions of policy involved in the decision of whether to grant or refuse. In many such cases, a duty of care will not arise precisely because of the third limb of the *Glencar* test. However, the situation which arises in this case is different. First, these were traditional activities which provided many of those concerned with their livelihoods. The Minister had at least gone so far as to provide some comfort to those involved in such traditional activities to the effect that it was not envisaged that those activities would be impaired by the creation of protected areas for the purposes of EU environmental law. While that comfort cannot, for the reasons already identified, give rise to a legitimate expectation, it does, in my view, give rise to at least a duty on the part of the Minister to put in place any reasonable measures necessary to enable the Minister properly to consider whether it was appropriate to grant any particular licence or permission. In circumstances where significant doubt had arisen, as a result of the position adopted by the Commission, as to whether the Minister could continue to grant licences or permissions in the absence of having sufficient scientific data to carry out an appropriate assessment for the purposes of EU environmental legislation, it seems to me that the Minister owed a duty of care to put in place measures to ensure that an appropriate assessment could be carried out. It is that failure which it seems to me has been established in this case.

15.38 While the duty of care which I have identified as having been breached may differ

slightly from the duty of care identified by the trial judge, I am not satisfied that there is any material difference in substance. At para. 15.7 of his judgment, Hanna J. identified the question as being as to "whether a duty of care exists to ensure that the Minister is put in a position to make a proper legal decision in the first place". Likewise, the case made by Cromane both in its amended statement of claim and in its written submissions before the High Court suggested that the appropriate studies "should have been available well before this period of time, and it was as a result of the failure of the Minister to have this relevant information that he was so poorly equipped to reopen the Cromane Harbour [sic] for mussel fishing any sooner than he did..." (see para. 8 of the submissions). I am, therefore satisfied that the duty of care which I have found to be breached comes within the scope of the case made by Cromane in the High Court and, indeed, the findings of the trial judge.

15.39 I would, therefore, uphold the decision of the trial judge that there was a duty of care on the Minister in the narrow circumstances in which I have defined it in the course of this judgment and that there was a breach of that duty of care. Before going on to the question of the calculation of damages there are two further points which arise. The first concerns the argument that the loss would have arisen anyway, and the second concerns the distinct legal personalities of Cromane and O'Sullivan McCarthy respectively. I now turn to those issues.

16. Would the Loss have occurred anyway?

16.1 The argument under this heading is to the effect that it was likely that some period would have been lost in any event in the light of the developments in European law which were to the effect that an appropriate assessment had to be carried out in order for traditional activities to continue in protected areas. For the reasons already analysed there is no doubt but that, as a matter of European law, traditional activities could not have been continued without an appropriate assessment. The real issue of causation which arises, therefore, is as to whether there is any causal link between the Minister's breach of duty of care and loss. The reason why it might be said that there is no such causal link is because it might be argued that, once European law changed, an appropriate assessment would have to have occurred at some stage. On that basis it might be said that it followed that the necessary scientific inquiry would have to have been made in order for an appropriate assessment to have been carried out. It might further be argued that, during the course of assembling the necessary data, there would inevitably have been a period during which lawful production would not have been possible in the harbour. On that basis it might finally be argued that the only consequence caused by the Minister's breach of duty of care might be said to have been that the harbour was closed in 2008 rather than some earlier year (for the reasons already addressed I am not satisfied that the question of closure in 2010 can really be sustained).

16.2 However, on the basis of the findings of the trial judge, which findings were supported by evidence, it seems clear that, had the Minister arranged for the collection of the appropriate scientific data at least as early as the time when the Commission challenged the Minister's view as to whether traditional activities could be continued without an appropriate assessment, the assessment required as a matter of EU law could have been completed within a timeframe which would not have led to any cessation of business. Given the events which have happened, we know that it proved possible lawfully to permit the relevant activities to continue once the appropriate assessment had been carried out. It follows that there is no reason to believe that, had the appropriate assessment been carried out in a timely fashion, a similar decision would not then also have been made thus leading to no cessation of business. It follows that there is a direct causal link between the failure of the Minister to assemble the necessary scientific data and carry out an appropriate assessment at least soon as the Commission's position became clear and the inability of O'Sullivan McCarthy to carry on

their activities at least during the 2008 season.

17. The Position of Cromane

17.1 The argument here suggests that Cromane was not directly affected by the negligence of the Minister. In that sense, a distinction is made between the positions of O'Sullivan McCarthy, who are the party directly affected by the Minister's actions, and that of Cromane, who are only indirectly affected by reason of being downstream purchasers from O'Sullivan McCarthy. It is, of course, the case that there are close connections between the two companies involving common shareholders and directors. They also have a very close business relationship. But they are separate legal entities.

17.2 The argument put forward on behalf of the State suggests that there is no reason in principle to distinguish between Cromane, as a downstream purchaser from O'Sullivan McCarthy, and any other wholesaler, transporter or retailer who might have been involved in the overall business which operated downstream to the mussel harvesting business of O'Sullivan McCarthy. If, for example, there were a local supermarket which could establish that it suffered loss because it had to purchase supplies on a less commercially attractive basis because of the effect on O'Sullivan McCarthy's mussel harvesting business, why should such a commercial entity not be regarded in the same light as Cromane?

17.3 In my view, that argument is well made. Persons choose to conduct their business as individuals or corporate entities for a whole range of reasons. When choosing to conduct business as a corporate entity, persons may choose to operate as a single company, or a number of companies which form part of a formal group or, as here, by entirely separate legal entities. There is a whole range of legal and fiscal consequences for those decisions. Sometimes they may happen to benefit parties. Sometimes they may not. But they are decisions made by those involved in the economic activity themselves. They must live with the consequences, both good and bad.

17.4 It does not seem to me that the fact that an entirely separate company with an entirely separate legal personality happens to have common directors and shareholders takes away from the fact that Cromane, as a downstream purchaser from O'Sullivan McCarthy, cannot be said to be in any different position, as a matter of principle and as a matter of law, from any other downstream purchaser. Such downstream knock-on effects do not, in my judgment, meet the proximity test identified as far back as *Donoghue v. Stephenson* and reiterated in *Glencar*. In my view, the trial judge was incorrect to allow the claim attributable to Cromane.

18. Damages

18.1 The first point to be made is that the scope of damages is, of course, significantly limited by reason of the limitations on liability which have already been analysed in this judgment. The trial judge distinguished between the damages attributable to Cromane, on the one hand, and O'Sullivan McCarthy on the other hand. On that basis, there would be no difficulty in removing from the equation those damages attributable to Cromane on the basis of my view that the State does not have any liability to Cromane itself.

18.2 However, even so far as O'Sullivan McCarthy is concerned, it is clear that the damages now must exclude those losses said to be attributable to the 2010 season, again for the reasons already indentified in this judgment. But apart altogether from that, the State made further arguments concerning the calculation of the damages which the trial judge awarded to O'Sullivan McCarthy. The State was critical of the acceptance by the trial judge of the evidence of the plaintiff's expert, Mr. Wynne, on a number of bases. First, it is said that Mr. Wynne based his figures on revenue in the three years prior to the year of assessment which, it was argued, removed the undoubted variation in price during those years from the equation. There was evidence

that the market price was not stable during that period and that it had decreased from €1,518 per tonne in 2006 to €698 per tonne in 2010. On the other hand, Cromane drew attention to the fact that the price for 2008 (which is, after all, the only year in respect of which damages are now to be calculated) was somewhat higher than average.

18.3 The State also drew attention to the fact that the accounts for 2010 (which would reflect mussel seed obtained in 2008 and harvested in 2010) showed no sales of mussels in the year in question. However, those accounts show expenditure of €68,027 on mussel seed purchases in 2008. This, according to the State, is a matter of "serious concern" for two reasons. First, the State suggests that the trial judge did not rule on this matter which it is said was a "significant issue in controversy relating to the quantification of damage." Second, the State suggests that the explanations given by the expert, Mr. Wynne, and Mr. O'Sullivan of O'Sullivan McCarthy differed in regard to the purpose of that expenditure. For example, it is said that Mr. Wynne appears to have attributed the 2008 expenditure to the purchase of mussel seed from local fisherman. In contrast to that evidence, Mr. O'Sullivan attributed €13,000 of the expenditure to the purchase of mussel seed while the explanation for the balance of the expenditure, which the State described as "incomprehensible", involved a complex barter system involving an exchange of grown mussels for work done by other fishermen who, it is said, did not appear as employees or service providers to either Cromane or O'Sullivan McCarthy in the accounts furnished to the Court. The State argued, in their submissions, that Mr. Wynne and Mr. O'Sullivan gave "starkly different explanations for the expenditure." Further points, which it is not necessary to go into in detail about at this stage, were also made.

18.4 It is also necessary at this point to mention the fact that Cromane also cross-appealed on the basis that the damages awarded by the trial judge were ultimately inconsistent with the specific findings which the trial judge made deriving from the evidence presented in relation to those damages.

18.5 Without reaching a definitive view in respect of each of the points raised, I am satisfied that the difficulty with the evidence and figures would make it impossible for this Court to put itself in a position where it could conduct a fair and just calculation of the damages properly attributable to O'Sullivan McCarthy arising out of the closure of the harbour in 2008. To attempt that exercise would involve the Court in excessive speculation which might end up being unfair to one or other party. In the circumstances, it seems to me that the proper course of action to adopt would be to remit the question of damages back to the High Court but, in so doing, to direct that the damages to be assessed must be confined to those arising out of the closure of the harbour in 2008 and must be confined to losses suffered by O'Sullivan McCarthy.

18.6 On that basis, I would remit the question of the calculation of O'Sullivan McCarthy's damages back to the High Court. It follows that the cross appeal should not be allowed as all issues of calculation not dealt with in this judgment should arise on the remittal.

19. Conclusions

19.1 I would allow the appeal in respect of legitimate expectation, allow the appeal in respect of negligence relating to Cromane, but dismiss the appeal in respect of liability for negligence in respect of O'Sullivan McCarthy. I would allow the appeal in respect of the quantum of damages in relation to O'Sullivan McCarthy and remit that question to the High Court. I would also dismiss the cross appeal by Cromane, as the quantification of damages should, in my view, be addressed on the remittal.

19.2 So far as the quantification of damages in respect of O'Sullivan McCarthy are concerned, I would confine the assessment of those damages by the High Court, when the case is remitted back, to an assessment of losses attributable to the inability of

O’Sullivan McCarthy to do business in the 2008 season only. I would exclude from the calculation of such damages any losses alleged to be attributable to the 2010 season.