

Easton Agriculture Ltd v Manawatu-Wanganui
Regional Council 5

High Court Palmerston North CIV-2008-454-31 10
30, 31 May; 1, 2, 3, 7, 8, 9, 10 June; 7 September 2011
Kós J

Local government – Liability of council – Floodway maintenance – Duty of care – Negligence – Causation – Statutory duty – Soil Conservation and Rivers Control Act 1941, s 148(1). 15

In the course of a 1-in-110-year flood, the plaintiffs' land was inundated following the breach by floodwaters of a stopbank of the Mutoa floodway. Responsibility for management and maintenance of the floodway had been assumed by the Council and the operating costs and capital improvements were funded by a special rating scheme. Eighty per cent was funded by those (including the plaintiffs) who benefited directly from flood protection. The remaining 20 per cent was funded from the general rate. The contributing beneficiaries of the scheme had a role in setting the operating costs and capital improvements budget. 20 25

The plaintiffs claimed against the Council in nuisance, strict liability for damage caused by the escape of water from land under control of the Council, negligence and breach of the Council's statutory duty under s 126 of the Soil Conservation and Rivers Control Act 1941.

The basis the of cause of action in negligence was that the Council had breached its duty of care by failing to identify and repair a 150 mm gap between the top of the stopbank crest and the underside of the trestle bridge and that that failure was the cause of the failure of the stopbank and the cause of the inundation of their land. The Council argued that s 148(1) of the 1941 Act, which provided that authorities were not liable without negligence, prevented the causes of action other than negligence being pursued. 30 35

Held: 1 The effect of s 148(1) of the Soil Conservation and Rivers Control Act 1941 was that claims against the council arising from breach of the stopbank could not be maintained in nuisance, strict liability for damage caused by escape of water or breach of statutory duty, but only in negligence (see [105], [106], [224]). 40

2 The Council owed the plaintiffs a duty of care in its monitoring and maintaining of the stopbanks. Such a duty was supported by the Soil Conservation and Rivers Control Act and there was sufficient proximity between the Council (as the owner of the stopbanks), and the adjoining landowners and occupiers (whose rates substantially funded stopbank maintenance), so that it was just and reasonable that a duty of care to monitor and maintain the stopbanks existed (see [135], [141], [224]). 45

Goldman v Hargrave [1967] 1 AC 645, [1966] 2 All ER 989 (PC) considered.

Landon v Rutherford [1951] NZLR 975 (HC) considered.

5 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, [1980] 1 All ER 17 (CA) considered.

3 The council had breached its duty of care by failing to identify and repair a 150 mm gap between the top of the stopbank crest and the underside of the trestle bridge (see [169], [174], [185], [194], [224]).

10 4 The plaintiffs had not proved on the balance of probabilities that the presence of the gap between the top of the stopbank crest and the underside of the trestle bridge had caused the catastrophic failures that occurred and hence was a substantial and material cause of the plaintiffs' loss or damage (see [195], [222], [224]).

Johnson v Watson [2003] 1 NZLR 626 (CA) applied.

15 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 applied.

Result: Judgment for the defendant.

Observation: Even if s 148(1) of the Soil Conservation and Rivers Control Act 1941 does not afford the council a complete defence to claims in strict liability
20 for damage caused by the escape of water from land under control of the council, that cause of action could not succeed because: (a) a floodway built through a flood-prone district is not a non-natural use of the land; and (b) use of the land for floodway purposes could not attract strict liability because the construction of the floodway was authorised or required by s 126 of the same
25 Act (see [107], [118], [119], [120]).

Rylands v Fletcher (1866) LR 1 Exch 265 distinguished

Transco plc v Stockport Metropolitan Borough Council [2003] UKHL 61, [2004] 2 AC 1 adopted.

30 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, (1994) 120 ALR 42 considered.

Autex Industries v Auckland City Council [2000] NZAR 324 (CA) considered.

Other cases mentioned in judgment

35 *Atlas Properties Ltd v Kapiti Coast District Council* HC Wellington CP172/00, 19 December 2001.

Atlas Properties Ltd v Kapiti Coast District Council CA30/02, 20 June 2002.

Burke v Waikato Regional Council [1996] DCR 897.

Cambridge Water Co Ltd v Eastern Counties Leather plc [1994] 2 AC 264 (HL).

40 *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772 (CA).

Hanson v Wearmouth Coal Co [1939] 3 All ER 47 (CA).

Hillier v Air Ministry [1962] CLY 2084.

Irvine & Co Ltd v Dunedin City Corporation [1939] NZLR 741 (CA).

45 *North Western Utilities v London Guarantee & Accident Co* [1936] AC 108 (HL).

Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd [2005] 1 NZLR 324 (CA).

Smeaton v Ilford Corporation [1954] Ch 450 (Ch).

South Pacific Manufacturing Co Ltd v NZ Security Consultants & Investigations Ltd [1992] 2 NZLR 282 (CA).
Tock v St John's Metropolitan Water Board [1989] 2 SCR 1181.
Wilson & Horton Ltd v Attorney General [1997] 2 NZLR 513 (CA).

Action

5

This was an action taken by Easton Agriculture Ltd, first plaintiff, Eveleigh Farming Co Ltd (in receivership), second plaintiff, against the Manawatu-Wanganui Regional Council in nuisance, strict liability for damage caused by the escape of water from land under control of the Council, negligence and breach of the council's statutory duty under s 126 of the Soil Conservation and Rivers Control Act 1941. 10

JO Upton QC and *MS Dobson* for the plaintiffs.
DJ Heaney SC and *SH Macky* for the Council.

Cur adv vult

KÓS J.

15

Table of contents

| | Para no | |
|--|----------------|----|
| Introduction | [1] | |
| Background | [5] | |
| Manawatu River | [5] | 20 |
| Lower Manawatu Flood Control Scheme | [10] | |
| Moutoa floodway | [13] | |
| Trestle bridge | [16] | |
| LMS funding | [21] | |
| LMS review | [23] | 25 |
| The Riley report | [24] | |
| Stage 2 of the LMS review | [28] | |
| Public consultation | [33] | |
| The February 2004 flood | [36] | |
| The flood generally | [36] | 30 |
| Moutoa basin flooding | [42] | |
| [Editorial note: [44]–[60] are omitted from this report.] | | |
| Catastrophic stopbank failure | [61] | |
| Sutherland report | [63] | |
| Parties | [67] | 35 |
| Plaintiffs | [67] | |
| Defendant | [73] | |
| Pleadings | [76] | |
| Claim | [76] | |
| Defence | [87] | 40 |
| Issues | [93] | |
| Issue 1: Can the Council be liable other than in negligence? | [94] | |

Table of contents

| | Para no |
|---|----------------|
| Submissions | [96] |
| Analysis | [101] |
| 5 Conclusion | [121] |
| Issue 2: Did the Council owe the plaintiffs a duty of care in its monitoring and maintenance of the stopbank? | [122] |
| Duty of care | [122] |
| Submissions | [126] |
| 10 Analysis | [131] |
| Conclusion | [141] |
| Issue 3: Was the Council negligent? | [143] |
| [Editorial note: [143]–[223] are omitted from this report.] | |
| Conclusion | [224] |
| 15 Disposition | [225] |

Introduction

- [1] A floodway stopbank fails. The floodway diverts part of a river's flow during flood conditions. Together the floodway and river can cope with a 1-in-100-year flood. But the flood that leads to the stopbank failure is greater still: a 1-in-110-year flood. The floodway is crossed by a highway bridge. The bridge cuts through the top of the stopbank on the southern side of the floodway. During the flood the water reaches and laps the bottom of the bridge. Yet the flood should still be able to be contained within the floodway stopbanks.
- [2] But the southern stopbank fails. First, just upstream of the bridge. Then, a few hours later, downstream of the bridge. Ultimately a gap of 40 m opens up about the bridge. The exact cause of the failure is in dispute. Nearby croplands belonging to the plaintiffs are flooded. The stopbank is the responsibility of a regional council. Must the council compensate the plaintiffs for the loss of their crops?
- [3] The main questions in this case are whether the Council was negligent in its monitoring and maintenance of the stopbank, and whether any such negligence caused the plaintiffs' loss. The plaintiffs expressly do not claim the construction of the bank or bridge was negligent.¹ Any such claims would long since have been time-barred.
- [4] Evidence as to quantum was received by the Court. By agreement the issue of quantum was reserved for further argument, if need be. This judgment is confined to whether the Council is liable to the plaintiffs.

*Background**Manawatu River*

- [5] The Manawatu River is about 160 km long. It rises on the eastern side of the Ruahine Ranges. Fifty kilometres later it passes through the Manawatu Gorge, and then flows on past the city of Palmerston North. From there to the small settlement of Opiki, the river is steep enough to transport gravel when the

¹ This was made clear in the plaintiff's closing submissions: see [81] below.

river is in flood, and the riverbed is gravelled. Downstream of Opiki the gradient is flat. The riverbed is silty. Flood velocities here are typically about 1.5 m per second, compared to 3–4 m per second in the steeper Palmerston North section.

[6] River level and flow records have been held longer for the Manawatu than any other river in New Zealand. An automatic recorder has been operating at Palmerston North since 1929. Manual information is available back to the 19th century. The February 2004 flood, with which we are concerned, was the third-largest flow recorded on the river: 5

| Year | Discharge (cumecs) ² | 10 |
|------|---------------------------------|----|
| 1880 | 4,000 | |
| 1982 | 3,800 | |
| 2004 | 3,500 | |

[7] At Opiki, where the river gradient flattens out, the Oroua River joins the Manawatu. The Oroua is the Manawatu’s major tributary. Below the confluence with the Orua, at Opiki, the Manawatu wends its way on towards the sea past flat lands called the Makerua and Moutoa basins. The plaintiffs farm in the Moutoa basin. 15

[8] Substantial swamp drainage works were undertaken in these areas in the 19th century. Flax was planted in the newly drained land. The flax fibre was used to make rope for sailing vessels and lashings for wool bales. Much of it was exported to Australia. Māori had exploited this resource for generations by the time pakeha settlers established ropewalks along the Manawatu river banks in the 1840s.³ When the flax industry declined in the late 19th century the land was drained and converted to farming. First Makerua, and later Moutoa, the area with which we are concerned in this case. 20 25

[9] The first flood protection works were constructed between 1923 and 1925. The Makerua Drainage Board constructed stopbanks to protect the Makerua basin. In the 1930s and 1940s more stopbanks were built, by the Manawatu-Oroua River Board and the Palmerston North River Board. 30

Lower Manawatu Flood Control Scheme

[10] The Lower Manawatu Flood Control Scheme (LMS) was undertaken by the Manawatu Catchment Board between 1959 and 1965. The LMS protects 320 sq km of land from flooding. But for these flood protection works, the city of Palmerston North, the town of Fielding, and significant areas of the region, in particular the Taonui, Makerua and Moutoa basins, would be prone to flooding in severe weather events. 35

[11] The LMS relies primarily on stopbanks to contain floodwaters. A key part of the scheme, as we shall see, is the Moutoa floodway. The LMS is designed to contain a “1 in 100 year flood”, meaning that such a flood is expected (measured over a very long period of time) to recur on average once every 100 years. To put it another way, there is a 1 per cent statistical probability of that flood size being equalled or exceeded in any given year. The 40

² Measured at Palmerston North.

³ T Buick *Old Manawatu* (Buick & Young, Palmerston North, 1903) at 142; AJ Dreaver *Horowhenua County & Its People* (Dunmore Press, Palmerston North, 1984) at 141–145.

LMS stopbanks were built with a design objective of a freeboard of 450 mm. That is, at all points the stopbank crests were to be 450 mm higher than the calculated 1-in-100-year flood level.

- 5 [12] At the time of the February 2004 flood, the 1-in-100-year flood flow was set at 3,450 cumecs (measured at Palmerston North). At 3,500 cumecs, the February 2004 flow exceeded that level slightly. It is common ground that it was a “1 in 110 year” flood.

Moutoa floodway

- 10 [13] Downstream of the settlement of Opiki, and the confluence of the Manawatu and Oroua Rivers, there is a long oxbow bend where the Manawatu doubles back on itself. On the apex of that bend vast sluice gates have been built. These are the Moutoa sluice gates. The sluice gates were built in the early 1960s. They are regarded as a major engineering feat. When open, they allow the river flow to be split. The major part of the water is sent down the Moutoa
15 floodway. The existing river channel will take the rest. The sluice gates serve as a critical safety valve. The change in gradient at Opiki means the river flow is far slower here than higher up the river. But for the ability to open the sluice gates, and divert part of the river down the floodway, floodwaters would bank up and overwhelm the stopbanks.

- 20 [14] The floodway passes directly across low-lying farmland in the Moutoa basin. It runs from the oxbow bend to a point near the Manawatu river mouth. It is 10 km long, and bypasses 30 km of winding river channel. The floodway averages 600 m in width. Its presence means that in all but floods exceeding the
25 1-in-100-year level, the Manawatu River water can be contained wholly within the existing river structure and the Moutoa floodway. The part of the Moutoa basin lying between the floodway and river channel should remain free from flood. It is that land the plaintiffs farm.

[15] The flood levels in February 2004, a 1-in-110-year flood, were always going to challenge the floodway and river’s capacity to cope.

30 *Trestle bridge*

- [16] Running at right angles to the floodway is State Highway 1. Just south of Foxton it crosses the floodway using a trestle bridge. The trestle bridge was built in the 1930s. The floodway, in the 1960s. The trestle bridge is lower than the adjacent floodway stopbanks. So, in effect, it cuts through them. Either side
35 of the bridge, the stopbank crest runs up against the outer fascia of the bridge, at about road level. Beneath the bridge long beams run with the road, supporting the bridge deck. They project down from the bridge deck. The stopbank builders built the crest as far up beneath the bridge as they could. Then they filled in the spaces above the stopbank and between the beams with
40 bags filled with cement and gravel. These harden to concrete. It is as if the spaces are filled with large flat rocks.

[17] Applying and enlarging the advertising adage that a picture is worth a thousand words, I reproduce three images adduced in evidence, which depict the situation:

45

[18] Figure 1 shows that the side of the bridge comprises: (1) a fascia (with safety parapet above); and (2) a series of longitudinal beams beneath (and inset from) the fascia. The beams project 480 mm below the fascia. This is the appropriate point to repeat some statistics that emerged in evidence:

- 50 (a) The designed stopbank level at its conjunction with the trestle bridge

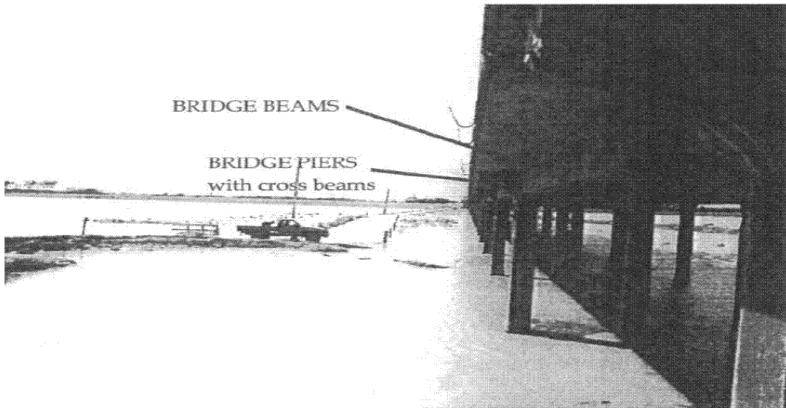


Fig 1: bridge substructure, downstream of bridge, looking north towards Foxtan.

was 5.2 m above mean sea level. That is also approximately the road level of the bridge. Although settlement had occurred on the crest of the stopbanks adjacent to the trestle bridge, those deficiencies had been identified in May 2002. Repair work was conducted in June 2003. I find at the time of the February 2004 flood, the stopbank heights were likely to be at the 5.2 m design level on either side of the trestle bridge.

(b) The underside of the bridge (that is, lowest point, the bottom of the downward projecting beams) is 4.52 m above mean sea level. Thus, obviously, the bridge cuts through the stopbank.

(c) A 1-in-100-year flood (that is, flood levels for which the floodway was designed) would reach 4.63 m above mean sea level at the bridge. At that level the flood waters would reach and lap the beams below the bridge fascia. But the floodwaters would still be contained within the stopbanks.

(d) The peak level of the February 2004 flood at the bridge was slightly higher than the design level. It reached 4.65 m above mean sea level. This level was reached at or shortly after 8.00 pm Monday 16 February 2004. That still left 550 mm freeboard between the flood level and the 5.2 m stopbank crest – more than the design level of 450 mm freeboard.

[19] Figure 2 is a recent photograph of the *northern* end of the trestle bridge, at the point it abuts the stopbank. That is the bank opposite the one that failed. It shows how cement bags have been used to fill the gaps between the stopbank and the arches formed by the longitudinal beams. While representational, it is not an accurate picture of the position at the *southern* end of the trestle bridge in 2004. The northern end has a crossbeam⁴ at or about the crest of the stopbank at that point. At the southern end, however, the bridge straddled the stopbank. The piers were set part way up the slopes either side of the bank. No piers and crossbeam met on the stopbank crest there. The cement bags had to be built

4 That is the structure joining the piers to the bridge (forming the three low archways shown in Fig 2).

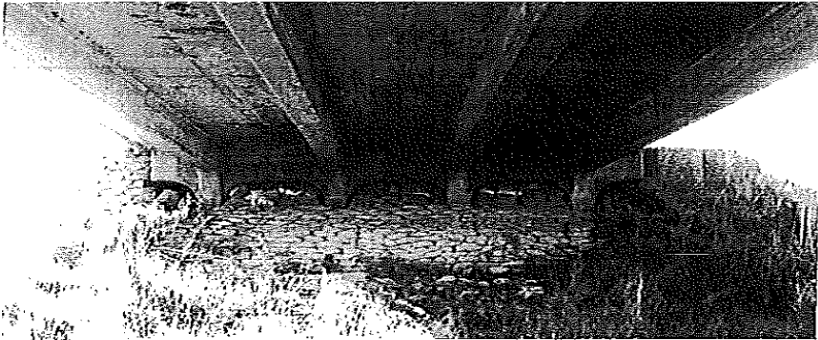


Fig 2: cement bag infill under bridge at northern stopbank abutment.

right up to the very underside of the deck of the bridge. This is made clearer in the next figure, which is a cross-section drawing provided by one of the expert witnesses called by the Council:

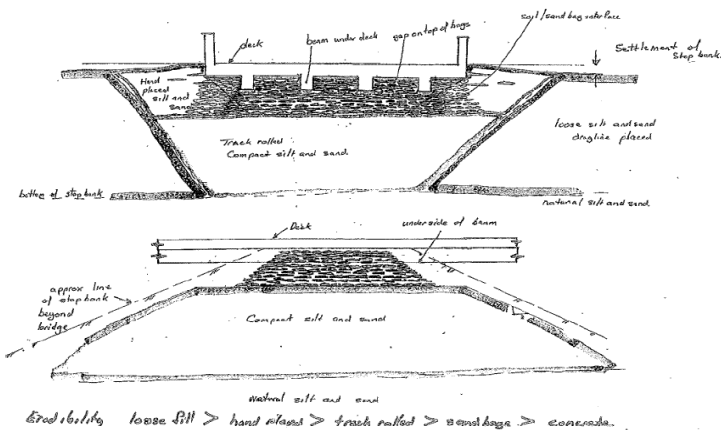


Fig 3: cross-section diagram prepared by Mr Noel Luxford depicting probable southern stopbank/trestle bridge conjunction in 2002

- 5 [20] The upper part of Fig 3 is shown on a north/south plane (that is, as if one was standing below the bridge, looking towards the stopbank). The lower part of the diagram is viewed on an east/west plane (as if one was standing on the stopbank, looking towards the bridge). Although the upper part of the diagram shows some settlement of the stopbank adjacent to the bridge, Mr Luxford
- 10 drew his diagram as if set in 2002. As I have already said, I am satisfied that the stopbank was rebuilt to its design level either side of the bridge in 2003.

LMS funding

- [21] The floodway stopbanks lie on land owned by the Manawatu-Wanganui Regional Council. LMS operating costs and capital improvements are funded by a special rating scheme. Eighty per cent is funded through targeted rating systems, paid for by those who benefit directly from flood protection. The remaining 20 per cent is funded from the Council's general rate. Beneficiaries
- 15

are represented on a Scheme Liaison Committee. The Council is required to consult with the Liaison Committee before including the Scheme budget in the Council's draft annual plan.

[22] The LMS budget for 2003/04 made provision for maintenance (\$984,238), capital works (\$70,773), flood damage reinstatement (\$2,299,353) and "management/supervision/inspection" (\$845,107). That cost was then spread, on a differential basis, across 77,000 individual ratepayer beneficiaries.

LMS review

[23] In 1992 the Council commenced a comprehensive review of the LMS. Stage 1, which began that year, concerned the Palmerston North region where the potential flood damage was greatest. Stage 2 related to the rural reaches of the river, from Ashhurst (above the city) down to the river mouth near the Moutoa basin. A key part of the stage 2 review was a geotechnical investigation by Riley Consultants Ltd.

The Riley report

[24] The Council's brief required Riley to assess stopbank conditions and to identify high and medium priority sections requiring more detailed investigation. Higher priority stopbanks were to have permeability checks by digging test pits or drilling. Medium priority stopbanks would also be tested where preliminary investigation indicated necessity. The brief also required the consultant "to check that services under, through or adjacent to the stopbanks do not compromise their security". In particular, it was to:

... check for any signs of deterioration or damage to the adjacent stopbank or structure itself which may impair the security of the stopbanks.

[25] Riley's report on the risk of failure of stopbanks, including those with which we are concerned, was presented in July 1994. The Riley report is essentially a geotechnical one. A preliminary examination of the stopbanks was followed by more intensive investigation. Twenty-eight test pits, 40 hand auger bore holes, 20 penetrometer measurements and a further 10 machine bore holes were drilled. From these investigations Riley was able to express a view on constituent materials in the stopbanks and their engineering properties. Its assessment of the probability of failure, in the event of a "bankfull" flood was "low to moderate" for the relevant southern floodway stopbank, immediately above the bridge. Below the bridge the risk was "low". By contrast, Riley expressed concern about the state of the stopbank on the northern side of the floodway. This incorporated sandhill material. The risk above the bridge was denoted as "very high." That below, "moderate". Riley concluded:

The assessed risk of failure for a flood stopbank crest (that is, at the point of over topping) is generally low. Some areas of high risk occur. These are generally applications under threat from undermining in the Manawatu/Oroua Rivers, and sections of the Moutoa floodway right bank which are at risk from piping failure in the foundations. These sections of the Moutoa floodway coincide with sandhills.

[26] "Piping" happens when permeable materials in a stopbank permit water to flow through, and then course through, the stopbank. The consequence is that the stopbank will erode at the exit point.

[27] Riley did not identify a particular risk associated with the trestle bridge, the focal point of this case.

Stage 2 of the LMS review

[28] Following the Riley report the Council's senior design engineer, Mr Graham Doull, undertook an investigation of the LMS stopbank heights. He used a Danish computer modelling technique. By these means he located
5 5.5 km of LMS banks lower than the 1-in-100-year design flood height. A further 20.7 km had less than the required 450 mm of freeboard.

[29] Mr Doull's work established that the floodway stopbanks were below the required freeboard level at two points. First, near the Stratton property, some 4.6 km from the river mouth. Secondly, at the trestle bridge, some
10 1,200 m from the river mouth. The Council's Group Manager of Operations, Mr Allan Cook, gave evidence that minor earthworks were undertaken in June 2003 to reinstate the design crest level of the floodway. The Council's records indicate a repair cost of \$1,411. Mr Cook could not say precisely where that money had been spent. It appears likely however that the deficiencies at the
15 bridge were fixed. He also noted that a more substantial freeboard reinstatement had also been undertaken approximately 3 km upstream of the bridge, at a cost of \$12,700. It is reasonably clear that this work reinstated the stopbanks near the Stratton property. It was there that the greatest deficiency in freeboard existed.

[30] Ultimately the plaintiffs make no complaint about the height of the stopbanks, save immediately under the trestle bridge.

[31] In 1998 Mr Doull prepared a stage 2 LMS review for consideration by Council. Based on the Riley report, Mr Doull prepared a list of works that could be done to further improve flood protection. Broadly the categories of
25 work were the raising of stopbank heights to design height, prevention of undermining by rock armouring, prevention of piping failures where porous layers in the stopbank soils had been identified, and some stabilisation of structures. Mr Doull undertook a cost/benefit analysis and presented five upgrade options. Option 1 involved all works on the list being undertaken, but
30 at a cost of \$28 m. The least costly option was Option 5, in which only a few of the very high priority works were to be undertaken.

[32] There was no evidence before me that any of the options, including the most expensive Option 1, involved works specifically at the trestle bridge.

Public consultation

[33] In 1999 the Council consulted with ratepayers about the options. The
35 Easton family interests⁵ made a submission in favour of Option 4. That involved expenditure of \$6.1m. It does not appear that the second plaintiff made a submission.

[34] A hearing committee convened to consider submissions. Eventually it
40 recommended Option 4 be adopted. But with two additional items. The total capital cost was to be \$6.6m. Annual maintenance was also to be increased, from \$1.1m to \$1.5m. The option would result in a 50 per cent increase in beneficiaries' rates. The works were to be carried out over a six-year period, starting in 2000.

[35] The major thrust of Option 4 was to bring the stopbank crest height in all
45 cases to 450 mm above the design flood level. That accounted for 65 per cent of the expenditure. Option 4 included the reinstatement work near the trestle bridge and the Stratton property that I have already described.⁶

5 The first plaintiff company was not yet conducting the family farming business.

6 At [29].

*The February 2004 flood**The flood generally*

[36] As noted earlier⁷ the February 2004 flood was the third largest on the Manawatu River since recording began in the 19th century. It was the largest flood since 1902. The tributary Oroua River experienced its largest ever recorded flood. The floodwater was greatly in excess of the design levels of its stopbanks. The Oroua stopbanks failed in five places. The resulting flooding was said to be “extensive and destructive”. Failures also occurred on the Manawatu River stopbanks at Koputaroa, on Kauri Creek, and on the Moutoa floodway at the trestle bridge. It is that failure that directly concerns us in this case. 5 10

[37] Heavy rain had occurred in the catchment in late January, and in early February 2004. The catchment was already very wet prior to the 15–16 February storm. Heavy rain fell on 14, 15 and 16 February. At Moutoa, the Council’s rain gauge recorded 62.6 mm across those three days. The total for the month was 250 mm – compared to a monthly mean of 67 mm. By way of comparison, 45 mm fell in January and 22 mm in March. Throughout the rest of the year the highest rainfall month was June, with 131 mm. The February rainfall event was, therefore, exceptional. 15 20

[38] Measured at Palmerston North, the Manawatu River was running at a maximum flow rate of 3,500 cumecs. As at 2004, the river system provided for a 1-in-100-year flood at 3,450 cumecs flow. On that basis, therefore, the February 2004 flood was, by a small margin, an over-design flood. The consequence was that the February 2004 flood rose into the 450 mm design freeboard level in some places. 20 25

[39] Council officers, including Mr Doull, used a sophisticated computer modelling system to identify likely river flows during the period of heavy weather. By midnight on Sunday 15 February, it was appreciated that the Moutoa sluice gates would need to be opened, to divert river flow down the Moutoa floodway. Landowners were advised, so they could move stock. The gates were opened at 7.00 am on Monday 16 February. Soon after, it became apparent that the Oroua River was in a state of exceptional flood. As Mr Doull put it: 30 35

During the morning of 16 February it was abundantly clear that the Manawatu River would be carrying a flood that at least approached its design flood, and would possibly exceed it. 35

[40] The peak flow past Palmerston North occurred at about 6.30 pm on Monday 16 February, although the river remained within 100 mm of its peak between midday and 9.00 pm that day. The peak flood downstream at the Moutoa trestle bridge occurred somewhat later of course, at or after 8.00 pm. 40

[41] As noted at [18], the peak floodwaters reached 4.65 m at the bridge. But the bridge itself offered only 4.52 m clearance. So the bridge structure intruded into, and constricted, the flood flow.

Moutoa basin flooding

[42] Before anyone appreciated that there had been a failure in the Moutoa floodway stopbank, local farmers and others were reporting to Council that ponding was occurring near the trestle bridge. That is, in the Moutoa basin, to the south of the floodway. 45

⁷ At [6].

[43] I now turn to the eye-witness accounts of the stopbank failure. They are of considerable importance when eventually the issue of causation is considered.⁸

[Editorial note: [44]–[60] are omitted from this report.]

5 *Catastrophic stopbank failure*

[61] It is common ground that at approximately 6.30 am on the morning of Tuesday 17 February 2004 the southern stopbank, between the Moutoa floodway and the Moutoa basin, gave way downstream of the bridge. The collapse was described by several of the foregoing eye-witnesses as “spectacular”. The stopbank “blew out”. Water rushed from the floodway into the Moutoa basin, and proceeded to back up the basin towards the plaintiffs’ farms.

10 [62] The breach, ultimately, reached 23 m upstream from the centreline of the bridge, and 17 m downstream. The bridge survived, intact.

15 *Sutherland report*

[63] Following the February 2004 flood and the various failures in the Council’s flood protection systems, the Council commissioned a review. The convenor was Dr AJ Sutherland, Dean of Engineering at the University of Canterbury. There were three other engineering members of the team. One of them was Mr PB Riley. His firm had undertaken the 1994 geotechnical review.¹² The review report is known as the Sutherland report. It was delivered in April 2004. It is a mixture of expert analysis and reportage. It refers liberally to information obtained from eye-witnesses. Some of those eye-witnesses gave evidence in this case, but not all. The Sutherland Committee was asked to consider the possible causes of failures, and to recommend appropriate forms of repair to avoid recurrence.

[64] On the reportage front, the Committee report contains some information that was not in evidence before me, and which I must put aside. For instance, an unnamed witness who reported a 300 mm water level drop at 6.00 am, before the major downstream breach of the stopbank. Similarly, two eye-witnesses who heard a “large bang” at 1.30 am the same morning. I shall disregard all that.

[65] As to the failure of the stopbank at the trestle bridge, the Committee concluded that the likely cause of failure was “the interaction between the bridge structure and the stopbank”. The Committee noted that the upstream water level striking the soffit caused a “pulsing” in the flow and increased velocities under the bridge and along the stopbank face. Any debris caught on the bridge would have exacerbated the situation. The Committee felt the presence of the bridge piers may have contributed to local scouring. But the experts who gave evidence before me all agreed that if local scouring had been a significant concern, earlier floods should have identified that.

[66] The Sutherland Committee considered a possible explanation of the reported flooding in the Moutoa Basin early Tuesday morning was a failure “at the vertical interface between the bridge structure and the stopbank”. The pulsing nature of the flow, in conjunction with “observed strong wave action” could have exploited a weakness at the interface, and could have caused sufficient scouring to lower the bank and cause the considerable overflow

8 At [195]–[223].

12 See at [25].

observed at 3.00 am. The Committee discounted seepage as a cause of failure, in the absence of direct evidence to support it. The Committee recommended improved armouring of the bank/bridge interface, and more effective sealing of the area under the bridge via a flexible waterproof butynol liner.

Parties

5

Plaintiffs

[67] The first plaintiff, Easton Agriculture Ltd, is a family-owned company. One of its directors, Mr Ian Easton, gave evidence. He has farmed in the area all his working life. The farm relevant to this case is located in the Moutoa basin on the Foxton Shannon Road. It is about 250 hectares in area. It was formerly farmed by Mr Easton's parents. The family has been there since 1961. The Eastons grow mainly potatoes, onions, squash, grass seed and cauliflower. They also run dry stock: cattle and some sheep.

10

[68] Mr Easton is a highly regarded farmer. In 2005 he won the Hill Laboratories Harvest Award. He is committed to sustainable farming, and operates a policy of strict crop rotation. He plants crops for two years, and then grasses the paddock for the next five.

15

[69] The second plaintiff's farm, known as Bussitons, is tucked against Mr Easton's at its north eastern boundary. It is a somewhat smaller operation, about 67 hectares, and I heard less about it in evidence. Mr Eveleigh has been farming in the Opiki area for approximately 50 years. He devoted himself to two crops: onions and potatoes.

20

[70] Both the Easton and Eveleigh farms are in an excellent area for potato production. The area is largely frost-free. The summer is moist because of the Ruahine ranges just to the east. The two farms are situated on Kairanga silt loam. That is some of the best soil there is for potato production, because potatoes can be stored in the ground until needed. The crop can mature, but need not be harvested immediately.

25

[71] The breached stopbank flooded the Moutoa basin. A vast amount of water flowed back up the basin from west to east. The area covered by water has been estimated at 2,000 hectares. The water volume is not known. Floodwaters ran up open drains cut into the basin by drainage boards and farmers in earlier years. That exacerbated the flooding. Almost all Mr Eveleigh's farm was flooded. So was a large part of Mr Easton's. Mr Easton had lifted a crop of onions for harvest prior to the flood. They floated on the floodwaters and ended up piled a metre high against a fence line. The floodwaters covered the plaintiffs' farms for up to 12 days.

35

[72] Although there was argument over the extent and duration of flooding (which would need to be resolved as part of any quantum hearing), it is undeniable that the flood caused substantial damage to the plaintiffs' properties and crops.

40

Defendant

[73] The defendant is the Manawatu-Wanganui Regional Council. For reasons not given in evidence, it prefers to call itself the "Horizons Regional Council". I imagine that reflects the fact that the region is rather flat.

45

[74] The Council is responsible for 33 river and drainage schemes. Each scheme is a separate entity, funded largely by targeted differential rating systems.¹³ The LMS is the largest of the 33 schemes. It accounts for 45 per cent of total scheme expenditure.

[75] These schemes were previously managed by the Manawatu Catchment Board and the Rangitikei/Wanganui Catchment Board. But in 1989 there was a reorganisation of local government in the area. The Local Government (Manawatu-Wanganui Region) Reorganisation Order 1989 dissolved the catchment boards. Their functions, duties and powers under the Soil Conservation and Rivers Control Act 1941 were transferred to the Council.

Pleadings

Claim

[76] The plaintiffs claim that following the opening of the Moutoa sluice gates, and the filling of the floodway on 16 February 2004, “the stopbank on the true left-hand side¹⁴ of the floodway progressively failed and breached in the vicinity of the trestle bridge, [and] the flood waters escaped the floodway and flowed back upstream”. The Council admits that allegation.

[77] The plaintiffs then allege the stopbank failure occurred because of the inadequate condition of the stopbank under the trestle bridge (“in particular the interface between the stopbank and the bridge”), the floodway landform geometry, the alleged poor condition of the cement bag infill under and in the vicinity of the bridge, the flood waters lapping onto the bridge beams, and the consequent hydraulic effects resulting from those various conditions. The Council denies all those allegations.

[78] The plaintiffs advance their case on four bases: negligence, private nuisance, *Rylands v Fletcher* liability, and breach of statutory duty. I will traverse each, briefly.

[79] *Negligence*: the plaintiffs allege that the defendant was negligent in failing to “note or in any way evaluate the conditions of the stopbank under the bridge” when it reviewed the LMS in 1997 and 1998; failing to model the bridge when assessing the hydraulic capacity of the floodway; and “failing to generally maintain to design standard and/or monitor the condition of the stopbank under the bridge”.

[80] The plaintiffs’ opening confirmed the focus of their case on the area immediately beneath the bridge. In particular, on the existence of an alleged gap above the cement bags, and beneath the underside of the bridge deck. Mr John Upton QC for the plaintiffs submitted:

In summary, the stopbank had narrowed under the bridge and the cement bags on top of the bank under the bridge had apparently settled leaving a significant gap. The stopbank at the bridge was in an inadequate condition, so that when the flood level came to the bottom of the bridge beams, water would simply have washed out and overflowed under the bridge.

But the narrowing of the stopbank was not ultimately considered by any of the experts (including the plaintiffs’ expert) as causative.¹⁵ I discount it accordingly.

[81] Furthermore, in closing Mr Upton made it abundantly clear that the plaintiffs were staking their claim firmly on deficiencies in the Council’s “maintenance and monitoring” of the stopbank. Mr Upton expressly disavowed any assertion that the stopbank construction was actionable.

[82] The plaintiffs’ claim in negligence was not confined to breach of the bank. It also extended to the Council’s response to the emergency, both in its

14 The “true left” and “true right” banks of a river or other waterway are defined by looking downstream.

15 See [209].

immediate response to the risk of flooding while the progressive failure was occurring, and in preventing certain remedial work being undertaken by the plaintiffs in an attempt to block the flow of water up the Moutoa basin.

[83] *Nuisance*: the plaintiffs plead that the facts give rise to an action of private nuisance, causing loss. That is about the substance of that pleading. 5

[84] *Rylands v Fletcher liability*: the plaintiffs also plead that escape of water from land under control of the Council, resulting in damage, creates liability on a *Rylands v Fletcher* basis.

[85] *Breach of statutory duty*: finally, the plaintiffs plead breach of statutory duty. The relevant duty is that under s 126 of the Soil Conservation and Rivers Control Act: 10

126. General powers of Catchment Boards – (1) It shall be a function of the River Catchment Board to minimise and prevent damage within its district by floods and erosion.

[86] The first plaintiff claims damages of \$1,412,467. The second plaintiff, \$1,127,920. The damages claims are confined to loss of income from sale of flood-damaged crops. No damage for harm to other property, or for reduced production in later years, are claimed. Interest and costs are sought. 15

Defence

[87] The Council denies each of the claims. It advances a number of defences. One, based on the Land Drainage Act 1908, was abandoned in closing. Those remaining were four in number. 20

[88] *Statutory defence to all claims other than negligence*: the Council contends that rights of action other than negligence are not available to the plaintiffs, because of s 148 of the Soil Conservation and Rivers Control Act. I will return to this topic shortly.¹⁶ 25

[89] *Rylands v Fletcher: natural user*: the Council pleads that the use of the Moutoa floodgates and floodway for the purpose of draining the district was an ordinary, natural use of the land. On that basis it would fall within an exception to the rule in *Rylands v Fletcher*. 30

[90] *Rylands v Fletcher: act of God*: if the foregoing defences do not prevail, the Council pleads that the storm event was of such magnitude as to constitute an act of God, for which it is not liable.

[91] *Limitation Act 1950*: finally, the Council pleads that the plaintiffs' allegations are time-barred by s 4 of the Limitation Act 1950, to the extent they relate to any act or omission by the defendant occurring prior to 24 January 2002. That is six years before the original statement of claim was filed. 35

[92] I turn now to the issues arising in this case.

Issues

[93] The issues arising in this case are four in number: 40

- (a) Can the Council be liable other than in negligence?
- (b) Did the Council owe the plaintiffs a duty of care in its monitoring and maintenance of the stopbank?
- (c) Was the Council negligent?
- (d) Did the Council's negligence cause the plaintiffs' loss? 45

Issue 1: Can the Council be liable other than in negligence?

[94] It is best to address this issue first.

¹⁶ At [94].

[95] Section 148(1) of the Soil Conservation and Rivers Control Act provides:

5 **148. Liability for damages arising from neglect** – (1) No Board shall be liable for injury to any land or other property caused without negligence of the Board by the accidental overflowing of any watercourse, or by the sudden breaking of any bank, dam, sluice, or reservoir made or maintained by the Board.

Submissions

10 [96] I start with the Council. It submits, in short, that claims against it arising from breach of the stopbank can be maintained (if at all) only in negligence. It says that the other three claims – private nuisance, *Rylands v Fletcher* and breach of statutory duty – are subsumed by statute into a single potentially permissible claim of negligence. But, as we shall see¹⁷ the Council also denies that a duty of care can arise at all in this case.

15 [97] Ms Sarah Macky argued this part of the case for the Council. She submitted that s 148 reflects a policy judgment made by Parliament to preclude liability of a strict nature for catchment boards (and therefore for regional councils assuming their functions under the Act) in major rainfall events. That is because those bodies simply have no control over such events. She submitted
20 that to hold catchment boards strictly liable for losses arising out of massive natural events would be unduly harsh, and would fly in the face of the express words of the statute. The provision thus prevents a finding of liability under common law actions for nuisance, *Rylands v Fletcher* and breach of statutory duty in this case.

25 [98] Ms Macky was unable to refer me to New Zealand authority directly on point. In *Burke v Waikato Regional Council*¹⁸ a District Court affirmed the right of a property owner to bring an action in negligence for inundation resulting from the alleged failure of a floodgate structure maintained by the regional council in that case. That case involved a striking-out application, and does not
30 take things much further. The same could be said for a High Court decision *Atlas Properties Ltd v Kapiti Coast District Council*.¹⁹ That was a claim arising from a storm which had caused under-road culverts to overflow. The council sought to rely on s 148. Durie J held that the section was not available to it as a defence. It was not a catchment board for the purposes of s 148. Moreover,
35 the work undertaken by the council in relation to the culvert was not work contemplated as part of the functions of a catchment board. Those conclusions clearly were correct. The decision was upheld on appeal, albeit on different grounds.²⁰

40 [99] Turning now to the plaintiffs, Mr Upton submitted s 148 of the Act applies only to conduct carried out without neglect. In this case the plaintiffs claim that the Council’s neglect or negligence was causative of their loss. Accordingly s 148 would not apply.

45 [100] Secondly, Mr Upton submitted that the Local Government (Manawatu-Wanganui Region) Reorganisation Order 1989 provided only for the Council to take over the “functions, duties and powers” of catchment boards under the Soil Conservation and Rivers Control Act. Said Mr Upton, “That

17 At [132].

18 *Burke v Waikato Regional Council* [1996] DCR 897.

19 *Atlas Properties Ltd v Kapiti Coast District Council* HC Wellington CP172/00, 19 December 2001, per Durie J.

20 *Atlas Properties Ltd v Kapiti Coast District Council* CA30/02, 20 June 2002.

order does not include the immunity or statutory protection available in s 148". The approach contended for by the plaintiffs, he submitted, provides a "better fit" with s 247H of the Local Government Act 1974 and s 191 of the Local Government Act 2002. These provide that a local authority is not entitled to create a nuisance, or deprive any person of any right or remedy that person would otherwise have in respect of a nuisance. 5

Analysis

[101] I reach three conclusions.

[102] First, the Council is the "Board" for the purposes of s 148 of the Act. This was admitted by the plaintiffs. They of course contend that the responsibilities imposed on such a Board in s 126 gives rise to an actionable statutory duty. So they cannot have it both ways, and do not try to. 10

[103] It is worth setting out why the Council is the "Board". The Local Government (Manawatu-Wanganui Region) Reorganisation Order 1989 gave effect to a reorganisation scheme advanced by the Local Government Commission. This dissolved a number of territorial authorities in the Manawatu and Wanganui regions. Three united councils, a city council, numerous borough district and county councils, two catchment boards and five drainage boards. All dissolved. The property of certain of these bodies (and in particular of the Manawatu Catchment Board and the Moutua Drainage Board) was vested in the new regional council. More importantly, the Order provides:²¹ 15 20

The functions, duties, and powers of the Manawatu-Wanganui Regional Council shall be:

...

(d) The functions, duties, and powers of a Catchment Board and a Regional Water board under the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967 or any other Act. 25

[104] This was a commonplace reform in 1989. As far as I am aware, there are no catchment boards left in New Zealand. All have been subsumed into regional councils. Nonetheless, the Act remains in place and imposes certain duties on "catchment boards". Section 126 is one such provision. Another, s 145, provides for claims against catchment boards for land damaged or injuriously affected.²² Section 148 follows shortly after that provision. 30

[105] In my view the intention of Parliament was simply that s 148 apply to any body undertaking the lawful functions, powers, and duties of a catchment board, under the Act, in maintaining watercourses or banks. 35

[106] Secondly, s 148 means what it says. The Council's liability for damage to property resulting from "the sudden breaking of any bank" (which is what happened here) is dependent on proof of negligence. In my view this has the statutory consequence of effectively displacing other forms of liability, apart from negligence. The provision operates not so much as a defence to the common law forms of action other than negligence, as an ouster of them. It follows that my conclusion in relation to s 148 disposes, also, of any claims in nuisance and breach of statutory duty. 40 45

21 Clause 16(1)(d).

22 Soil Conversation & Rivers Control Act 1941, s 145.

[107] Thirdly, even if I had not reached the conclusion that s 148 excluded liability under the rule in *Rylands v Fletcher*, I would have held that the rule does not apply in this case.

[108] It is worth reminding ourselves that the rule in *Rylands v Fletcher* represented not so much an advance in the law in 1866, as a reversion to a more medieval approach to tort liability. One in which liability was absolute, regardless of negligence. By 1866 negligence had become the effective organising principle of actions on the case. Neglect – negligence – characterised actions on the case, in contrast to trespass which tended to focus upon intentional wrongdoings. *Rylands v Fletcher*, as the late Professor AWB Simpson²³ points out, was an action brought squarely on the basis that Mr John Rylands’ reservoir, built above old coal workings,²⁴ was “carelessly and negligently constructed”.²⁵ At first instance an arbitrator had found Mr Rylands’ contractors negligent. But not Mr Rylands personally. The former were not worth pursuing. The latter was not vicariously liable for their actions. Mr Fletcher therefore pursued Mr Rylands in his personal capacity to the Court of Exchequer in banc (where he lost) and thence (but now on the basis that liability should be strict) to the Court of Exchequer Chamber²⁶ (where he won). There, Blackburn J said, famously:²⁷

20 We think that the true rule of law is, that the person, who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and that if he does not do so, he is prima facie answerable for all damage which is the natural consequence of its escape.

25 [109] Thus a negligence case was transformed into a strict liability one. Professor Simpson’s study offers a possible explanation for this jurisprudential diversion. In the decade before *Rylands v Fletcher* was decided, two other large reservoirs had failed, and far more catastrophically. First, in 1852, the Bilberry Dam:²⁸

30 Construction of this decrepit, ill-designed, and ill-maintained structure had begun in 1839, and its collapse at 1 am on Thursday, February 5, 1852, came as no surprise; some fifty or more people were standing at or near the dam at the time, confidently expecting it to go. Others, more optimistic or fatalistic, had retired to bed below it.

35 Seventy-eight died and there was widespread property loss. Then the Dale Dyke embankment, near Sheffield (and overseen by the nephew of the Bilberry Dam engineer) failed in 1863. The death toll this time was 238. The property owner claimants briefed Sir Hugh Cairns QC. It was he who, as Lord Cairns, affirmed Blackburn J’s decision when *Rylands v Fletcher* reached the House of

23 Professor Brian Simpson was a pre-eminent historian of the common law. Lamentably he died earlier this year, on 11 January 2011, precisely 150 years (and one month) after the actionable event in *Rylands v Fletcher*.

24 Through which, on 11 December 1860, the water burst downwards, emptying Mr Rylands’ reservoir but inundating Mr Thomas Fletcher’s coalmine.

25 See AWB Simpson *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v Fletcher* (1984) 13 J Leg Stud 209 at 212.

26 Occupying the same essential function as that performed by the Court of Appeal, when constituted in 1875.

27 *Rylands v Fletcher* (1866) LR 1 Exch 265 at 265 and 279–280.

28 Cited at n 25 at 219.

Lords. In the ensuing compensation proceedings,²⁹ the dam owner was represented by counsel who acted for Mr Rylands. And the Dale Dyke claimants were represented by counsel who thereafter was for Mr Fletcher.

[110] Since *Rylands v Fletcher* we have seen the rule applied to a number of community or privately conveyed utilities: water,³⁰ sewerage,³¹ electricity,³² and gas.³³ As Professor Smilie has pointed out,³⁴ the cases in which liability for these activities has arisen have tended to be ones involving bulk conveyance, as opposed to domestic installations. But the dividing line is by no means distinct.

[111] Due regard to the context and content of *Rylands v Fletcher* might suggest that this rule concerning the escape of dangerous things might itself be more confined. Its proper function is to impose, exceptionally, strict liability for escaping hazards that are of their nature: (1) very dangerous; and (2) (perhaps) unexpected, so that the adjacent land owner cannot make satisfactory alternative provision – for example, by insurance.

[112] In Australia the High Court of Australia abandoned the rule in *Rylands v Fletcher* in *Burnie Port Authority v General Jones Pty Ltd*.³⁵ It held that it had been absorbed within general principles of negligence, public nuisance and trespass. In doing so it returned some way to the orthodox position *ex ante Rylands v Fletcher*. Although *Burnie* was a majority decision, the High Court of Australia has not revisited the issue.

[113] In England, the House of Lords was invited to take a similar approach in *Transco plc v Stockport Metropolitan Borough Council*.³⁶ But it declined the invitation. In an earlier appeal, in *Cambridge Water Co Ltd v Eastern Counties Leather plc*, Lord Goff had said that, as a general rule, the imposition of strict liability is more appropriately a matter for Parliament than the courts.³⁷ The same might also be said of abolition of the rule. But confinement in accordance with original purpose is another thing. The House of Lords did exactly that in *Transco* when Lord Bingham said:³⁸

Bearing in mind the historical origin of the rule, and also that its effect is to impose liability in the absence of negligence for an isolated occurrence, I do not think the mischief or danger test should be at all easily satisfied. It must be shown that the defendant has done something which he recognised, or judged by the standards appropriate at the relevant place in time, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be.

29 The dam owner was subject to a wide-ranging and strict compensation provision in the private Act of Parliament authorising construction of the dam: s 68 of the Sheffield Waterworks Act 1853. The provision had been inserted in the bill following the Bilberry Dam disaster: Simpson, cited at n 2 at 234–237.

30 *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772 (CA); *Irvine & Co Ltd v Dunedin City Corporation* [1939] NZLR 741 (CA).

31 *Smeaton v Ilford Corporation* [1954] Ch 450 (Ch).

32 *Hillier v Air Ministry* [1962] CLY 2084 (a case where cows were electrocuted by high voltage cables laid beneath the plaintiff's fields).

33 *North Western Utilities v London Guarantee & Accident Co* [1936] AC 108 (HL); *Hanson v Wearmouth Coal Co* [1939] 3 All ER 47 (CA).

34 Smilie, "Non-natural Use" [2011] NZLJ 88.

35 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

36 *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1.

37 *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264 (HL) at 305.

38 *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1 at 11.

[114] In New Zealand, the Court of Appeal too has declined to follow the Australian abrogation option. In *Autex Industries v Auckland City Council*³⁹ the defendant council was sued in respect of a burst water main. It submitted that New Zealand should follow *Burnie* and treat *Rylands v Fletcher* as having been subsumed into the law of negligence. A majority of the Court contemplated the possibility that the concept of non-natural user might be different now from when the similar fact pattern in *Irvine & Co Ltd v Dunedin City Corporation*⁴⁰ was decided. The minority appeared to consider *Irvine* still good law, and remained critical of the approach taken in *Burnie*. They cited with approval this observation of Professor John Fleming, supporting *Rylands v Fletcher* as a vital component of tort theory:⁴¹

Negligence deals with the wrong way of carrying out an activity, the residuary risk of which it is not unfair for victims to shoulder themselves. Strict liability deals with activities which even when carried out with due care, retain an abnormal risk and could be deemed negligent as such but for their countervailing utility.

[115] Certainly, as the House of Lords held in *Transco*, there will be a residue of cases where strict liability properly applies. As noted earlier, such cases involve the imposition of exceptional hazard and (from the adjacent owner's perspective) unexpected outcome.⁴² Take, for instance, the lawful manufacture or storage of explosives. If through no fault of anyone at all they explode, and devastate the neighbourhood, are the neighbours to be denied compensation for want of proof of fault?

[116] It may well be time, however, to reconsider whether the rule should apply to commonplace utilities, such as water and sewerage. Particularly where their presence is obvious to adjacent landowners. It may be that courts will eventually conclude that liability for the failure of such systems is dependent in all cases on proof of negligence.

[117] Regardless, however, of these philosophical considerations, two particular responses to the *Rylands v Fletcher* claim, additional to s 148, can be made in this case.

[118] First, a floodway built through a flood-prone district is not a non-natural use of the land. The very necessity for its construction suggests that it is not. The consequence of not having constructed the floodway would, in the context of this storm event, likely have been inundation of the Moutoa basin and surrounding district. The works do not of their nature engage hazard; rather they seek to defray hazard that natural causes have already created. In a context where works are constructed to remove (or at least diminish) a risk otherwise present, it seems counter-intuitive to regard them as creating an exceptional hazard. And, moreover, their presence is immediately apparent to adjacent landowners. Those landowners knew they were a community work, and that they were not completely flood-proof in nature. The community set the extent to which capital should be spent on the stopbanks. It can be taken to have had an informed appreciation of the general risks associated with them.

39 *Autex Industries v Auckland City Council* [2000] NZAR 324 (CA).

40 See n 30 above.

41 (1995) Tort Law Review 56 at 60.

42 If the hazard is simply stored, for instance, the adjacent owner may not be aware of the activity's existence at all.

[119] Such a view is supported by the decision of La Forest J (with whom Dickson CJ agreed) in *Tock v St John's Metropolitan Water Board*.⁴³ In that case there had been a ferocious rainstorm. A nearby stormwater drain failed to work, and the plaintiff's basement was flooded. La Forest J concluded that the installation of public drainage systems was "an indispensable part of the infrastructure necessary to support urban life" and could not be characterised a non-natural use.⁴⁴ 5

[120] The second response is that the very statutory duty relied upon by the plaintiffs to found their breach of statutory duty claim creates a fundamental objection to *Rylands v Fletcher* liability. Section 126 of the Soil Conservation and Rivers Control Act provides that "it shall be a function of every catchment board to minimise and prevent damage within its district by floods and erosion". As Lord Scott put it in *Transco*:⁴⁵ 10

... it is, I think, worth reflecting on why it is that an activity authorised, or required, by statute to be carried on will not, in the absence of negligence, expose the actor to strict liability in nuisance or under the rule in *Rylands v Fletcher*. The reason, in my opinion, is that members of the public are expected to put up with any adverse side-effects of such an activity provided always that it is carried on with due care. The use of the land for carrying on the activity cannot be characterised as unreasonable if it has been authorised or required by statute. Viewed against the fact of the statutory authority, the user is a natural and ordinary use of the land. This approach applies in my opinion, to the present case. The council had no alternative, given its statutory obligations to the occupiers of the flats, but to lay on a water supply. Strict liability cannot be attached to it for having done so. 15
20
25

Conclusion

[121] For the reasons given above, which centre upon s 148 of the Soil Conservation and Rivers Control Act, the Council's liability to the plaintiffs in this case is dependent on proof of negligence. 30

Issue 2: Did the Council owe the plaintiffs a duty of care in its monitoring and maintenance of the stopbank?

Duty of care

[122] The essential case for the plaintiffs is that the Council owed them a duty of care to monitor and maintain (to design standards) the condition of the stopbank.⁴⁶ 35

[123] I dismiss from consideration allegations concerning duties of care in the conduct of the 1997/1998 LMS review. Likewise modelling of hydraulic capacity of the floodway. All of these would be time-barred, and were not the subject of extensive evidence or submission. As I have said earlier, the plaintiffs' focus is not on construction,⁴⁷ but on subsequent monitoring and maintenance of the stopbank adjacent to the trestle bridge. 40

43 *Tock v St John's Metropolitan Water Board* [1989] 2 SCR 1181.

44 At [74]. The remaining members of the Supreme Court determined the case on other grounds.

45 *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1 at 33.

46 See [79]–[82] above.

47 Including reconstruction, there being community consensus to adopt Option 4: see [31]–[35] above.

[124] I also dismiss allegations relating to the response of the Council to the emergency. Although pleaded, this aspect was but faintly pursued. There was no evidence of any cogency to suggest that the Council's response to these unexpected and catastrophic floods was other than impeccable. I need not waste
5 time now analysing the nature of the duties they owed in respect of their flood response.

[125] So the pertinent question here is simply whether the Council owed the plaintiffs a duty of care in monitoring and maintaining the stopbanks adjacent to the trestle bridge.

10 *Submissions*

[126] The plaintiffs submitted that the Council owed them a duty of care in the monitoring and maintenance of stopbanks, for the following reasons: the Council had a statutory duty to protect and maintain its waterways;⁴⁸ it was funded by ratepayers, who were a particular identifiable class; ratepayers being
15 levied for flood protection purposes were in "an almost contractual relationship with the Council"; ratepayers were entitled to assume that the Council would carry out its responsibilities appropriately; and if monitoring and maintenance was not carried out properly at critical areas such as the bridge/stopbank interface, then serious damage was likely (along with significant risk to the
20 community).

[127] Turning to issues of policy rather than proximity, the plaintiffs submitted that there were no political or policy issues involved, and that the proposed liability related to purely operational matters. Mr Upton submitted:

25 The Council has assumed responsibility for maintenance and monitoring in circumstances where ratepayers were entitled to assume that the Council has the skills and resources to do so properly. Further, the ratepayers themselves had no capacity to assess the risks nor to directly protect themselves from risks of the present kind.

[128] The sole case cited by the plaintiffs was *Atlas Properties v Kapiti Coast District Council*.⁴⁹ I have discussed that decision already at [98].

[129] The Council, on the other hand, submitted that what is contended for by the plaintiffs is a novel duty of care. Counsel had not found any decided case in New Zealand where a regional council or catchment board had been held to owe a duty of care to farmers in respect of flooding caused by breach of a
35 stopbank. Citing, in particular, the Court of Appeal decisions in *South Pacific Manufacturing Co Ltd v NZ Security Consultants & Investigations Ltd*⁵⁰ and *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd*,⁵¹ the Council submitted that the overall consideration must be one of policy. It was submitted that if a duty was imposed in this case, then "it will open the floodgates to so
40 many claims after every flooding event that the end result would be a massive cost to the community as a whole and obviously significant resources being dedicated to litigation".

48 Soil Conservation and Rivers Control Act 1941, ss 10, 126 and 133.

49 *Atlas Properties v Kapiti Coast District Council* HC Wellington CP172/00, 19 December 2001, per Durie J.

50 *South Pacific Manufacturing Co Ltd v NZ Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA).

51 *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).

[130] The Council submitted that it was not correct to view this case as an attack on the operational management of the LMS. The management of that scheme was dictated by the funding available, something voted upon by the community. Thus the case dealt with significant policy and resourcing issues. Ms Macky submitted:

It is not for the Courts to override the wishes of the community in determining what level of protection the community is prepared to pay for. The imposition of a duty by the Courts, if it requires greater expenditure than approved by the community, will be a burden to the community by way of increased rates. ... [I]t is not for the Courts to exercise this function but rather the community through implementing policy as envisaged by the Act.

Analysis

[131] I conclude that a duty of care does exist in respect of monitoring and maintenance of the floodway stopbanks. I reach this conclusion for three reasons:

[132] First, there is s 148 of the Soil Conservation and Rivers Control Act.⁵² Two points can be made about s 148:

- (a) it would be a remarkable consequence if s 148 were to have the effect of excluding causes of action other than negligence, but that negligence itself could not then arise. The Council's stance effectively would render it immune for all practical purposes from civil liability; and
- (b) the purpose of s 148 (and its adjacent provisions) is in part to confirm that bodies such as the Council *should* be liable if they are negligent in the construction or maintenance of stopbanks.

[133] Secondly, there is the fact that the Council explicitly undertakes monitoring and maintenance of the stopbanks, and budgets for that activity. A significant percentage of the annual rating of landowners benefiting from the LMS scheme (and therefore paying the lion's share of its cost) is spent on maintenance.⁵³ Council work gangs inspect the banks on a regular basis. No major policy or resource allocation issue arises. The allocation has been made already. The Council monitors and maintains.

[134] And it has little choice but to do so. It was common ground among the expert witnesses called for the parties that stopbank security is dependent on good maintenance practices. As Mr David Hamilton, a consulting engineer with particular experience of catchment boards and regional councils, put it:

Good practice for a regional council that owns and operates flood control and drainage schemes is to ... provide for maintenance of the scheme to meet defined levels of service.

And:

A well-run scheme which involves extensive stopbanks would typically involve regular inspections with each part of the stopbanks in the scheme being inspected at least once in every 24 month period or as required as a result of specifically noted issues.

⁵² See at [95].

⁵³ See at [21] and [34].

[135] It is proper to infer in such circumstances a duty of care in the performance of that operational function. At the very least those who pay rates for maintenance services are proximate.

5 [136] Harm to adjacent landowners between the stopbanks and the Manawatu River to the south, following failure to meet that duty, is wholly foreseeable. I do not understand the Council to have suggested otherwise. In my view the Council had a duty of care to monitor and maintain the stopbanks so that the community could reasonably be assured that they would conduct flood waters in ordinary circumstances. The consequences of failure to do so plainly include significant risks to people as well as to property. Witness the invidious experience of the Stratton family.⁵⁴ The Council was well placed to undertake the duty. Indeed stopbank monitoring was already a regular responsibility of the local work gang overseer. Broader policy reasons do not exist to negate this duty. Rather, to negate the duty would conflict with the underlying legislation.

15 [137] The proposition advanced by Ms Macky for the Council that this would “open the floodgates to so many claims after a flooding event”, causing a “massive cost to the community” is more a reflection of the extent of danger that would arise from disregard of the duty of care, than a reason not to impose it. The point is more relevant to determination of the relevant standard, rather than the existence of a duty, of care.

20 [138] The fact that the community itself determines the extent of maintenance services to be performed will significantly influence, although not determine, the *extent* of the duty imposed. I will consider that under Issue 3.

25 [139] Thirdly, although the nature of the breach of duty alleged in this case is an omission to repair, landowners in New Zealand may be held to owe a duty to maintain their land and to take positive steps to prevent harm to adjacent landowners resulting from the operation or use of their land. The principle finds expression in cases like *Goldman v Hargrave*,⁵⁵ *Landon v Rutherford*⁵⁶ and *Leakey v National Trust for Places of Historic Interest or Natural Beauty*.⁵⁷

30 [140] The former cases were ones of negligence by omission in failing to respond adequately to a fire (itself not caused by negligence).⁵⁸ The latter concerned the fall of unstable soils from one hillside property to another lying below. Although *Leakey* was brought in nuisance, the discussion of the relevant duty of care is equally transferable to negligence. The Privy Council decision in 35 *Goldman* demonstrates that proposition, drawing as it does upon authorities in both forms of action. What *Goldman* holds is that a landowner has a general duty of care to a neighbouring occupier, in relation to hazards occurring on that land (and regardless of cause). The duty is to take such steps as are reasonable for a person in the shoes of the landowner to prevent or minimise the risk once 40 the landowner is (or should have been) aware of it.

[141] To impose a duty of care on the Council in this case, in respect of the monitoring and maintenance of the stopbanks, and in favour of adjacent landowners, is supported by the underlying legislation. And it is orthodox as a matter of common law. In short, there is sufficient proximity between the

54 See at [48].

55 *Goldman v Hargrave* [1967] 1 AC 645 (PC).

56 *Landon v Rutherford* [1951] NZLR 975 (HC).

57 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 (CA).

58 See also *Wilson & Horton Ltd v Attorney General* [1997] 2 NZLR 513 (CA).

Council (as the owner of the stopbanks), and the adjoining landowners and occupiers, that it is just and reasonable that a duty of care to monitor and maintain the stopbanks should exist.

[142] I find, therefore, that the Council owed the plaintiffs a duty of care in monitoring and maintaining the floodway stopbank. 5

[Editorial note: [143]–[223] are omitted from this report.]

Conclusion

[224] For the foregoing reasons, I find:

- (a) The effect of s 148(1) of the Soil Conservation and Rivers Control Act is that claims against the Council arising from breach of the Moutoa floodway stopbank can be maintained only in negligence. 10
- (b) Reinforced by that same provision, the Council owed the plaintiffs a duty of care in monitoring and maintaining the floodway stopbanks.
- (c) The central and overwhelming focus of the plaintiffs' case was that the Council had breached that duty of care by failing to identify and repair 15 a gap above the cement bags topping the stopbank crest, under the trestle bridge on the southern side of the floodway.
- (d) As a matter of fact there was indeed a gap of approximately 150 mm in that location.
- (e) The failure of the Council to identify and remedy that gap, in the 20 course of its routine monitoring and maintenance of the stopbanks, was in breach of its duty of care to the plaintiffs.
- (f) In that respect, alone, I find the Council to have acted negligently.
- (g) The plaintiffs, however, failed to prove on the balance of probabilities 25 that the presence of the gap caused the catastrophic failures that occurred to the stopbank. Those failures, both upstream and downstream of the bridge, were more probably caused by factors independent of the gap.
- (h) Accordingly, it is more probable than not that the floods that damaged 30 the plaintiffs' crops would have occurred to exactly the same extent had the gap not been there.

Disposition

[225] Judgment is entered for the defendant.

[226] The defendant is entitled to costs on a category 2 basis. If the parties cannot agree costs within 15 working days, the defendant is to file a memorandum within a further five working days. The plaintiffs are to respond within a further five working days. 35

[227] I thank counsel for their assistance.

Judgment for the defendant.

Solicitors for the plaintiffs: *Wadham Goodman* (Palmerston North). 40
Solicitors for the defendant: *Heaney & Co* (Auckland).

Reported by: Chris Chapman, *Barrister*