Double J Smallwoods Ltd v Gisborne District Council

High Court Gisborne CIV-2015-416-25; [2017] NZHC 1284
3, 4, 5, 6, 7 April, 13 June 2017
Thomas J

Tort — Fire — Rylands v Fletcher — Negligence — Nuisance — Fire spread through pampas and toe toe vegetation on defendant's land — Embers igniting causing damage to plaintiff land — Deliberate lighting of fire — Claim for damages — Defendant aware of fire hazard posed by pampas and toe toe vegetation — Failure to take reasonable steps to reduce or abate hazard — Whether duty of care owed by defendant — Appropriate measure of damages — Contributory negligence — Contributory Negligence Act 1947, ss 3, 3(1)

Double J Smallwoods Ltd (Smallwoods) carried on business as a sawmilling remanufacturing company on land it leased and on land owned by the second plaintiff, G & P Enterprises Ltd (G & P) the Property). The third plaintiffs, Jon and Margaret Gardner, were directors and shareholders of Smallwoods and G&P. The defendant, Gisborne District Council owns two parcels of reserve land which are bisected by the Waikanae Creek (Lot 2 and Lot 3). The plaintiffs' claim concerns a fire which occurred on 7 January 2010, which began in vegetation around the western end of Lot 3 but spread and ignited vegetation on Lot 2. The fire caused widespread damage, including the total loss of a storage shed, partial loss of a mill building and damage to plant, stock and other items. The plaintiffs claim in nuisance, negligence and *Rylands v Fletcher* strict liability. They say they suffered an unreasonable interference with their right to use and enjoy the Property because the pampas, scrub and weeds growing on Lots 2 and 3 (Council Land) posed a fire hazard and increased risk of fire spreading to the property. The Council had control of the Council Land and its use of it created an unreasonable interference to the Property and as a result the plaintiffs suffered loss and damage. The plaintiffs further say the Council owed them a duty of care, being aware of the fire hazard, and failed to take reasonable steps to reduce, remove or abate that hazard. The plaintiffs claim damages and losses including business losses, consequential losses and general damages for anxiety, stress and inconvenience suffered by the third plaintiffs.

Held (judgment for the plaintiff in the sum of $875,254.68)

1 In New Zealand, an action based on *Rylands v Fletcher* is a special form or "subset" of private nuisance action which extends strict liability to certain cases where damage results from an isolated escape of something harmful from the defendant's land.

Hamilton v Papakura District Council [2000] 1 NZLR 265 (CA) applied.

Rylands v Fletcher [1868] UKHL 1, (1868) LR 3 HL 330 considered.

2 The growing of pampas and other vegetation on the Council Land was a natural use of the land, and although pampas is recognised as flammable, it is doubtful it would be considered "exceptionally dangerous or mischievious" and in all circumstances could not be considered extraordinary nor unusual.

3 An owner is not strictly liable where a nuisance proceeds from a state of affairs created on a person's land by the unauthorised act of a stranger whom the owner (or occupier) has no control over, or arises from natural causes without human intervention. However, there will be liability if an owner "adopts" or "continues" a nuisance.

4 An owner "continues" a nuisance if the owners knows or ought to know of its existence on the land and fails to take reasonably prompt and effective steps to remove or abate it.

Tindall v Far North District Council HC Auckland CIV-2003-488-135, 20 October 2006 applied.

5 An owner is under an affirmative duty to take reasonable care to remove or mitigate such hazards as occurred on its land and which could cause a foreseeable risk of harm to neighbouring property. As the Council was relatively well-resourced and had the ability to raise finances through rates and other measures, there was an expectation upon them to take certain intervening measures.

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

6 The determinative factor in considering whether a land owner has a duty of care to his or her neighbours to ensure no hazards occurring on the land cause foreseeable loss or harm is control over the land where the hazard arises, rather than the identity of the landowner.

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

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

7 A plaintiff must establish that a reasonable person in the Council's position could have foreseen that the non-removal of pampas grass on the Council Land involved a risk of injury to the plaintiffs and establish what a reasonable landowner would do by way of response to the risk. Relevant considerations include the magnitude of the risk, the probability of its occurrence as well as the expense, difficulty and inconvenience of taking alleviating action.

Wyong Shire Council v Shirt (1980) 146 CLR 40 (HCA) applied.

8 The Council did not have a duty to clear its reserves of all vegetation. The duty was to do that which was reasonable in the circumstances. As the Council knew of the fire hazard of pampas/toe toe

as well as the frequency of hot dry summers and potential for high winds, the Council reasonably should have considered and addressed the risks.

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

9 The loss which occurred was not too remote and a type foreseeable by the Council. Fire damage was a foreseeable consequence of the Council's negligence.

Taupo Borough Council v Birnie [1978] 2 NZLR 397 (CA) applied.

Attorney-General v Geothermal Produce NZ Ltd [1987] 2 NZLR 348 (CA) applied.

10 There had been a departure from a reasonable standard of risk management by the first plaintiff including failure to implement measures to protect the yard from spread of fire. On that basis, it was just and equitable to reduce the damages to the plaintiffs by 50 per cent.

Cases referred to in judgment

Attorney-General v Geothermal Produce NZ Ltd [1987] 2 NZLR 348 (CA).
Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520 (HCA).
Fletcher v Rylands (1865) 3 H&C 774 (Exch).
Fletcher v Rylands (1866) LR 1 Ex 265 (Exch Ch).
French v Auckland City Corporation [1974] 1 NZLR 340 (SC).
Gilbert v Shanahan [1998] 3 NZLR 528 (CA).
Goldman v Hargrave [1967] 1 AC 645 (PC).
Hamilton v Papakura District Council [2000] 1 NZLR 265 (CA).
Hill v Waimea County Council HC Nelson A8/84, 12 March 1987.
Johnson v Auckland Council [2013] NZCA 662.
Kenny v Dunedin City Corp [1920] NZLR 513 (CA).
Leakey v National Trust for Places of Historical Interest or Natural Beauty [1980] QB 485 (CA).
North Shore City Council v Body Corporate 188529 [2010] NZSC 158, [2011] 2 NZLR 289.
O'Hagan v Body Corporate 1899855 [Byron Avenue] [2010] NZCA 65, [2010] 3 NZLR 445.
Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co [The Wagon Mound (No 1)] [1961] AC 388 (PC).
Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co [The Wagon Mound (No 2)] [1961] AC 617 (PC).
Rylands v Fletcher [1868] UKHL 1, (1868) LR 3 HL 330.
Standard v Gore [2012] EWCA Civ 1248, [2012] 3 EGLR 129.
Taupo Borough Council v Birnie [1978] 2 NZLR 397 (CA).
Tindall v Far North District Council HC Auckland CIV-2003-488-135, 20 October 2006.
Wyong Shire Council v Shirt (1980) 146 CLR 40 (HCA).

Texts referred to in judgment

Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, 2016) at [10.2.07].
Stephen Todd [2014] NZ L Rev 513, 525.

Trial
This was a trial for claims in nuisance, negligence and Rylands v Fletcher liability for a fire.

TJ Rainey and *ND Smith* for the plaintiffs.
FD Divich and *AC Harpur* for the defendant.

THOMAS J.

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Introduction
[1] The first plaintiff, Double J Smallwoods Ltd (Smallwoods), carries on business as a sawmilling remanufacturing company on land it leases and on land owned by the second plaintiff, G & P Enterprises Ltd (G & P), at 127 Awapuni Road, Gisborne (together referred to as the Property). The third plaintiffs, Jon and Margaret Gardner, are directors and shareholders of Small woods and G & P.
[2] The defendant, Gisborne District Council (the Council), owns two parcels of reserve land which are bisected by the Waikanae Creek (the Creek). Lot 3 DP9506 (Lot 3) adjoins the northern bank of the Creek and Lot 2 DP9506 (Lot 2) is between the southern bank of the Creek and the north-western boundary of the Property.
[3] The plaintiffs' claim concerns a fire which occurred on 7 January 2010 (the Fire), which the plaintiffs say began in vegetation (likely pampas and scrub) around the western end of Lot 3. The Fire spread southeast towards the Creek. Windblown embers blew across the Creek and ignited vegetation on Lot 2 and then the Fire and windblown embers spread southeast into the Property, causing widespread damage, including the total loss of a storage shed (called an air shed), partial loss of a mill building and damage to plant, stock and other items.

[4] The Council says the Fire began in the rail corridor on land not owned by the Council. The Council had joined as third parties KiwiRail Holdings Limited and New Zealand Railways Corporation (together referred to as KiwiRail which term includes its predecessors, Tranzrail and Ontrack). The Council discontinued its claim against them.

[5] The plaintiffs claim in nuisance, negligence and strict liability. They say they suffered an unreasonable interference with their right to use and enjoy the Property because the pampas, scrub and weeds growing on Lots 2 and 3 (together the Council Land) posed a fire hazard and increased risk of fire spreading to the Property. The Council had control of the Council Land and its use of it created an unreasonable interference to the Property and as a result the plaintiffs suffered damages and loss.

[6] As far as the negligence claim is concerned, the plaintiffs say the Council owed them a duty of care, being aware of the fire hazard posed by the pampas, scrub and weeds on the Council Land and failed to take reasonable steps to reduce, remove or abate that hazard.

[7] The plaintiffs claim damages and losses including business losses, consequential losses and general damages for anxiety, stress and inconvenience suffered by Mr and Mrs Gardner.

[8] The Council denies the claim, saying that the vegetation on the Council Land was a reasonable and natural use of the Council Land. Furthermore, that the Fire was deliberately or accidentally lit by an unknown person, it started on land not owned by the Council and the Council had no reasonable opportunity to extinguish it before it spread. As far as negligence is concerned, that in the conditions prevailing at the time, any vegetation could pose a fire hazard, it was not foreseeable that there would be an unlawful lighting of a fire and the Council cannot reasonably be required to remove all vegetation which might in certain conditions pose a fire hazard in the event of an unlawful or accidental fire.

[9] The Council says Mr and Mrs Gardner have no standing and cannot claim general damages in their capacity as directors of Smallwoods and G & P.

[10] The Council raises affirmative defences: it had no direct control of persons who started the Fire; if the Council were negligent, then the plaintiffs consented to the risk of damage by the spread of fire (volenti non fit injuria); contributory negligence by the plaintiffs failing to take reasonable steps to safeguard their own interests; and business loss is an expectation loss and not recoverable in tort. At the trial, Ms Divich, appearing for the Council, withdrew the defence based on volenti non fit injuria.

Issues

[11] The issues which require determination are:

(a) Did the Council's use of the Council Land create, continue or adopt an unreasonable interference (nuisance) to the plaintiffs' right to use and enjoy the Property?

(b) Did the vegetation growing on the Council Land pose an unreasonable fire hazard and an increased risk of fire spreading to the Property?

(c) Did the Council know the Property was at risk of damage or injury by fire in the vegetation, including pampas grass, on the Council Land?
(d) What, if any, duty did the Council owe to the plaintiffs to prevent or minimise the known risk of damage or injury to the Property arising from the vegetation including pampas grass on the Council Land?
(e) Did the Council breach that duty by failing to do what was reasonable in all the circumstances to prevent or minimise the known risk?
(f) Was the Council's breach of this duty causative of the loss suffered by the plaintiffs?
(g) To what extent would removal or reduction of vegetation on the Council Land have reduced or prevented the Fire from spreading, if at all?
(h) What is the quantum of the loss suffered by the plaintiffs?
(i) Did the plaintiffs fail to exercise the skill and care which would be expected of a reasonable prudent person in their position to avoid a foreseeable risk of harm? If so, what reduction (if any) should be made to the damages which would otherwise be payable?
(j) Can Mr and Mrs Gardner claim general damages?

[Editorial note: The Judge then considered the evidence, which does not call for reporting, and made findings of fact on it.]

Factual findings

[94] I am satisfied on the balance of probabilities that:

- The Fire ignited on Lot 3 on the northern side of the Creek in the pampas bushes on the boundary of Lot 3 and the railway land.
- The Fire was deliberately lit.
- The fuel load of the pampas/toe toe, weeds and scrub on Lot 3 contributed to the development and spread of the Fire over Lot 3.
- The strength and direction of the high winds on the day contributed significantly to the spread of the Fire.
- Had Lot 3 been cleared and maintained as mown or line trimmed grass the Fire would have spread more slowly because the fuel load would have been smaller.
- The pampas/toe toe, weeds and scrub on Lot 3 were a major contributor to the Fire crossing the Creek to Lot 2, again aided by the high winds. The presence of similar vegetation on Lot 2 meant the Fire quickly ignited and spread on Lot 2.
- Had Lot 3 been cleared and maintained as mown or line trimmed grass, the Fire would likely not have crossed the Creek.
- Once the Fire reached Lot 2, the pampas/toe toe, weeds and scrub contributed to the Fire spreading to the Property. However, given the conditions, most types of vegetation would have had the potential to spread the Fire to the Property, given the relatively short distance between the edge of the Creek on Lot 2 and the boundary of the Property. The height and type of vegetation on Lot 2 meant it spread more quickly to the Property.

- Once at the Property, the Fire spread by land and by windborne embers landing on combustible material in the Property.
- Flying embers landed in the Property and ignited material such as vegetation and stacks of timber, which in turn spread the Fire to the air shed and mill.
- The fuel load on the Property, including its location, contributed to the spread of the Fire.
- The Fire was on the Property before the air shed was set alight.
- Embers landed on a fuel outside the air shed, causing the air shed to ignite.

[95] I am satisfied that in the circumstances the vegetation on the Council Land posed a fire hazard.

PART II – LEGAL ANALYSIS AND LIABILITY FINDING

[96] Given those factual findings, I now turn to consider the three causes of action against the Council. I will briefly consider strict liability and nuisance before addressing in more detail what was agreed to be the cause of action most relevant to this case, negligence.

[97] The authors of *The Law of Torts in New Zealand* summarise the overall position as follows:[2]

> (a) In the classic case of nuisance where the defendant, or someone for whose acts the defendant is responsible, performs an activity or creates a state of affairs on the land that causes or threatens continuing or recurring interference with the use or enjoyment of neighbouring land, liability turns on whether the interference is unreasonable and lack of negligence is no defence. Damages are recoverable only if harm of the kind suffered was a foreseeable consequence of the acts that gave rise to the interference.
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> (b) Where the plaintiff claims damages for loss caused by a single accidental escape of something harmful from the defendant's land, and the event is unlikely to be repeated, the action lies either in negligence or under the special strict liability rule in *Rylands v Fletcher*.
>
> (c) The principle derived from *Sedleigh-Denfield v O'Callaghan* and *Goldman v Hargrave*, which requires occupiers to take reasonable steps to remove dangerous conditions on their land which they were not responsible for creating, is based on negligence but remains actionable in private nuisance in cases of continuing interference with the use or enjoyment of land.
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> (d) Where activities conducted in a public place (for example on the highway or in a reserve) interfere with the use or enjoyment of neighbouring land, an action in private nuisance may lie against the body in occupation or control of the area if it condones, and therefore, impliedly authorises the activity. Otherwise the occupier may be liable under the *Goldman v Hargrave* principle for failing to take reasonable steps to put a stop to the activity ...

[98] The plaintiffs' position is that this case falls squarely within (c) and/or (d) above.

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2 Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, 2016) at [1 0.2.07] (citations omitted).

Strict liability – Rylands v Fletcher

[99] The rule in *Rylands v Fletcher*[3] has been the subject of extensive analysis in many common law jurisdictions. Whether strict liability as set out in *Rylands v Fletcher* ought to be retained is subject to diverging judicial and academic opinion. The Australian High Court has held that the rule has been absorbed by the principles of ordinary negligence.[4]

[100] The courts in England and New Zealand have not been persuaded to abandon the rule, but the England and Wales Court of Appeal has limited its potential scope in respect of fire.[5] In *Hamilton v Papakura District Council*, the New Zealand Court of Appeal held that an action based on *Rylands v Fletcher* is a special form or "subset" of private nuisance action which extends strict liability to certain cases where damage results from an isolated escape of something harmful from the defendant's land.[6]

[101] In the present case, the growing of pampas and other vegetation on the Council Land was a natural use of the land. Although pampas is recognised as flammable, it is doubtful it would be considered "exceptionally dangerous or mischievous". Certainly, the use of the Council Land for growing pampas and other vegetation could not, in all the circumstances, be considered extraordinary and unusual. In any event, it was the Fire which escaped from the Council Land or which caused vegetation embers to escape. Moreover, I am satisfied that, on the balance of probabilities, the Fire was deliberately lit and therefore the defence of act of a stranger applies.

[102] For these reasons, the claim based on strict liability pursuant to the principles of *Rylands v Fletcher* fails.

Nuisance

[103] Where a nuisance proceeds from a state of affairs created on a person's land by the unauthorised act of a stranger over whom the owner (or occupier) has no control, or arises from natural causes without human intervention, the owner is not strictly liable. However, an owner who "adopts" or "continues" a nuisance will be liable. An owner adopts a nuisance by making use of the state of affairs for his or her own purposes. An owner continues a nuisance if the owner knows or ought to know of its existence on the land and fails to take reasonably prompt and effective steps to remove or abate it.[7]

[104] In this case, the plaintiffs say that, while the pampas/toe toe was naturally occurring on the Council Land, the Council adopted the nuisance because the Council had the ability to remove it and failed to do so in circumstances where it was aware of the fire hazard posed by the pampas/toe toe.

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3 *Fletcher v Rylands* (1865) 3 H&C 774 (Exch); *Fletcher v Rylands* (1866) LR 1 Ex 265 (Exch Ch); and *Rylands v Fletcher* [1868] UKHL 1, (1868) LR 3 HL 330.

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

5 *Stannard v Gore* [2012] EWCA Civ 1248, [2012] 3 EGLR 129 (CA). See also Stephen Todd [2014] NZ L Rev 513 at 525.

6 *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA).

7 *Tindall v Far North District Council* HC Auckland CIV-2003-488-135, 20 October 2006 at [65]–[701.

[105] In *Leakey v National Trust*, a naturally occurring hazard (land instability) arose on the defendant's land.[8] The hazard was not caused or aggravated by any human activities on the defendant's land. The trial Judge found that at least six years before the incident, the defendant knew the unstable land was a threat to the plaintiff's property. Despite requests from the plaintiff, the defendant had not taken any action to prevent any slips or subsidence. The Court of Appeal found the defendant liable in nuisance. The defendant was under an affirmative duty to take reasonable care to remove or mitigate such hazards as occurred on its land and which could cause a foreseeable risk of harm to neighbouring property.

[106] In *French v Auckland City Corporation*, thistle seeds spread from the defendant's land to a neighbouring property.[9] The High Court found the landowner liable for the losses caused to his neighbour's property as a consequence of his failure to take reasonable steps to prevent the spread of seeds from weeds growing on his land. The action was brought in nuisance and negligence. The Court observed that, if a claim is based on nuisance, a claimant would have to show he suffered substantial annoyance or damage and, in any case, the Court would be concerned to strike a tolerable balance between the conflicting claims of landowners to enjoy their properties and the interests of surrounding occupiers.[10] The present case can be distinguished in that the damage was not caused by the spread of pampas grass but by the Fire started by a third party outside the defendant's control.

[107] In *Hill v Waimea County Council*, fire spread from a council rubbish tip to an adjoining property.[11] The council was found not liable in negligence as its use and management of the rubbish tip was reasonable. The council was held liable in nuisance. However, in *Hill* there was no evidence of a third party starting the fire. Furthermore, the defendant had actively brought rubbish onto the land, rather than omitting to remove something naturally occurring.

[108] In the present case, the Council's position is it was the Fire rather than the pampas/toe toe which was the nuisance. The Council had no opportunity to intervene and stop the Fire once it started, nor did the Council adopt the Fire.

[109] The Council also contends that, in the context of the Council Land being a small piece of the 900 hectares of reserve land held by the Council, less should be expected of the Council.[12] Against that, however, the Council can be considered to be relatively well-resourced and it has the ability to raise finance through rates and other measures. In those circumstances, and particularly where the Council was aware of the fire hazard, I do not accept that less ought to be expected of it.

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8 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 (CA).
9 *French v Auckland City Corporation* [1974] 1 NZLR 340 (SC).
10 At 351.
11 *Hill v Waimea County Council* HC Nelson A8/84, 12 March 1987.
12 *Goldman v Hargrave* [1967] 1 AC 645 (PC) at 663.

[110] In any event, the issue of liability in the case of spread of tire where the fire was started by a third party is best considered in the context of negligence.[13]

Negligence

[111] As recognised by the Privy Council in *Goldman v Hargrave*, a land owner (or occupier) owes a duty of care to his or her neighbours to ensure no hazards occurring on the land (whether natural or man-made) cause foreseeable loss or harm.[14] That duty obliges an owner of land to take reasonable steps to remove or reduce such hazards as are recognised by the owner. The duty depends on knowledge of the hazard and ability to foresee the consequence of not dealing with it. In the words of Lord Wilberforce:[15]

> In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able bodied: the owner of small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more.

[112] In that case, a tree which had been hit by lightning and was still smouldering was cut down into sections by the defendant, who did not, however, try to extinguish the smouldering fire, simply leaving it to burn itself out. The fire reignited and spread to the neighbour's property.

[113] In the present case, the plaintiffs argue the Council was aware of the significant fire risk posed by the pampas grass on the Council Land at the rear of the Property. Being alive to the existence of that hazard,[16] the Council was subject to a duty to take reasonable care. The scope of the duty was to do what was reasonable in all of the circumstances, which was to remove the pampas grass on the Council Land so as to remove or reduce the fire risk.

[114] There is no authority to support the proposition that the status of the landowner as a territorial authority is somehow relevant to the existence of that duty. Both *Goldman v Hargrave* and *Leakey v National Trust* suggest that the determining factor in the existence of the duty is control over the land where the hazard arises, rather than the identity of the landowner.[17] The Council conceded the point.

[115] It is clear from the evidence that, for some years prior to the Fire, the Council was aware of fires being illegally lit in the rail corridor

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13 Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, 2016) at [10.2.06(3)].

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

15 At 663.

16 The fact certain Council officers may not have appreciated at the time that the reserve was in fact Council Land is irrelevant. The Council clearly knew it owned the land.

17 See Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, 2016) at [5.6.05].

adjoining the Property and the Council Land. The Council was not only aware of the fire hazard the pampas/toe toe posed, but was sufficiently concerned to require those responsible for the railway corridor to clear the vegetation. Indeed the Council was so concerned it threatened to use what statutory powers it had to ensure that action took place. The Council cannot sustain the position that it was unaware of the fire hazard. There may not have been a fire for a number of years and there may not have been fires on the Council Land itself previously. Yet this is irrelevant in the circumstances of the proximity of the railway corridor and Council Land, the confusion as to the ownership boundaries and responsibilities, and the common state of both the railway corridor and Council Land with the presence of pampas/toe toe.

[116] The issue is whether the Council as landowner acted reasonably in all the circumstances by not taking active steps to remove the pampas grass on the Council Land.

[117] The plaintiffs must establish that a reasonable person in the Council's position could have foreseen this involved a risk of injury to the plaintiffs. If so, they must establish what a reasonable landowner would do by way of response to the risk. Relevant considerations include the magnitude of the risk, the probability of its occurrence, as well as the expense, difficulty and inconvenience of taking alleviating action.[18]

[118] The Council's position, apparently with the benefit of hindsight as there does not appear to be documentary support for the position, is that it was reasonable to allow vegetation to remain on the Council Land to mitigate the risk of erosion of the bank to the Creek and to improve water quality, toe toe being a desirable plant for such purposes. Again, however, the context needs to be considered. Given the known fire risk of pampas/toe toe and the history of fires in the general area with close proximity to a timber yard, plant selection would have required careful consideration. Furthermore, the Council's position in this regard is undermined by the fact that land adjoining Lot 2 owned by the Council appears clear of vegetation, as does the park owned by the Council adjacent to Lot 3.

[119] In Ms Divich's submission, to expect the Council to keep the Creek bank in mown grass and devoid of any scrub or bush, which might be set alight by a third person, to protect neighbours from the potential spread of fire is unreasonable and would amount to an interference with the Council's right to use its land. The Council was comfortable the Creek was a natural fire break which would, in normal conditions, contain any fire to the railway side of the Creek. The fire experts all agreed that the Creek constituted a natural fire break, and that its width exceeded the recommended fire breaks in vegetated land. Ms Divich referred to Mr Kelderman's evidence that under the prevailing weather conditions a fire would have spread on to the Property even if there were simply grass about 300mm high on the Council Land. Ms Divich then conceded in closing it would have been reasonable for the Council to remove the fire risk presented by the pampas/toe toe.

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18 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 (HCA) at 47-48.

[120] The potential benefit of the Creek providing a fire break does not appear to have been considered previously by the Council. The context of previous fires and the known fire hazard of pampas/toe toe, as well as the frequency of hot dry summers and potential for high winds, together created a risk the Council reasonably should have considered and addressed. Had the Council Land been grassed, any fire would have spread more slowly, increasing the prospect of it being controlled or contained before it reached the Property. This does not mean the Council has a duty to clear its reserves of all vegetation. The duty is to do that which is reasonable in the circumstances.[19]

[121] I am satisfied the Council breached its duty by failing to take steps which were reasonable for it to take in the circumstances to prevent or minimise the known risk of damage or injury to the Property by fire. This failure was a material cause of the Fire and the loss suffered by the plaintiffs.

[122] The Council was itself aware of the duties of a landowner to its neighbours in this situation and the measures which were reasonable for the landowner to take. In 2001 the Council wrote to KiwiRail's property manager following a fire in toe toe, noting that "this type of overgrowth is dangerous, particularly when next to a timber yard". Relevant too is the Council's own report on the Fire and the fact that the Council Land is bordered to the west by Dukes Yard (affected by previous fires), with residential land to the north and a school and Smallwoods' commercial premises to the south. Bearing those factors in mind, and given the known fire risk of pampas, it is clear that the Council should have taken action to remove the pampas.

[123] The Council should, as acknowledged by Mr Scott, have done that which it was insisting KiwiRail do – clear the pampas grass from the Council Land. Had it done so, it would have established the area in mown grass. The Council's own correspondence with KiwiRail establishes a reasonable baseline of what the Council expected.

[124] Further illustrating a reasonable baseline, Principal Rural Fire Officer Ray Dever is quoted in the *Gisborne Herald* 2 February 2017 edition as saying:

> We have a heap of overgrown sections around the district. If you own one of them, we suggest you give some consideration to your neighbours.
>
> Cut the grass to reduce the fire risk.
>
> If a fire starts on a property with long grass and spreads to affect the neighbours then the property owner is liable for any damage caused to the neighbour's place.

[125] I am satisfied it was more likely than not that, had the pampas/toe toe been removed, the plaintiffs' losses would have been avoided. It is unlikely the Fire would have started on Lot 3 or, if it had, that it would have spread to Lot 2 and the Property. The Council's negligence was a cause in fact of the plaintiffs' loss.

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

[126] The Council's negligence was also a cause of the losses at law given the material and substantial causal link between the Council's negligence and the plaintiffs' loss. The Council's negligence was a material cause of the chain of events leading to the loss and there was no break in the chain sufficient to sever the Council's liability.

[127] Neither was the loss too remote. A defendant who is guilty of negligence will be liable for the foreseeable consequences of that negligence, provided the loss caused is not too remote to bar recovery.[20] A foreseeable risk is a "real risk", being "one which would occur to the mind" of a reasonable person in the position of the defendant and which it "would not brush aside as far-fetched".[21]

[128] In the present case, the loss which occurred must have been of a type foreseeable to the Council. There is no requirement that the defendant foresee the full amount or extent of that damage.[22] Fire damage to the Property was clearly a foreseeable consequence of the Council's negligence. The Council had previously recognised the risk of fire spreading to the Property from land adjacent to it. The Council is liable for the loss, even if the extent may have been greater than anticipated.

Contributory negligence

[129] Section 3(1) of the Contributory Negligence Act 1947 provides:

> **3. Apportionment of liability in case of contributory negligence**
> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: ...

[130] This creates an affirmative defence which must be pleaded. The burden of proof is on the defendant.[23]

[131] Where the Court is satisfied a plaintiff has suffered damage which has been caused by the fault of both the defendant and the plaintiff, the Court may in its discretion apportion damages as between them. The issue is whether a plaintiff negligently failed to take reasonable care to protect its interests where it is proven that its failure has been a cause of the loss for which it sues.[24] The second issue is relative blameworthiness.[25] The test to be applied is the degree of departure from

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20 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co* [1961] AC 388 (PC) [*The Wagon Mound (No 1)*].

21 *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 AC 617 (PC) [*The Wagon Mound (No 2)*] at 643.

22 *Taupo Borough Council v Birnie* [1978] 2 NZLR 397 (CA); and *Attorney-General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA).

23 *Kenny v Dunedin City Corp* [1920] NZLR 513 (CA).

24 See *Johnson v Auckland Council* [2013] NZCA 662 as a recent example but also see *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 445 [*Byron Avenue*] and the obiter comments of Tipping J in the Supreme Court in *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289.

25 *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA).

the standard of a reasonable person with the characteristics of the claimant.[26]

[132] I have concluded Smallwoods did not adopt reasonable risk management practice on the Property in the circumstances as it knew them to be, given the fire hazard on the Council Land and the railway land. Pampas/toe toe, scrub, grass and overgrowth grew along the length of the border with the railway corridor. Although some clearing had been done down the boundary, this had not reached the north western corner by the time of the Fire. A cleanup every two years was insufficient. The boundary was fenced by a wire fence and it is notable this has now been replaced by a metal fence.

[133] I take note of the efforts by the plaintiffs to clear vegetation on the other side of the boundary.

[134] It was reasonable for the various items to be stored on the Property. The problem was the location and method of storage, particularly given the hazards within the Property of vegetation, the sawdust heap and combustible items stored on the Property near the boundary separated by a wire fence.

[135] The expert evidence about the development and spread of the Fire once it reached the boundary with the Property satisfies me that the presence and location of vegetation and combustible material on the Property played a material part in the spread of the Fire and ignition of the buildings.

[136] In these circumstances, I am satisfied there was a departure from a reasonable standard of risk management. In all the circumstances a reasonable manager of a timber yard would have implemented measures to protect the yard from the spread of fire, in particular by ensuring the site was clear of vegetation, there was no vegetation growing against any buildings, combustible material was stored well away from the boundary, and there was a solid boundary fence.

[137] In Ms Divich's submission, the plaintiffs' failure should be set at around 50 to 75 per cent. Mr Rainey for the plaintiffs said any liability should be no more than 20 per cent.

[138] In all the circumstances, I assess it as just and equitable to reduce the damages to the plaintiffs by 50 per cent.

[**Editorial note**: The Judge then considered contested evidence and certain uncontested heads of damage, which do not call for reporting, and made damages findings.]

Result

[200] The damages awarded to the plaintiff are $875,254.68.[30]

Interest

[201] Pursuant to the Judicature Act 1908, I award the plaintiffs interest at the prescribed rate of five per cent from the date of the losses awarded.

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26 *Byron Avenue*, above n 24 .

30 Based on the table provided in the joint memorandum of counsel dated 2 June 2017. The plaintiffs' losses of $1,614,155.27 are reduced by 50 per cent as a result of contributory negligence, leaving $807,077.64. Added to that is the Council's 50 per cent share of the boundary fence, $68,177.04.

Costs

[202] If the parties are unable to agree costs, the plaintiffs are to file a memorandum within 28 days of the date of this decision, with any response from the Council 14 days thereafter.

Reported by: Kim J McCoy, *Barrister*