LEGAL LIABILITY FOR WATER ESCAPE
(*AND WHAT YOU CAN DO TO AVOID IT*)

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Abstract

Local Authorities, network utility operators, contractors, engineers and consultants supervising works, all face the risk of potential liability for actions which cause damage through the direction or escape of water to property. Under the Resource Management Act 1991, territorial authorities, consulting engineers and contractors have all been prosecuted for water related offences. In addition to the risk of statutory liability, common law liability for the torts (civil wrongs) of negligence, nuisance, trespass and the rule in *Rylands v Fletcher* continue to be applicable.

This paper outlines the categories of potential legal liability at common law, and in statute. It explains the common law rights of "natural servitude", and illustrates this with case law examples.

A resource management case, *Gilbert v Tauranga District Council* involving an enforcement order application against a territorial authority for stormwater discharge to private land is discussed, in order to illustrate the issues which arise under the Resource Management Act 1991. Lastly, some strategies are suggested in order to avoid or minimise the risk of liability for water escape.

1. INTRODUCTION

The issue of legal liability for water (including stormwater) escape is not new. However, a number of changes in Local Government, make the issue a timely one to review. This is because:

- Local Authorities have the obligation under the new Local Government Act 2002 to adopt more rigorous planning for asset and infrastructure management.
- Local Authorities are required to carry out assessments of water and sanitary services.
- There is increased use of contracting out functions historically performed "in house" within engineering departments.
- The expiry of the transitional period in the Resource Management Act for water discharges means that many territorial authorities are still undergoing the process of obtaining resource consents for bulk legacy stormwater discharges.

These issues make it timely for Local Authorities and their consulting engineers to review the legality of stormwater discharges.

2. LIABILITY AT COMMON LAW

The landowner's rights

Liability for water escape in New Zealand is these days codified in statute,[1] however common law causes of action are still legally important. Liability at common law can arise for the torts (civil wrongs) of negligence, nuisance, trespass, under the rule in *Rylands v Fletcher,* or due to a wilful act.[2]

When water escape occurs and the escape is not in accordance with an easement, a statutory right or the common law right of natural servitude, a common law cause of action will arise. A cause of action involves the ability to sue the responsible party in Court for the escape of water.

In New Zealand, the owner and occupier of land can be liable where the water escape amounts to a common law cause of action, provided it has not been caused by an act within "the ordinary and natural use of the land".[3] Much argument revolves around what is the "natural or ordinary use of land".

The Natural Servitude

A duty exists for a lower landowner to accept the natural flow of water from a higher landowner – this has long been recognised as an inherent property right in New Zealand law.[4] This "natural servitude"

allows the higher landowner to discharge onto the lower land water that would normally fall there (as long as it is in the natural use of the land).[5] This would include rainfall that has accumulated on the higher land for instance. In cases of water escape, the natural servitude operates as a defence to a common law cause of action (such as nuisance).

The natural servitude doctrine is subject to several limitations. The higher landowner is not entitled to discharge onto the lower land any "foreign water" – water which has been brought onto the land from a different water source.[6] Nor is the higher land owner allowed to cause damage to the lower land by artificially altering the natural flow of the water, when damage (either in type or magnitude) did not occur when the land received only the natural flow discharge.[7] For example, higher landowners cannot tarseal a road and therefore increase the velocity of the natural flow to the extent that it causes damage to lower land (when no damage occurred before the road was tarsealed).[8]

What amounts to ordinary and natural use of land is a question of fact to be considered separately in each case, with all surrounding circumstances to be taken into account.[9] For example, ploughing on agricultural land was held to be natural use, but not the drainage of a swamp.[10] The clearing of an old drain with the consent of the lower landowner has been deemed natural, yet the construction of a shed on the boundary of the higher land was not considered natural.[11]

So, despite the law not being very specific, general conclusions can be drawn about the application of the natural servitude doctrine. The key points to remember appear to be that the higher land owner is entitled to discharge to lower land any water which falls naturally on the higher land, as long as it is done "naturally". The higher land owner can even use an artificial structure to discharge this water, so long as it does not appreciably increase the burden upon the lower land (i.e.: cause increased damage).[12] The higher landowner is not entitled to discharge "foreign" water onto a lower land.[13]

Nuisance or Trespass

Provided the land use is not within the natural and ordinary course, water escape from one property to another can constitute a nuisance. Strictly speaking an immediate discharge of water onto another person's land is a trespass, while a discharge onto an immediate property, which then flows onto another person's land is a nuisance.

Nuisance arises when an activity (continual or not) of one person either causes damage to another's land, or interferes with the use and enjoyment of the other persons land.[14]
Nuisance can either be public or private – a public nuisance arising when a particular entity inflicts injury, discomfort, or inconvenience on all members of the public within the scope operation of the entity's activity.[15] Private nuisance is when a specific landowner is injured or discomforted.

The escape of water from one property to another can clearly constitute a nuisance, be it via a continuing escape[16] or a one-off flooding.[17]

Powrie v Nelson City Corporation is a good example of water escape leading to the finding of a legal nuisance.[18] In that case, the local authority widened and metalled a road, increasing the catchment area from which stormwater was discharged. The increase in stormwater flow was measured at about 9 times the previous level. It was a continuing nuisance to the plaintiff's land (flooding in every heavy rainfall). The defence of natural servitude was not available to the local authority as the burden on the lower land had been appreciably increased –it was clearly not within the natural and ordinary use of the land.[19]

Nuisance is probably the most common tort to occur in water escape cases.

The Rule in Rylands v Fletcher

The rule in *Rylands v Fletcher* states that where a person brings on to land and keeps there, for his or her own purposes, anything which is likely to do mischief if it escapes, that person is liable for damage which is the natural consequence of that escape.

Recent judicial opinion has held the rule in *Rylands v Fletcher* forms part of the law of nuisance.[20] This rule will not apply, however, if it can be shown that the particular use of the land was reasonable or natural notwithstanding the dangerous nature of the thing brought on to the land.[21] For example, in *Cambridge Water Co Ltd*[22] at Court of Appeal level, the storage of perchloroethene at a tannery was held to be a natural use of land in the High Court, and no liability arose for its escape. This finding

was later overruled by the House of Lords, Lord Goff stating that "*the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use*".

The *Cambridge Water Co Ltd* case has been followed in New Zealand. It appears that anybody who brings something not natural on to land, and allows it to escape, will face strict liability for any damage that occurs to the land of others.

Engineers, contractors, and others responsible for project works should be especially aware of this type of liability if there are hazardous substances taken on to land for a particular project.

Negligence

Negligence involves the breach of a duty of care owed to another as a result of which that other suffers loss.[23] The duty of care is owed to those who are regarded in law as "neighbours" of the defendant that is, those who are in a relationship of proximity that a reasonable person would recognise that harm might be caused to them if reasonable care were not exercised. Forseeability of harm, or remoteness, is essential to succeed in a claim for negligence.

In *Mayor of North East Valley v Worsdell*,[24] local authority contractors wrongly blocked a street surface water drain. The resultant flooding caused permanent damage to an adjacent property. The local body was held liable as the wrongful act of blocking the drain was a breach of a duty of care owed to land owners near the drain. The damage caused by the flooding was held to be a reasonably foreseeable result of blocking the drain. The defence of natural servitude was not raised, but clearly could not have succeeded considering the increased water burden placed on the plaintiff's land.

To establish a defence to a negligence claim it will be important to attempt to show that the actions involved were within the generally approved or acknowledged practices of the trade or profession concerned. Evidence to show that the correct method of carrying out an activity was followed can defeat a negligence claim. This may show that the act did not amount to a breach of a duty owed. For example, in *Budden v BP Oil and Shell Oil Ltd*,[25] the addition of lead to petrol which resulted in health problems for numerous children, although wrongful, was held not to be negligent as the oil companies had been compliant with the prescribed standards in the regulations made under the UK Control of Pollution Act 1974. The English High Court held that an act could not be negligent if it adhered to a standard believed to be in the public interest. Although there is no New Zealand authority as of yet, it does suggest there is a strong incentive to work within relevant industry guidelines.

Proof of Damage at Common Law

A plaintiff suing in negligence will recover damages for losses that were reasonably foreseeable by the defendant when the wrong was committed. Reasonably foreseeable damage means the damage that a reasonable person would have identified as a “real risk” – i.e. the kind of damage suffered must have been reasonably foreseeable as a real risk rather than one that a reasonable person would have brushed aside as far-fetched or fanciful.[26]

Forseeability of damage has also been held to be a requirement in nuisance and *Rylands v Fletcher* actions. This is a departure from the former position whereby nuisance was seen as a strict liability tort (regardless of forseeability). Now a test of remoteness of damage applies.[27]

In *Hamilton v Papakura District Council,* the Council's contractor conducted weed spraying in the catchment area for the regional water supply. Although the herbicide from the weed spray did contaminate the water, it did so to a level at which the water met drinking water standards. The plaintiff's tomato plants however, were of a more sensitive nature and the contaminated water was sufficient to kill off an entire crop. It was held, both in the Court of Appeal and the Privy Council, that it was not foreseeable to the defendant that their weed spraying could lead to the destruction of a crop of overly-sensitive tomato plants.

The addition of a forseeability requirement to a nuisance type action will help to limit the potential liability that could be faced for water escape.

Local Authority Liability

Local Authority liability for water escape will be affected by the specific terms of any applicable legislation such as the Land Drainage Act 1908, the drainage provisions of the Local Government Act

1974 (the majority of the drainage provisions of this Act remain in effect), and any special drainage legislation, or drainage legislation that applies to local areas.

Where the local authority (or a contractor or consultant exercising the Council's statutory power) causes damage by water escape, so long as they are not negligent, their liability could depend on whether there is any immunity for the damage.[28] For example, in *Irvine v Dunedin City* [29] a burst water main which resulted in the flooding of the plaintiff's basement was held to be within a statutory immunity conferred by Parliament. In *Irvine* it was held by the Court of Appeal that no action lay for a nuisance which was necessarily or inevitably involved in the construction and maintenance of an authorised public work, and which would found a claim for compensation under the Public Works Act.[30] However, there are limits to this defence because a local authority (and those working under their powers) is not authorised to cause a nuisance.[31]

Issues also arise as to the extent of liability a local authority faces when works and services are contracted out.

The Local Government Act 2002 prohibits the local authority from indemnifying a "council controlled organisation" ("CCO") against civil liability.[32] This may suggest that when the authority contracts out to a CCO, the risk of civil liability for the performance of the service is passed to the CCO. A CCO should be aware that when contracting with a local authority, they would in most cases be accepting the risk of civil liability for their own torts (civil wrongs). While there are exceptions to this general theme, the exceptions would not generally exonerate the CCO from liability for their own torts. Most likely the local authority will also be subject to a claim for liability as well – with the deeper pockets of the local authority being attractive to a plaintiff seeking relief.

Remedies in Common Law Cases

The remedies available for damage caused by water escape depend on the type of damage. Often in cases of on-going nuisance, an injunction will be required to prevent the nuisance from continuing. Generally, in negligence cases damages rather than an injunction will be the remedy sought.

3. STATUTORY REMEDIES FOR WATER ESCAPE

Resource Management Act 1991

While common law actions in the Courts for the torts (civil wrongs) of trespass, negligence or nuisance, continue to be of relevance, in practice, statutory remedies, specifically under the Resource Management Act 1991 are likely in many instances to be quicker, and more cost-effective. The Resource Management Act 1991 provides for many means of enforcement:

1. Declarations: s 310 RMA
2. Abatement notices: s 322-325 RMA
3. Enforcement orders: s 314-321 RMA
4. Interim enforcement orders: s 320 RMA
5. Infringement notices: s 343A-343D RMA
6. Prosecutions for offences: s 338 RMA [33]

Infringement notices and abatement notices are limited to use by local authorities. All of the other enforcement methods are able to be used by "any person".

Under the RMA, no person may take, use, dam or divert any water unless the taking, use, damming, or diversion is expressly allowed by a rule in a regional plan and in any relevant proposed regional plan, or resource consent.[34] Similarly, in relation to discharges no person may discharge any contaminant or water into water, or any contaminant onto land in circumstances which may result in that contaminant entering water, unless expressly allowed by a rule in a regional plan and in any relevant proposed regional plan, or resource consent.[35]

The discharge or diversion must be authorised by both the operative regional plan, and the proposed regional plan, unless authorised by resource consent.
Importantly the RMA expressly provides that even if the diversion or discharge complies with the RMA, this does not remove the need to comply with all other Acts, regulations, bylaws, and rules of law[36] i.e.

even if a water discharge has consent under the RMA, this does not mean that the discharge is authorised to create a nuisance at Common Law.

Other Statutory Remedies

Depending on the situation, in addition to RMA methods, there are a range of other enforcement tools and legal remedies available to address environmental problems including:

- Local Government Act 2002 remedies: breach of by-law, infringement notices, injunctions and prosecutions.
- Specific statutory remedies under the Biosecurity Act 1993, the Health Act 1956 (containing statutory power for injunctions under section 29), and Hazardous Substances and New Organisms Act 1996.

4. CASE EXAMPLE

Enforcement Order Application

***Gilbert v Tauranga District Council,* A006/03, Judge DFG Sheppard, 10/02/2003**

In 1987 the Gilberts bought a 1-hectare property at Waihi Road, Tauranga, and erected a dwelling. The land was low lying, and below current building platform levels. In its natural state, the land would have drained to the north, towards the Tauranga harbour.

From around 1979 to 1985 fill was placed on the adjoining land to the immediate north to facilitate development for housing. This interfered with the natural drainage.

To alleviate drainage problems, Mr Gilbert dug an open drain along his northern boundary (the 'northern' drain) that directed water to the west, connecting with an existing public drainage system. Around the same time, the flow direction of stormwater in a Council controlled drain from an existing housing development in Jonathon Street was reversed to flow in the direction of the Gilberts' property. The Council stormwater was directed to the northern drain on the Gilberts' property.

As adjacent housing was developed, sections were piped in a substandard way to connect and discharge to the Gilbert northern drain. In 2000 the Council replaced those substandard pipes with a larger 450mm pipe, which lead to the northern drain on the Gilberts' property.

The Gilberts complained of flooding caused by overflows from the northern drain (which was receiving Council controlled stormwater).

The Gilberts sought enforcement orders under section 314 of the Resource Management Act. It was alleged that the discharge of stormwater to the northern drain contravened section 15 RMA, was not authorised by any regional rule, and was causing adverse effects to the environment, namely flooding to the Gilbert property. The application sought injunction type orders requiring the Council to: cease discharging stormwater from the pipe to the northern drain, and cease and remedy flooding to the Gilbert property.

The Council denied that the discharge was a contravention of the Resource Management Act, and defended the case.

1. Was the reversal in flow in the Jonathon street drain lawful?

The Court held that the diversion of the water in the Jonathon Street drain, begun in around 1985, was not authorised under the Water and Soil Conservation Act 1967, and was not lawful.

2. Did the discharge to the northern drain contravene the RMA?

The Court found that the discharge from the Jonathon Street drain to water in the northern drain was not authorised by the Transitional or Proposed Regional Plans under the RMA, and contravened s15 RMA.

The Court accepted evidence from the Gilbert's engineer who had sampled the quality of the stormwater discharge. The analysis showed that that the stormwater was a "contaminant" as defined in section 2 RMA.

3. Did the discharge have "existing use rights" allowed under section 20 RMA?
The Council claimed that the discharge of stormwater was authorised by section 20 of the RMA. This required the Council to show that the activity of discharging stormwater was lawfully established and that the effects of the discharge would be so similar in intensity and scale to the those which existed on 30 September 1991 (the day before RMA came into effect).

On the facts the Court found that this defence was not made out.

3. Had the northern drain become a public drain?

The Council argued that it was entitled to discharge water to the northern drain because it was a "public drain" under the Local Government Act 1974 ("LGA"). The Council was required to show that it had control of the drain for 20 years in order to come within the Local Government Act provisions. The Court found that the northern drain was created in 1983 for drainage of the Gilbert property. It was not under the Council's control for 20 years and s441(2) LGA did not apply.

4. Determination

The Court found that the Council was discharging stormwater in contravention of the RMA. It had continued to do so despite persistent protests from the Gilberts. The District Council was ordered to cease the discharge of stormwater to the northern drain on the Gilbert property. The Gilberts were entitled to costs.

5. LESSONS?

The Gilbert case contains some lessons for local authorities carrying out drainage works. There was a number of errors and unfortunate circumstances:

- Historically the discharge from the Council's stormwater drain was reversed (unlawfully) to flow in the direction of the Gilbert property. The reversal was a contravention of the existing water legislation as an unauthorised diversion. This historical situation was not legitimised by any rule in a regional plan.

- At the time of the upgrade to the 450-mm stormwater pipe in the year 2000, the Gilberts objected. Neither the Council nor the consulting engineer for the project appeared to obtain legal advice on the repeated objections from the Gilberts.

- Even had there been a rule authorising the discharge, there still would have been an unlawful event, because the concentration of water to the Gilbert property was in breach of the common law of nuisance.

- The Council was unable to establish ownership of the northern drain as a "public drain".

6. STRATEGIES TO AVOID OR MINIMISE THE RISK OF LIABILITY FOR WATER ESCAPE

1. Always find out: is resource consent required?

The majority of prosecutions and other enforcement action under the RMA involves cases where work has occurred without obtaining consent required by the RMA, or by district and regional plans. Unfortunately there have been a number of cases where contractors have relied upon instructions by a head contractor that no consent is required, only to later find out that this advice was wrong. The Courts have made it plain that contractors cannot escape liability under the RMA by stating that they are operating under their employer's instructions.

2. Check with both District or City Councils and Regional Councils

Sometimes it is wrongly assumed that resource consent is only required from the territorial authority (i.e. district or city councils). As a result, any need to also obtain consent from the relevant regional council is overlooked.

3. Know what, if any, conditions or performance standards apply

Compliance with any conditions, standards or terms of consent is a mandatory obligation for those carrying out works under a resource consent. Even if resource consent is not required, and the works are allowed as of right by a district or regional plan, the plan itself will often contain conditions, sometimes called performance standards.

4. Make sure that the conditions fit the contract

Often work will be contracted or tendered for in advance of resource consent being granted. When this occurs a check should occur to make sure that the contract contains terms that fit with the consent conditions.

5. Inform staff and contractors

Once resource consent is granted, communication of consent conditions to staff as well as to contractors is vital. A key step to externalising risk is to make sure that a copy of the consent is explained and delivered to all staff and contractors involved in the job. If external sub-contractors are involved, it is important to keep a record of the fact that a copy of the consent has been supplied to them as well. Making sure the conditions of consent and other council requirements are available can also include informal measures such as keeping a copy of the consent displayed in the staff room.

6. Establish a system for environmental compliance

If charged with a breach of the RMA the nature of limited defences under the RMA means that it is usually necessary for defendants to show that a "system" for environmental compliance exists. This is to make sure that all reasonable steps were taken to avoid errors occurring in the first place. This system for compliance should, as a minimum:

- Establish clear responsibilities for identified people (i.e. for steps 1 to 6 as above).
- Identify the person with ultimate accountability, e.g. the site manager.
- Communicate with and inform all involved, including employees and contractors/subcontractors.
- Have in place appropriate supervision or training programs or both.
- Identify areas of risk, and how those are to be dealt with.
- Establish procedures for dealing with incidents and their reporting.
- MONITOR AND REVIEW THE SYSTEM PERIODICALLY TO CHECK THAT IT WORKS.

7. Even if there is consent, is there a concentration or diversion of water not allowed at common law? (i.e. does it come within the rights of "natural servitude").

8. Is there a system for logging complaints, and a process of ensuring that complaints receive a "compliance check" on the legality of any discharge?

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[1] For example, s15 Resource Management Act 1991.
[2] For example, an artificial device to divert water onto another's land.
[3] *Rylands v Fletcher* (1868) LR 3 HL 330, *New Zealand Forest Products Ltd v O'Sullivan* [1974] 2 NZLR 80; *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264; [1994] 1 All ER 53.
[4] *Gibbons v Lenfestey* (1915) 84 LJPC 158; *Bailey v Vile* [1930] NZLR 829.
[5] *Bailey v Vile* [1930] NZLR 829.
[6] *Strange v Andrews* [1956] NZLR 948; *Simpson v Attorney-General* [1959] NZLR 546.
[7] Davis v Lethbridge [1976] 1 NZLR 689;
[8] *Dijkmans v Howick Borough* [1971] NZLR 400.
[9] Supra at Note 4.
[10] Crisp v Snowsill [1917] NZLR 252.
[11] *Spear v Newham (No 2)* [1936] GLR 310.
[12] *Eaton v Dalgleish* [1940] GLR 612.
[13] Supra at Note 6.
[14] *Matheson v Northcote College Board of Governors* [1975] 2 NZLR 106.
[15] *Attorney-General v Abraham and Williams Ltd* [1949] NZLR 461; [1949] GLR 229 (CA).
[16] *Powrie v Nelson City Corporation* [1976] 2 NZLR 247.
[17] Hamilton v Papakura District Council [2000] 1 NZLR 265 (CA); [2002] 3 NZLR 308 (PC).
[18] *Powrie v Nelson City Corporation* [1976] 2 NZLR 247.
[19] Ibid at page 252.
[20] *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53; *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA); [2002] 3 NZLR 308 (PC).
[21] Ibid; *Irvine and Co Ltd v Dunedin City Corporation* [1939] NZLR 741; [1939] GLR 390 (CA).
[22] *Cambridge Water Co Ltd v Eastern Counties Leather plc.*
[23] *Williams v Attorney-General* [1990] 1 NZLR 646 (HC and CA) at 678 and 679 per Richardson J and *Donoghue v Stevenson* [1932] AC 562; [1932] All ER Rep 1.
[24] (1883) 1 NZLR SC 335.
[25] [1980] JPL 586.
[26] *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 AC 617; [1966] 2 All ER 709 (PC) at 718 (*The Wagon Mound (No 2)), Stephenson v Waite Tileman Ltd* [1973] 1 NZLR 152 (CA),
[27] *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* (The Wagon Mound (No 2)), *Howard Electric Ltd v AJ Mooney Ltd* [1974] 2 NZLR 762, *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324 (CA) and *Hamilton v Papakura District Council* [2002] 3 NZLR 308 (PC).
[28] *Jutland Flat (Waipori) Gold-Mining Co Ltd v McIndoe* (1896) 14 NZLR 99 (CA); *Irvine and Co Ltd v Dunedin City Corporation* [1939] NZLR 741; [1939] GLR 390.
[29] Ibid.
[30] Ibid.
[31].Local Government Act 2002, s 191
[32] Local Government Act 2002, s62.
[33] There have been a number of cases under the RMA where local authorities have been prosecuted for water offences.
[34] section 14 RMA
[35] section 15 RMA
[36] section 23 RMA.