Privy Council Appeal No. 14 of 1987

The Christchurch Drainage Board *Appellant*

v.

(1) Michael Anthony Brown and Adrienne Ida Brown and
(2) The Chairman Councillors and Inhabitants of Heathcote County *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH SEPTEMBER 1987

Present at the Hearing:

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN
LORD GRIFFITHS
SIR ROBERT MEGARRY

*[Delivered by **Lord Templeman**]*

In these proceedings the trial judge, Hardie Boys J., held that the appellant, Christchurch Drainage Board, was liable to the first respondents, Mr. and Mrs. Brown, for the common law tort of negligence in the sum of $32,900. The Court of Appeal of New Zealand (Sir Robin Cooke P., Richardson J. and Sir Clifford Richmond) upheld the decision of the trial judge. The Drainage Board, with the leave of the Court of Appeal, now appeal to Her Majesty in Council.

The Heathcote River as it flows through the administrative area of Heathcote County is susceptible to flooding. The Drainage Board was incorporated in the last century and now under the Christchurch District Drainage Act 1951, as amended, is responsible for the supervision, control and provision of sewage and drainage services in the Christchurch drainage district. The Drainage Board's district includes part of the administrative area of Heathcote County. By the Act of 1951 all water courses within the district are vested in the Drainage Board which is empowered to provide and

maintain defences against flooding. The Drainage Board's expenses are raised by rates levied on the occupiers of hereditaments within the district. The Heathcote County is administered by the second respondent the Heathcote County Council ("the H.C.C."); the expenses of the H.C.C. are raised by rates levied on the occupiers of hereditaments within the county.

Control of the development of land within the administrative area of a county is vested in the County Council and becomes material under Planning legislation, Health Acts, and also under the Counties Acts on the sub-division of land registered under one title. Thus by section 22 of the Counties Amendment Act 1961, where any person holding any land in the County proposes to sub-divide the land for the purposes of sale or building, the owner must submit a plan of the scheme of sub-division to the County Council and, by section 23(1)(a), the Council must refuse to approve the scheme plan if it is of opinion that the land is not suitable for sub-division. By section 23(3) the Council in deciding pursuant to section 23(1)(a) whether any land is suitable for sub-division:-

> "shall take into consideration any danger that may exist of the land being eroded or inundated by the sea or by a river or lake, and, if the Council is of opinion that the danger is such as to render the land unfit for sub-division for building purposes, it may refuse to approve the scheme plan or, before approving the scheme plan, require the owner to make such provision for the protection of the land from erosion or inundation as the Council thinks fit."

In carrying out its duty under section 23 of the Act of 1961 the H.C.C. reasonably relied on the Drainage Board for information with regard to flood danger and for advice as to any requirements, such as a minimum ground floor level, necessary to protect any new building from flood damage. In the exercise of its statutory functions the Drainage Board carried out research and maintained records and statistics of the heights attained by flood water from time to time at various land marks on and near the Heathcote River. Applications for approval of a scheme plan made to the H.C.C. were therefore referred to the Drainage Board which recommended refusal or recommended the imposition of conditions or other precautions if the records kept by the Drainage Board indicated the possibility of flood damage. In the minority of cases where a proposal for the erection of a new building did not involve the sub-division of land, the developer nevertheless required a building permit from the H.C.C. and required the approval of the Drainage Board of the drainage and sewage

arrangements envisaged for the building. Every application for a building permit was therefore referred by the H.C.C. to the Drainage Board. The trial judge found from the uncontradicted evidence given on behalf of the H.C.C. that "as a matter of practice the Board drew to the County's attention any situation of flood danger apparent from a building permit application. The officers in the county's building department relied on the Board to do so unasked".

Mrs. Brown was born in the year 1944 and from 1947 onwards lived with her parents at their house in Centaurus Road in the County of Heathcote and in the district of the Drainage Board, about 50 yards from the Heathcote River. The house was built on a ridge which was above flood level and the ridge fell steeply to ground which sloped gently to the east bank of the Heathcote River. An unmade track, later made up and known as Palatine Terrace, ran along the east bank of the river and over a sewer installed by the Drainage Board. In 1949 Mrs. Brown's father purchased the ground between his house plot and the river for the purposes of an orchard. The orchard ground was comprised in a single title separate from the title of the house plot.

Between 1949 and 1965 the Heathcote River overflowed its bank on two or three occasions to an extent sufficient to flood part of the orchard ground between the river and the ridge. Mrs. Brown left her parents' home in 1965 but was staying with her parents at Centaurus Road in 1968 when a violent storm known as the Wahine storm caused the Heathcote River again to flood the orchard ground. In 1973 the orchard ground was transferred to Mrs. Brown. Mr. and Mrs. Brown, who were then only engaged, proposed to build a house on the orchard ground in a position which Mrs. Brown thought to be above the flood level attained on the orchard ground. The transfer of the orchard ground to Mrs. Brown did not involve the sub-division of land because the orchard ground was comprised in a single separate title, but Mr. Brown, who was the builder, required and duly applied to the H.C.C. for a building permit and his application was referred to the Drainage Board. The application was accompanied by plans and specifications which indicated that the ground floor level of the proposed house was intended to be 9 inches above the level of the manhole of the Drainage Board sewer under Palatine Terrace. The site of the proposed house was visited by a representative of the Drainage Board; he indicated that the site was satisfactory and eventually the Drainage Board approved the application for a building permit without any comment or requirement relating to flood danger. In 1973 the Building and Planning Bylaws and Regulations administered by the H.C.C. required a new building to

be sited at least 25 feet from any neighbouring property. When Mr. Brown submitted to the H.C.C. his application for a building permit, he also submitted a separate application for dispensation from the Regulations to enable him to build up to 15 feet from a neighbouring boundary. Mr. Brown advanced the following reasons for requiring dispensation from the Regulations:-

> "Due to the topography of the section, it has been found desirable to erect our home in a higher position than first intended so that any risk of an unforeseen flood in the Heathcote river is provided for adequately."

The County's Engineering Department recommended dispensation from the Regulations because:-

> "This section slopes towards the Heathcote river and the higher end of the section i.e. the rear would give a measure of flood protection to the dwelling erected on this section."

The request for a dispensation was not referred to the Drainage Board. The H.C.C. granted the dispensation and the building permit. Mr. Brown built the house for which permission had been obtained, and the Drainage Board's representative after a further visit to the site approved the connection of the house sewage to the Drainage Board sewer in Palatine Terrace. The house was occupied by Mr. and Mrs. Brown in 1974 and was settled on them both as a joint family home. The house was flooded in 1975, 1976 and 1977 and the Browns were forced to raise the level of the ground floor by some six feet at a cost of more than $30,000.

The records maintained by the Drainage Board in 1973 established that the manhole cover in Palatine Terrace was 40.86 feet above the measuring level employed by the Board to measure floods. The ground floor level of the Brown's house was 41.61 feet. Every five years, on average, the Heathcote River in the neighbourhood of Palatine Terrace flooded to a depth of 42.65 feet. The flood level attained at the time of the Wahine storm was 44.21 feet. Every fifty years, on average, the flood level reached 46.92 feet. The house was doomed to be flooded, and was flooded, until the ground floor level was raised to a height of 47.57 feet in 1977.

In 1977 Mr. and Mrs. Brown brought these proceedings against the H.C.C. and against the Drainage Board for negligence in failing to warn of the danger of flooding or in failing to require the house to be built above known flood levels. The statement of claim did not allege any practice by the Drainage Board of informing the H.C.C. about flood dangers in relation to applications for building

permits which did not involve a sub-division of a title to land. The H.C.C. and the Drainage Board denied liability. On 4th November 1981 the H.C.C. amended its defence to plead in the alternative contributory negligence on the part of Mr. and Mrs. Brown in building their house without first ascertaining the flood levels. The Drainage Board did not plead contributory negligence. Neither authority sought to blame the other.

The trial of the action began on 23rd November 1981. The Drainage Board elected not to give evidence. The evidence of the Browns and of the H.C.C. relating to liability and contributory negligence was taken. The proceedings were adjourned for counsel's submissions to be prepared. The adjourned hearing took place on 13th May 1982 when counsel for the Browns and counsel for the H.C.C. debated liability and contributory negligence. Counsel for the Drainage Board denied liability and also adopted the arguments put forward by the H.C.C. Hardie Boys J. gave judgment on 11th August 1982. He found that the H.C.C. was not liable. He found that the Drainage Board was liable and, in view of the fact that the Drainage Board had not pleaded contributory negligence, he reserved the issue of contributory negligence for further argument. Nevertheless he said "if I were able, I would reduce the plaintiffs' damages by two-thirds on this account". A further hearing took place on 2nd November 1982 and a further judgment was delivered on 26th November 1982 when the learned judge refused the Drainage Board leave to amend its pleadings so as to plead contributory negligence and gave judgment for the Browns against the Drainage Board for the full amount of damages. On 21st December 1982 the Drainage Board appealed. The Browns appealed against the dismissal of their claim against the H.C.C. The appeal was heard in May 1985 and the Court of Appeal delivered judgment in June 1986. The appeal by the Drainage Board was dismissed. The appeal by the Browns against the H.C.C. was adjourned. Final leave to appeal to Her Majesty in Council was granted to the Drainage Board on 23rd December 1986 and on the hearing of that appeal the H.C.C. did not appear.

There are several unsatisfactory features in this case. The Browns were aware of flood danger and were foolish not to ask the H.C.C. or the Drainage Board to check flood levels. The H.C.C. was made aware by the Browns of flood danger and was foolish not to refer the Browns' application for a dispensation from the building bylaws and regulations to the Drainage Board with an express request to check flood levels. The Drainage Board knew that the house was sited near the Heathcote River and was foolish not to check flood levels in accordance with its usual practice when the Browns' building permit application was

referred to the Drainage Board. Yet the H.C.C. failed to plead that it was the practice of the Drainage Board to check and advise on flood danger. The Drainage Board did not plead contributory negligence on the part of the Browns. The H.C.C. and the Drainage Board failed to claim indemnity or contribution from one another. Although the Drainage Board is a public authority accountable for the performance of its duties and the exercise of its powers, the Drainage Board submitted an uninformative defence and did not call any evidence. The trial judge apportioned blame between the Browns and the Drainage Board but refused the application of the Drainage Board to amend its defence so as to obtain apportionment of liability. The appeal of the Browns against the H.C.C. has been left in limbo. In these circumstances the only question which their Lordships are at liberty to determine is whether the Drainage Board owed to the Browns a duty of care to check and report on flood levels.

The law of negligence has not ceased to evolve. In his judgment in these proceedings Sir Robin Cooke P. listed seven "major decisions overseas which we have wished to take adequately into account" and thirteen New Zealand decisions on negligence since 1977. Summarising the approach of the New Zealand Court of Appeal, the President said in [1986] 1 NZLR. 76 at 79:-

> "... we have considered first the degree of proximity and foreseeabilty of harm as between the parties. I would put it as whether these factors are strong enough to point *prima facie* to a duty of care. Second, if necessary, we have considered whether there are other particular factors pointing against a duty. It is also conceivable that other factors could strengthen the case for a duty ... we have found this kind of analysis helpful in determining whether it is just and reasonable that a duty of care of a particular scope was incumbent upon the defendant.
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> We have also recognised that, if the loss in question is merely economic, that may tell against a duty ... [although] the economic loss point [is not] automatically fatal to a duty of care."

Their Lordships are not now required to consider the authorities to which the President referred because the present appeal falls to be decided on the question whether a sufficient degree of proximity existed between the Drainage Board and the Browns. Their Lordships respectfully and gratefully acknowledge the useful summary by the President of various factors which are to be taken into account

and may not yet finally be defined or refined in the evolution of the common law tort of negligence. The President also alluded to another problem which does not arise in this case, namely the question whether and in what circumstances a statutory duty imposed on a local authority otherwise than for the preservation of health or safety creates a common law duty in negligence. In determining that question there will inevitably fall for consideration, in the light of the consequences of *Anns v. Merton London Borough Council* [1978] A.C. 728, the desirability on the one hand of the courts and not the legislature deciding to compensate anyone who suffers damage which could have been avoided, and the desirability on the other hand of not making the ratepayer or taxpayer an insurer and indemnifier against loss.

The Act of 1951 authorised the Drainage Board to provide and maintain defences against flooding and for that purpose the Drainage Board carried out research and recorded flood levels. These functions did not bring the Board into proximity with any individual landowner. When the Drainage Board became under a statutory duty to approve the drains and plumbing facilities and sewage arrangements proposed for the Brown's house that duty did not extend beyond checking that the house was adequately provided with the necessary facilities. But a duty of care may be assumed; see *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465. If for example the H.C.C. had expressly asked the Drainage Board to check flood levels when the Browns' building permit application was submitted to the Drainage Board then there can be no doubt that the Drainage Board would have been under a duty of care not only to the H.C.C. but also to the Browns. The evidence in this case is that the Drainage Board habitually acted without an express request by the H.C.C. and checked flood levels whenever building permits were referred to them. The duty of the Drainage Board in these circumstances cannot be any less than the duty which they would have assumed if they had been expressly asked.

Counsel for the Drainage Board in a persuasive address relied on five main submissions:-

1. The Browns were the authors of their own misfortune when they relied on Mrs. Brown's knowledge of flood levels instead of asking the Drainage Board. But authorities such as the Drainage Board exists to protect the ignorant and those whose little knowledge is dangerous.

2. The H.C.C. were to blame for not asking the Drainage Board to check flood danger. But the evidence is that the Drainage Board normally behaved in relation to building permits as though

the Drainage Board had been asked to do so. The Drainage Board representative had inspected the site. The Drainage Board admitted that in relation to sub-divisions the H.C.C. relied upon the Drainage Board.

3. The H.C.C. did not plead a practice by the Drainage Board to advise on flood levels. It is true that the defences of the H.C.C. and the Drainage Board were both singularly, and for public authorities, sadly uninformative. But the H.C.C. called evidence and the Drainage Board elected not to call evidence.

4. The H.C.C. and the Browns did not rely on the Drainage Board. But in circumstances such as these reliance cannot be required from the ignorant and the H.C.C. on behalf of the Browns relied upon the practice followed by the Drainage Board.

5. Liability for contributory negligence should have been visited upon the Browns. But the Court of Appeal decided not to interfere with the exercise by the trial judge of his discretion to refuse to admit an amendment pleading contributory negligence and on this procedural point their Lordships decline to interfere with the decision of the courts below or their consequences.

For these reasons their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the respondents' costs.