Oosthoek et al. v. Corporation of the City of Thunder Bay *
Nadeau v. Corporation of the City of Thunder Bay *
Bennett et al. v. Corporation of the City of Thunder Bay *
Edwards et al. v. Corporation of the City of Thunder Bay *
[Indexed as: Oosthoek v. Thunder Bay (City)]

30 O.R. (3d) 323

[1996] O.J. No. 3318

Nos. C24478, C24477, C20340 and C24479

Court of Appeal for Ontario,

Catzman, Carthy and Laskin JJ.A.

September 27, 1996

* Application for leave to appeal to the Supreme Court of Canada dismissed with costs September 26, 1997 (La Forest, Gonthier and Major JJ.).

*Torts -- Negligence -- Public authorities -- Municipal liability -- Combined sanitary and storm **sewer** backing up and causing basement flooding -- Municipality aware that connection of rainwater leaders from houses to **sewers** contributing to cause of flooding -- Municipality failing to enforce by-law requiring disconnection of rainwater leaders -- No explanation for failure to enforce by-law -- Municipality liable for negligence.*

*Torts -- Nuisance -- Private nuisance -- Defences -- Statutory authority -- Inevitable consequences -- Municipality constructing combined sanitary and storm **sewers** -- Basements flooding during heavy storm -- Defence of statutory authority not available if damages not inevitable consequences of construction.*

Torts -- Nuisance -- Private nuisance -- Defences -- Statutory authority -- Inevitable consequences -- Onus of proof -- Water mains breaking and causing basement flooding -- Municipality failing to disprove that mains installed without negligence -- Municipality failing to establish inevitable consequences to base defence of statutory authority.

Four claimants sued the City of Thunder Bay in test cases. The claims of O and N related to flood damage during a heavy rainstorm in June 1991 from a backup in combined sanitary and storm **sewers** constructed by the former City of Fort William in 1907 and 1925. The problem of basement flooding had been identified in a 1965 engineering report prepared for the City of Fort William. The report noted that the City's paving program and new development eliminated absorptive soils and increased the water movement to the **sewers.** It also noted that rainwater leaders on homes were a contributing factor. The report recommended, among other things, the construction of storm relief **sewers** and the disconnection of rainwater leaders. The recommendations were repeated in a 1970 study. A 1987 study noted some progress in reducing flooding by a **sewer** separation program but also that a considerable area still needed remedial measures estimated to cost $7.75 million.

The trial judge found that the City had not completed the **sewer** separation program for lack of funds. He found the City acted on the recommendation about rainwater leaders in 1985 when it passed a by-law directing disconnection and prohibiting further connection. The City, however made no effort to enforce the by-law and its inactivity was unexplained. The trial judge found that the ongoing connection of the rainwater leaders was an effective cause of the overloading that caused the June 1991 flooding and that the City was liable in negligence for its failure to enforce the by-law. The trial judge also found the City liable in nuisance and found against the defence of statutory authority because the flooding was not the inevitable consequence of the construction of the two **sewers** based on the state of knowledge at the time of construction.

The claims of E and B related to waterpipe failures from corroding iron pipes. The water main that burst to flood the Es' basement was installed in 1909 with a latent defect that should have been discovered at the factory. The trial judge found the City liable in nuisance.

The water main that burst to flood B's basement had been installed in 1956 with provincial approval of the location and manner of installation. The main likely burst because of the action of ground frost on the brittle cast iron pipe. The trial judge found the City liable in nuisance to B and refused to find inevitable consequences because the City did not meet the onus of showing that the incident did not arise from improper installation. The City appealed.

Held, the appeals should be dismissed.

For the O and N claims, the defence of statutory authority is immaterial if the flooding was not the inevitable consequence of the original construction of the two **sewers.** Here, the extensive paving of streets, the increased density of development, the use of rainwater leaders and weeping tiles contributed to the flooding. These fresh circumstances did not relate back to the original construction. There was no basis in this case for a finding of inevitable consequences from the original construction, and the trial judge was correct in finding the City liable for damages for nuisance. As to the claim in

negligence, the potential for flooding was known and yet the municipality failed to follow through with enforcement of the by-law. There was no evidence that a considered policy decision not to enforce the by-law was made by the City; there was no evidence that any consideration was given, and there was thus the basis for a successful claim in negligence.

In the E case, the cause of the burst was a flawed pipe for which the City was not responsible. Nonetheless, it is not the expected consequence of any municipal water system that its components will be flawed and cause damage, and the City was liable in nuisance.

In the B case, it was appropriate to place the burden of disproving that the flooding did not arise from improper installation on the City. It must be remembered that this was a common law nuisance and that protection from liability for its consequences must be strictly limited. Otherwise, there is no monetary incentive for conduct which minimizes risk of damage to others.

Cases referred to

Anns v. Merton London Borough Council, [1977] 2 All E.R. 492, [1978] A.C. 728, 141 J.P. 526, [1977] 2 W.L.R. 1024, 121 Sol. Jo. 377, 75 L.G.R. 335 (H.L.); Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, 29 C.C.L.T. 97, 26 M.P.L.R. 81, [1984] 5 W.W.R. 1, 66 B.C.L.R. 273, 54 N.R. 1; Manchester Corp. v. Farnworth, [1930] A.C. 171, [1929] All E.R. Rep. 90, 99 L.J.K.B. 83, 94 J.P. 62, 46 T.L.R. 85, 73 Sol. Jo. 818, 27 L.G.R. 709, 142 L.T. 145 (H.L.); Tock v. St. John's Metropolitan Area Board, [1989] 2 S.C.R. 1181, 64 D.L.R. (4th) 620, 104 N.R. 241, 1 C.C.L.T. (2d) 113, 47 M.P.L.R. 113, 82 Nfld. & P.E.I.R. 81, 257 A.P.R. 181; Toronto (City) v. Polai, [1970] 1 O.R. 483, 8 D.L.R. (3d) 689 (C.A.), affd [1973] S.C.R. 38, 28 D.L.R. (3d) 683

Statutes referred to

Ontario Water Resources Act, R.S.O. 1990, c. O.40, s. 59

Appeals from a judgment of Kurisko J. (1995), 24 M.P.L.R. (2d) 25 (Gen. Div.), for the plaintiffs in actions for damages for negligence or nuisance.

Michael Royce, for appellant.
Brian T. Daly and Laird **Scrimshaw,** for respondents.

The judgment of the court was delivered by

CARTHY J.A.: -- This is an appeal from a decision concerning the liability of the City of Thunder Bay (the "City"), in nuisance and in negligence, for damages caused by flooding to the basements of local residents. Four representative claimants brought the action as a test case and it is the apparent intention of the parties that the outcome of this case will determine the allocation of responsibility as

between the municipality and the other home-owners involved.

For the purposes of this decision it is necessary to make the following distinction between the claimants:

The **Sewer** Cases

The Oosthoek and Nadeau claims relate to damage caused by flooding which occurred during a heavy rainstorm on June 26, 1991. On that day, approximately 200 basements were flooded, largely as a result of a backup in the City's sanitary and storm **sewers** which were constructed by the former City of Fort William early in this century.

The Water Cases

The claims of the Bennetts and the Edwards relate to various waterpipe failures experienced by the City in recent years arising out of bursting, leaking or corroding cast iron pipes which were installed prior to 1970. Many of these problems have resulted in water damage to private property.

After a trial of these four cases, largely based on an agreed statement of facts and documents, Kurisko J. found the City liable in the **sewer** cases both in nuisance and negligence and liable in the water cases in nuisance.

The factual background and issues are comprehensively canvassed in the reasons of the trial judge reported as Oosthoek v. Thunder Bay (City) (1995), 24 M.P.L.R. (2d) 25. This enables me to repeat only those facts that are necessary to an understanding of these reasons and to touch upon the issues only as is necessary to identify a difference of viewpoint or emphasis.

The **Sewer** Cases

The **sewers** that caused the problems are combined **sewers,** that is, they receive both waste water from homes and storm runoff. The combined **sewers** that caused the Oosthoek and Nadeau floods were constructed in 1907 and 1925 respectively. The only notable difference between the two **sewers** is that the City was able to document provincial approval for the plans of the Nadeau **sewer** pursuant to the then applicable statute, but it could not find similar documentation for the Oosthoek **sewer.** This distinction led the trial judge to find statutory authority for the construction of one but not for the other. As will be indicated later, I do not consider that the issue of statutory authority needs to be dealt with on the appeal in light of my conclusions with respect to the doctrine of inevitable consequences. Therefore, I do not elaborate further on the facts or statutory basis for these findings.

It appears that the problem of sewage water flooding into basements was first officially identified in a 1965 engineering report undertaken for the City of Fort William. The report pointed out that flooding is generally caused by a large volume of water reaching the **sewers** within a short period of time. The report also noted that the City's continued paving program and the expansion of the City's drainage area for new development eliminated absorptive soils and, consequently, increased the quantity of

water and accelerated its movement toward the **sewers.**

Another contributing factor was that houses had typically been built with rain water leaders, pipes down the side of a house which direct water from the eavestrough into the house connection and ultimately to the combined **sewer.** If those leaders were to be disconnected from the **sewer** line, dispersing the water in the yards adjacent to the houses, the surge during a storm would be lessened. On this basis, the report recommended the construction of storm relief **sewers,** the disconnection of rainwater leaders and the consideration of storm drainage requirements prior to the commencement of a paving program. Those recommendations were repeated in a 1970 study by the same engineering company.

In a 1987 study conducted by another engineering company for the City it was noted that the **sewer** separation program which had been commenced in the 1960s had succeeded in reducing the number of basement flooding problems but that a considerable area of the City still required remedial measures. The engineering company estimated the cost of such measures at up to $7.75 million.

The trial judge found that the only reason the City had not completed the **sewer** separation program was lack of funds. However, despite the 1965 recommendations concerning the disconnection of the rainwater leaders, it was not until 1985 that the City passed a by-law directing that rainwater leaders then installed be disconnected and prohibiting any future connection. The by-law further directed that weeping tiles be disconnected from the house connection and that no further weeping tiles be connected to the storm **sewer,** again to ensure the maximum usage of unpaved areas for absorption of water during peak flows. The by-law contemplates that disconnections are to be at the cost of the home-owner and the evidence was that no attempts were made to enforce the by-law despite the fact that by-law officials recognized, from the outward appearance of homes, that disconnections had not been made.

With respect to the Oosthoek and Nadeau floods, the trial judge found as follows at p. 42 of his reasons:

> The reason the **sewer** surcharged and flooded on June 26, 1991 was that the combined sanitary storm **sewer** system did not have the capacity to handle the additional water from the rainstorm of that date. There is no evidence there was any obstruction in any **sewer** pipe which caused the backups.
>
> Although the City believes the triggering event that overloaded the combined **sewers** was the intensity of the rainfall on June 26, 1991, it does not say the rainfall was a storm of unforeseeable intensity.

And he further found at pp. 59-60:

The enactment of the rainwater roof leader by-law was a policy decision to regulate the connection of rainwater leaders to the combined **sewers** as part of the operation and maintenance of the sewerage system. In coming to this conclusion, I apply the following words of Wilson J. in Kamloops:

. . . it is fair to say the City of Kamloops had a statutory power to regulate construction by by-law. It was in its discretion whether to do so or not. It was, in other words, a "policy decision."

It is apparent from the Agreed Statement of Facts the rainwater leaders continue to be a cause of the overloading of the combined **sewers** [the trial judge then quoted from the agreement as follows]:

The City acknowledges that the connection of roof leaders allows rainfall immediate and direct access to the **sewer** via the house connections and enhances the risk of basement flooding during high intensity rainfall. It is the view of the City Engineering Department that a high intensity rainfall can surcharge the sanitary system (with resultant flooding of basements) by reason of the direct access rainfall has to the sanitary **sewer** through illegal roof leaders flowing into the house connections.

There is a further admission that enforcement of the by-law is the responsibility of the City, and that in the years after 1985 employees of the Thunder Bay engineering department have observed roof leaders connected to house connections." There is no evidence to support a finding the City gave any consideration to enforcement of the by-law, and decided against doing so on policy grounds (i.e., "policy considerations at the secondary level," per Wilson J. in Kamloops.)

I find the ongoing connection of rainwater leaders to the combined **sewers** was an effective cause of overloading the combined **sewers** during heavy rainfalls. I also find the City failed to take any action to enforce its policy decision to prohibit connection of rainwater leaders to the combined **sewers.**

The lack of evidence of any reason for this inaction permits me to conclude there was no reason for the inaction. Inaction for no reason cannot be a policy decision taken in the bona fide exercise of discretion. The City did not act with reasonable care, and the conditions for liability of the City to the Plaintiffs have been met.

> The City was negligent in the operational enforcement of the rainwater roof leader by-law, as a result of which the rain from the rainwater leaders continued to be an effective cause of overloading the combined **sewers** during the heavy rainfall on June 26, 1991. Such negligence is not immune to tortious liability.

(Kurisko J.'s emphasis; footnotes omitted)

No appeal is taken from the trial judge's finding that the City's decision, to proceed with the separation of the **sewers** as funds become available, protects it as a policy decision against liability for negligence according to the principle expressed in Kamloops. However, the finding of negligence on the ground that the building by-law inspectors failed to enforce the by-law is under appeal. I will deal with negligence after speaking to the claim for nuisance.

Nuisance

In dealing with the claim for nuisance the trial judge found that the Nadeau **sewer** was constructed pursuant to statutory authority but that the City had failed to meet its onus of establishing, by appropriate documentation, that the Oosthoek **sewer** was so constructed. In the course of his reasoning, he considered the effect of s. 59 of the Ontario Water Resources Act, R.S.O. 1990, c. O.40, which provides for circumstances in which sewage works may be deemed to have been constructed in accordance with statutory authority.

For my part, I see more certainty in the application of the inevitable consequences doctrine to the facts of this case than in the significance of statutory authority as it may apply to a 1907 or 1925 event. If the flooding was not the inevitable consequence of the original construction of these two **sewers** then statutory authority is immaterial. Further, this approach eases the task of analyzing and applying the Supreme Court of Canada's reasons in Tock v. St. John's Metropolitan Area Board, [1989] 2 S.C.R. 1181, 64 D.L.R. (4th) 620. There is no true majority view expressed in that case on the significance of statutory authority but there is consistency, on the subject of inevitable consequences, between the reasons of Wilson J., speaking for three members of the court and the reasons of Sopinka J., speaking for himself, which together make up a majority.

After referring to certain correspondence between a consultant engineer and the mayor of Fort William in 1912 and 1915, suggesting that the **sewers** at the time were adequate to meet future requirements, and emphasizing the importance of planning for future development, the trial judge found as follows at pp. 64-65:

> Indeed, the information gap extends from 1915 until the 1965 Wardrop Report, when, with the benefit of hindsight, it was established that developments subsequent to the installation of the combined **sewers** rendered them inadequate. The Agreed Statement of Facts sets out several factors that contributed to the overloading of the combined **sewers:** the number of new homes

> added to the system, water from rainwater leaders and weeping tiles connected to the combined **sewers,** paving of roads with curbs and drains that direct surface water during storms into the **sewers,** paving of private property (such as parking lots and laneways), all of which prevent absorption of rainwater into the ground and add to the flow of water into the streets, and hence into the catch basins. The foregoing is confirmed by the 1970 Wardrop Study and the 1987 Theil Study.
>
> In short, there is no evidence of the state of "scientific" knowledge concerning **sewer** design or the likelihood of flooding in the future at the time of installation of the Oosthoek and Nadeau **sewers.** Thus, there is no evidence that the flooding on June 26, 1991 was the inevitable result of the authorized location and manner of installation of these **sewers** at the time they were installed.

In Tock both Wilson J. and Sopinka J. relied upon the doctrine articulated by Viscount Dunedin in Manchester Corp. v. Farnworth, [1930] A.C. 171 at p. 183, [1929] All E.R. Rep. 90 (H.L.), (p. 1213 in Tock):

> When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

The appellant urges upon this court that we need not look for the precise thinking and knowledge of the municipal authorities at the time of construction of the **sewers** and can rather draw reasonable inferences as to what the municipal authorities probably knew at the time and the probability that they expected occasional **sewer** backups in the future. It is said that all of the evidence at trial indicated that occasional **sewer** backups and flooding have always been inherent in undivided **sewer** systems. That might be arguable if floodings were occasional and there were no change in the facility or the environment to markedly alter the utility and functioning of the **sewers.**

A dam built across a river valley will inevitably flood a portion of the valley and that would be a clear case of statutory authority protecting against damage claims. However, if subsequent unanticipated events cause a surcharge of water overflowing the dam the increased flooding is not the inevitable consequence of the original construction.

Similarly here, the extensive paving of streets and other surfaces, the increased density of development, and the use of weeping tiles and rainwater leaders connected to the **sewers** have all to the knowledge of the City contributed to the surcharge during extensive storms and have brought about flooding. These are all fresh circumstances arising from the development of the infrastructure of

a municipality over many years and they do not relate back to the original **sewers** and their construction designs, nor could they have been foreseen by any possibility in the proportions reflected in the 1965, 1970 and 1987 reports. In my opinion, there is not even the beginning of a basis for establishing inevitable consequence on the facts of this case, let alone one in accordance with the strict onus upon the municipality referred to in the reasons of Sopinka J. in Tock.

I am therefore in agreement with the trial judge that the municipality is liable to the plaintiffs Oosthoek and Nadeau for damages for nuisance.

Negligence

Given this finding on nuisance, it is not necessary to deal with the trial judge's findings of negligence in order to deal with the claims arising from the **sewer** backups. However, I will express a few words on this subject in deference to the fact that these are presented as test cases and because, according to counsel's statement, the municipality, its taxpayers, and their respective insurers, are seeking a rational and fair approach to the allocation of responsibility for this type of incident.

The potential for this nuisance was not hidden from view. Since at least 1960 it was known that drain connections were an aggravating factor which would likely be a contributing cause to future floodings. The municipality recognized this fact and passed a by-law in 1987 with a specific purpose of avoiding the danger. However, it was only if a large number of drainpipes were disconnected that the danger could be allayed and, thus, only the municipality could respond effectively. The duty was recognized, the ambit of risk and the persons who could suffer foreseeable harm was clear. Yet the municipality failed to follow through with enforcement of the by-law.

In Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, Wilson J., speaking for the majority, applied the judgment of the House of Lords in Anns v. Merton London Borough Council, [1977] 2 All E.R. 492, [1978] A.C. 728, in finding a municipality liable for a failure of its building inspectors to enforce the building by-law. It was held that the building inspectors' duty to enforce the by-law was an "operational" duty as opposed to a policy decision that would stand in the way of a claim of negligence against a municipality.

The appellant in this court argues that in Kamloops the by-law imposed a mandatory duty on the inspector to enforce the by-law, whereas the Thunder Bay by-law simply gives the inspector a power to act. That distinction cannot have been intended to affect the general principle because in the Anns case itself the inspector had only a power to act. In dealing with the judgment of Lord Wilberforce, Wilson J. said at p. 10 of Kamloops:

> He then dealt with the argument that where the local authority is under no duty to inspect but merely has a power to inspect, it can avoid liability for negligent inspection by simply deciding not to inspect at all. He pointed out that this overlooks the fact that local authorities are public

> bodies operating under statute with a clear responsibility for public health in their area. They must, therefore, make their discretionary decisions responsibly and for reasons that accord with the statutory purpose. They must at the very least give due consideration to the question whether they should inspect or not and, having decided to inspect, they must then be under a duty to exercise reasonable care in conducting that inspection.

The appellant also makes reference to Toronto (City) v. Polai, [1970] 1 O.R. 483, 8 D.L.R. (3d) 689 (C.A.), affirmed [1973] S.C.R. 38, 28 D.L.R. (3d) 638, where this court held that a municipality has no obligation to enforce its by-laws. The case concerned Toronto's maintenance of a list of zoning by-law offenders against whom no prosecution should be brought. In my opinion that judgment is not inconsistent with the judgment in Kamloops, supra. Neither the present case nor Kamloops tests the general obligation to enforce by-laws. It can be said that the City has the right not to enforce its by-laws and, yet, unless that decision is made at the policy level, its failure to do so may give rise to a claim for damages by someone to whom a duty is owed and who is within the ambit of risk of harm by reason of that failure. The Toronto (City) v. Polai decision was not concerned with damages for negligence.

The City's inspectors knew the purpose of the by-law and they knew of the offences. There is no evidence that any consideration was given to the question of enforcement or nonenforcement, and, as expected, the offending drains contributed to the flooding. I agree with the trial judge that this founds a claim in negligence.

The Water Cases

In November 1990 a water main burst flooding the Edwards' basement. The main had been installed in 1909 pursuant to legislation authorizing a municipality to install water systems and prior to the enactment of legislation requiring the municipality to obtain provincial approval of plans for the installation. The trial judge found that the cause of the break was a latent flaw that should have been discovered at the factory but that was not detectable by visual inspection at the time of the installation.

The Bennett appeal concerns a water main which burst in February of 1993, flooding the Bennetts' basement. That main had been installed in 1956 pursuant to legislation which did require provincial approval of the plans. Relying upon the agreed statement of facts the trial judge found at p. 69 of his reasons that:

> . . . it is most probable that the action of frost in the ground exerted forces on the unfrozen soil surrounding the buried pipe. The buried pipe likely became subject to a force which snapped the brittle cast iron pipe.

However, as pointed out by the trial judge at p. 75 of his reasons:

> This does not preclude the pipe bursting as a result of the frost acting on improper installation, soil conditions, or settlement of the ground.

In respect of both of these water main cases the trial judge canvassed all of the issues raised in the **sewer** cases including: the City's failure to upgrade its system in accordance with Ministry guidelines in 1979; the budget restraints preventing it from doing so; the defence of statutory authority; and the history of frequent and regular water main bursts both in Thunder Bay and in municipalities throughout Canada. He concluded that the City was liable in both cases and summarized his conclusion at p. 75 of his reasons as follows:

> The defence of policy decision protects the City against negligence, if any, for failure to upgrade the water system in accordance with the higher standards that have been developed since the water mains were originally installed. The defence of statutory authority fails in the water cases because the City has failed to establish that the broken water mains were the inevitable consequences of the installation of these water mains. In addition, in Edwards, the City has failed to prove the location and manner of installing the water main was carried out in accordance with specific statutory requirements.

To uphold the finding of liability it is only necessary for this court to conclude that the trial judge was right in his conclusion that inevitable consequence had not been established. If so, liability flows in nuisance no matter what test for statutory authority is applied and the claim in negligence is unnecessary.

In the Edwards case the conclusion is in my opinion obvious. The cause of the burst was a flawed pipe for which the City bears no fault. Nonetheless, it is not the expected consequence of any municipal water system that its components will be flawed and cause damage. This is a classic case of nuisance for which the City must bear responsibility.

The Bennett case presents more difficulty because there was provincial approval of the location and manner of installation of the system (assuming, without deciding, that legislation contemplating an approval process can be equated to legislation conferring an authority which is itself specific as to the manner and location of doing the authorized act) and the trial judge found that the bursting of pipes is inevitable in a waterworks system. Notwithstanding that finding, the trial judge refused to find inevitable consequence because the City failed in its burden of proof of demonstrating that this incident did not arise from improper installation.

As observed earlier, there are sharp divisions between the three sets of reasons of the Supreme Court of Canada in Tock v. St. John's Metropolitan Area Board, supra. However, only Sopinka J. speaks specifically of the burden of proof, at p. 1226:

> The burden of proof with respect to the defence of statutory authority is on the party advancing the defence. It is not an easy one. The courts strain against a conclusion that private rights are intended to be sacrificed for the common good. The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

In my view this strict burden is appropriate, even where, as here, the municipality is deprived of any ability to defend itself because time has deprived it of whatever evidence might have been available to establish inevitability. It must be remembered that this is a common law nuisance and that protection from liability for its consequences must be strictly limited. Otherwise, there is no monetary incentive for conduct which minimizes risk of damage to others. I made earlier reference by way of example to the dam which floods the valley. The burden of proof may well restrict protection against liability to comparably clear examples of inevitability.

For these reasons I would dismiss the appeals with costs.

Appeals dismissed.	

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