

witnesses' expenses. If the parties are unable to agree, costs, disbursements and expenses are to be fixed by the High Court.

REASONS

Randerson and Harrison JJ [1]
Hammond J [133]

RANDERSON AND HARRISON JJ

(Given by Harrison J)

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Introduction

[1] One evening in February 2004, during a period of prolonged and heavy rainfall, a large slope collapsed into a gully in a rural area in Taranaki. The landslide occurred mainly within a property owned by the respondent, Brian Street. But it encroached upon the common boundary of an adjoining property owned by the appellant, Michael Brouwers and his former wife, Patricia, causing some of their

land to subside also. The Brouwers had nearly completed construction of a new home in an area physically adjacent to the landslip area. As one expert observed after the slip, the house was “perched on the edge, it looked precarious”.

[2] As a result of the landslip, the local authority would not issue a Certificate of Code Compliance for the Brouwers’ building without an engineer’s confirmation of land stability. Because they were unable to afford the cost of erecting a retaining wall, the Brouwers sold the property at a price substantially less than its notionally unimpaired market value. They sued Mr Street in the High Court, claiming damages for the amount of the shortfall on sale. They alleged that Mr Street’s commission of the torts of removal of support, negligence or breach of statutory duty caused their loss. In a reserved decision delivered following trial at New Plymouth, Andrews J dismissed all three claims.¹ In this Court, Mr Brouwers has confined his grounds of appeal to the first two causes of action.²

[3] The fate of Mr Brouwers’ appeal will be materially influenced by our conclusion on the cause of the landslip. Was it caused, as Mr Brouwers alleges, by the failure of a critical component of a drainage system erected on Mr Street’s land which had the effect of sluicing away his right of lateral support? Or was it caused, as Mr Street asserts, by the forces of nature and in particular severe rainfall?

Background

[4] We have drawn upon Andrews J’s narrative to prepare a truncated summary of the background circumstances for our purposes.

[5] Mr Street owned and occupied a rural property at Surrey Hill Road, inland from Oakura and situated on the northern slopes of the Kaitake Ranges, to the west of Mt Taranaki. Mr Street and a friend had acquired the property from his parents in 1988. In its original state the area of the property was more than 22 hectares and included a pond which Mr Street’s parents had created in the area of an existing watercourse. The pond was a dam-like construction which was drained through a

¹ *Brouwers v Street* [2009] NZRMA 500 (HC).

² Mrs Brouwers was originally a party to the appeal but was given leave to withdraw on 13 July 2010. Counsel did not suggest that her withdrawal was relevant to determination of Mr Brouwers’ appeal.

combination of logs and earth, laid as a platform allowing water movement underneath and over the top as a ford when there was heavy rain.

[6] In 1995 Mr Street and his friend physically subdivided the land. Mr Street took the property to the north and his friend acquired an area to the south including the pond. Mr Street then constructed an access-way to his property off Surrey Hill Road following the route of a cattle track.

[7] Construction of the access-way required Mr Street to alter the drainage from the pond. He dug an open channel on either side to channel water from the pond across the access-way at a point further in from the road, and on to another channel. Later in 1999 and 2000 Mr Street decided a more permanent solution was required. He installed an 800 millimetre steel culvert under the access-way so that it could be metalled. The pipe then led to the existing channel. From there the water was conveyed by a flume, which was an open, artificial water chute constructed of corrugated iron, at a 34° angle down a large bank into a gully filled with native bush. This was the bank which later collapsed. The effect of Mr Street's work was to divert the outlet away from its existing course by 30 metres to directly above the site of the slip.

[8] Mr Street constructed the entire system. It was, as his counsel, Ms Susan Hughes QC observed, of a tripartite nature. The first part was the existing drainage channel from the swamp. The second part was the steel culvert. The third part was the channel's continuation into the flume. The flume, and the integrity of its right-angled concrete join to the channel, assumed central importance to the Brouwers' case.

[9] In 2001 Mr Street subdivided his land. He sold a one hectare block to the Brouwers on the western or Surrey Hill Road side. Mr Street purposely aligned the block's south-eastern boundary to ensure that the channel and flume drainage system remained on his land.

[10] Mr Brouwers, who is a builder, decided to construct an adobe or mud brick style dwelling on a site not far from and above the bank which later collapsed. He

had earlier removed a row of 20 to 30 pine trees from near the eastern boundary and planted some natives there. Because the proposed dwelling was close to the south-eastern and south-western boundaries of the Brouwers' property, adjoining Mr Street's property, the Taranaki District Council required the Brouwers to obtain Mr Street's approval before it would issue a building consent. Mr Street advised the Brouwers of a slip which had occurred earlier at the point of the original drainage from the pond but, nevertheless, gave approval. Mr Brouwers then commenced construction of the dwelling and also erected a water tank, pump shed and septic tank soak pit nearby.

[11] In February 2004, just before Mr Brouwers had completed construction of his dwelling, NIWA recorded rainfall at New Plymouth airport of 398 millimetres. This reading was 416 per cent of normal and the second highest monthly rainfall since records began in 1863. It was agreed that, because of its elevation, rainfall at Surrey Hill Road would have been greater than that recorded at New Plymouth airport.

[12] One of the heaviest days of rainfall was on 28 February. Mr Street, who has lived in the area for most of his life, said that it rained for 24 days continuously at Surrey Hills. Mr Street inspected the flume at about 7 pm on 28 February. His evidence, noted by Andrews J, was as follows:³

I found a water course that was flowing like I've never seen water before. There was so much rain the flume appeared to have been working sufficiently to handle that [but] it was at its maximum. ... I did venture down beside the flume and while doing that wanted to get the hell out of there straight away because the water under foot was soggy, the footing under ground was so muddy that with surface water running off it was hard to get a decent footing on that side of the bank. ... The water in the ground was loaded up with surface water and the amount it was still raining over top.

[13] Mr Brouwers felt a "land movement tremor" at about 9 pm that evening. There was "a very sharp movement and a thud". He went outside and found "considerable subsidence right behind the barn". He and his family then left the property because they believed it was unsafe to remain.

³ At [39].

[14] On 29 February a geologist, Mr Karl Browne, visited the site. He was impressed by the huge size of the slip. He noticed “a massive amount of earth had moved down into the valley”. He observed that it was very close to the house which was perched on the edge and looked precarious. The western end of the landslip had encroached between one to two metres onto the southern corner of the Brouwers’ property, near where their new house was erected. Mr Browne was briefed later as an expert for the Brouwers.

[15] Later, on 10 March, Mr David McKay, a consulting engineer retained by the New Plymouth District Council, visited the site. He observed that the channels and culvert of Mr Street’s drainage system had accommodated the flow of water without overtopping. But he saw that the flume had collapsed. All its materials of corrugated iron and wooden trestles were at the toe of the slip. Mr McKay described the slip itself as a circle type failure where a slope fails by rotating round a fixed point. The head scarp was up to 10 metres high. Its shape approximated an arc, and extended to the base of the gully floor. Mr McKay, too, was later briefed as an expert by the Brouwers.

[16] The Brouwers sought quotes for the remedial work necessary to satisfy the local authority’s requirements. Four options for constructing retaining walls were obtained. The prices ranged between \$41,000 and \$82,000 but Mr Brouwers was advised that the cost could quadruple. The Brouwers were unable to secure a fixed price for the remedial work or a guarantee of its quality. So they sold the property by tender for \$255,000 a year after the slip.

[17] Mr Kelvin Gifford, a valuer, assessed the property’s market value immediately prior to the slip at \$450,000; and its hypothetical value as at 31 January 2005, assuming the slip had not occurred, at \$515,000. At trial the Brouwers quantified the loss in value of the property at \$260,000, although the statement of claim put the loss at \$295,000. They also claimed additional special damages of \$6,495 and general damages of \$50,000.

Causation

Introduction

[18] Identification of the mechanism which caused the landslip was critical to the Brouwers' case. Was the operative cause a failure of the flume, or a severe rainfall event? Did the flume fail first causing the slope to collapse? Or did the slope fail first causing the flume to fail?

[19] While an inquiry into causation normally follows the negligence assessment, it was not possible to divorce one from the other in this case, as Andrews J herself recognised in this brief conclusion when determining two of the Brouwers' allegations of negligence:

[145] With respect to the February flume, there was considerable dispute between the expert witnesses as to the "order of failures". Mr Chapman and Mr McKay contended that the flume had failed first, resulting in water being discharged directly onto the bank, causing it to be scoured (by the "sluicing" effect of the force of water hitting the bank) and then triggering the slip. Mr Barbarics contended that the flume failed at the same time as the bank. Mr Barbarics said there was no evidence of "sluicing". While Mr Chapman agreed that the photographs did not demonstrate sluicing, he responded to a question put to him in re-examination that evidence of sluicing would be hidden or eliminated by the subsequent slip.

[146] Having considered the evidence, I am unable to conclude, on the balance of probabilities, that the channels and February flume failed first, causing the bank to be scoured, resulting in subsidence and the slip. Accordingly, I cannot find this particular of negligence proved.

[20] Andrews J found that the Brouwers' claim did not satisfy the threshold elements of liability on either of the relevant causes of action of removal of support and negligence. We appreciate that she therefore considered it unnecessary to address the consequential element of causation.⁴ However, we believe the causation dispute lay at the heart of the case. The Brouwers would have lost summarily unless they proved that failure of the flume was a substantial or operative cause of the landslip. If the Court found that the slip did not result from human intervention but

⁴ At [148].

instead from a natural event such as heavy rainfall, the Brouwers' claim would be at an end, rendering an inquiry into liability superfluous.

[21] With respect, it would have been of assistance to us if Andrews J had not confined herself to a brief conclusion based upon the Brouwers' failure to discharge the burden of proving causation. That may have been the appropriate response to an absence or paucity of evidence or to the provision of inherently weak or implausible evidence by the party carrying the burden of proof. But in this case there was a considerable body of conflicting factual and expert evidence. It required a careful evaluation, followed by a reasoned conclusion on causation either as a primary ground for dismissing the Brouwers claim or against the contingency of an appeal on the ground that the Judge erred on liability in law or fact. Its absence leaves us with the difficult choice between remitting the proceeding back to the trial Judge for further findings or making our own assessment of the evidence.

[22] We raised this issue with counsel following Mr Gudsell QC's criticism of the Judge's omission to determine causation. Both opposed remission of the proceeding back to the High Court. We shall undertake the necessary evaluation afresh, based solely on the record and without the benefit of seeing and hearing the witnesses. On the other hand, no issues of reliability or credibility are apparent from the transcript. It is a matter of analysing all the relevant evidence.

[23] Because the landslip swept away much of the relevant physical evidence, the causation inquiry is necessarily a reconstructive exercise. Both sides called experts whose opinions merit careful examination. The Brouwers' experts focused on the integrity of Mr Street's drainage system and, in particular, the flume.

The Brouwers' experts

[24] Mr John Chapman was the first of the Brouwers' three experts. He is a consulting engineer in private practice in New Plymouth. He worked for local authorities for seven years before setting up a private practice in 1981. He has over 25 years experience in investigating landslips in the Taranaki area.

[25] Mr Chapman addressed the causes of the 28 February 2004 subsidence. His inquiry involved an understanding of the mechanisms of soil stability, fluid mechanics and hydrology. He originally inspected the site on 1 March 2004 and reviewed the drainage system. He noted as follows:

The open drain was flumed from the top of the slope of the embankment down to the valley floor by folded corrugated sheeting secured by driven timber stakes. The existence of a water supply extraction at the right angle bend immediately prior to flume entry (being the water supply pipe covered by the easement), in my view offers the possibility of scouring of the backfilled trench as a further point of vulnerability to the containment of channel flows.

[26] Mr Chapman concluded:

The subject hillside had been saturated by heavy rain. The large flow from the open cut drain will have caused the failure of the flume due to any or all of the following:

- Localised bank failure causing loss of the entry structure between the open drain and flume due to scouring along water supply trench for the easement.
- Due to the right angle entry to the flume the momentum of water flow would generate a standing wave to the outside of the curve potentially overtopping the entry structure causing scour of the entry structure and flume supports.
- Failure of structural supports and flume jointing i.e. overcome by weight of water.
- Over topping or leakage would have rapidly scoured supports allowing the full flow of water to cascade down the slope.

[27] In Mr Chapman's opinion the flume suffered a tensile failure due to a significant water flow within it, leading to sluicing of the lower valley sides and failure of the upper slopes already under pressure from the elevated water table. The existence of an open drain cascading down to the valley floor would have had significant hydraulic sluicing power. Mr Chapman observed that, if the flume had remained intact or in place during the slip, it would have probably been lying in one place, rather than in many pieces at quite some distance.

[28] In supplementary examination-in-chief, Mr Chapman said this:

During heavy rainfall wetland levels will elevate but due to the short time or duration and the permeability of the soil, that is the ability of water to flow through the soil, I do not believe the actual rainfall event will have had significant effect on the free ground water surface. It is fair to say that the heavy rainfall over the preceding months will have elevated the moisture content of the soil within the slip zone but as such, not have added to the actual free ground water surface significantly.

[29] In the course of Ms Hughes' careful cross-examination, Mr Chapman repeated his opinion that, where there was a large flow of water at high velocity, the join between the channel and the flume would be under considerable and sustained pressure and would fail unless it was "very coherent". While the connection may act as a good seal, its capacity to restrain the flume from longitudinal movement would be minimal; and where it was suspended on framing which was not properly engineered, at the head of a 45° slope, the join would have offered little restraint to water flowing consistently at 300 litres per second (this flow-rate was assessed by Mr Browne and while it was questioned by Ms Hughes it was not contradicted by Mr Street's experts and we accept its accuracy). By comparison, the connection may well have survived if the surface was flat. The most likely cause of failure, in Mr Chapman's opinion, was the flume pulling away from its concrete encasement under intense water pressure.

[30] Much of Ms Hughes' cross-examination was directed towards the effects of rainfall and establishing possible inconsistencies between Mr Chapman's initial report in March 2004 and his evidence at trial, leading to this exchange:

Q. The duration of rain and intensity of it must surely have been factors for you to consider?

A. If we had the data we could do more detailed analysis the data was not available you look at the end result and say here is a slip with flume across it we've had a very large rainfall event. I have investigated a large number of slips in Taranaki over last 25 years. The majority of causes are water whether it be from soakage pits, rainwater tanks, downpipes, over banks the majority of these slips are merely isolated surface slides. *The slip we have here is a large slip circle failure and requires more than a little bit of surface saturation to generate the slip.*

(Our emphasis.)

[31] Later Ms Hughes suggested to Mr Chapman that he was unable to exclude the possibility that the bank might have failed on 28 February irrespective of the flume. His response was that “that scenario is highly unlikely”.

[32] Mr David McKay was the Brouwers’ next expert witness. He is also a civil engineer in private practice. He works for a company which is owned by the two principal local authorities in Taranaki. He has over 33 years of civil experience. As earlier noted,⁵ he assessed the cause of the slip shortly after it occurred at the request of the New Plymouth District Council.

[33] In Mr McKay’s opinion, the channel would have accommodated the water flow without overspill. (Andrews J’s finding that the pipe and channel were capable of coping and did cope with the water flow was not challenged on appeal and is supported by the absence of evidence, as Ms Hughes emphasised, that the channel ever overflowed.)⁶ However, Mr McKay believed that the flume was not similarly capable; and that the location of the flume materials - the corrugated iron and trestles - at the toe of the slip indicated that they fell first with the slip bulldozing them ahead on collapse. In his view, consistent with Mr Chapman’s view, if the land had slipped first, the flume would have moved with it.

[34] Mr McKay described the likely mechanism in this way:

... The water squirts out between the corrugated iron joints - which in turn causes scouring around the base of the trestles. This results in a collapse of the flume mechanism, resulting in the water simply scouring out the embankment. The result is the hillside is undermined. The ash country in this area would scour out deep channels and the sides of the embankment have collapsed - as occurred in February 2004.

I am satisfied that the flume did give way on or about 28 February 2004, and that as a direct result of its failure, the embankment slipped, as depicted in photographs...

The result of the action of the water spilling out from the flume with force would have been to scour out the bank like the sluice guns used in the gold fields in the 19th century. The loss of earth from the bank under this sluicing effect would have undermined the foundations of the trestles holding up the flume, causing collapse. Sluicing of the bank would have continued at a faster rate with the loss of the flume and would have washed

⁵ See above at [15]

⁶ At [76],

the flume to the bottom of the bank. The loss of bank material would have destabilised the bank in the immediate area as the slope of the bank would have been steepened and the inherent support to the bank weakened. The loss of bank material would also have contributed to the lowering of the slope factor of safety to below unity allowing the bank to collapse.

The heavy rain, in itself, or in combination with the other factors noted above, would not, in my opinion, have resulted in the slip, unless the flume had failed. The flume's failure was the dominant factor leading to the slip.

[35] In Mr McKay's opinion the slip was caused by water saturation which arose in these ways:

... the construction of the channel and flume on top of the bank, and the trench for the pipe for the neighbouring water supply, have been the major point of ingress of water into the soil. Contributing causes will also be the naturally high water table coming from the swamp area to the southwest of the building site and to a lesser extent, the loss of pine trees and vegetative cover from the bank. ...

Mr McKay also expressed the view that by shifting the original drainage outlet Mr Street further contributed to the increase of saturation of the area in question and also the pore water pressure on the bank face. In the High Court, Andrews J rejected this contention, considering instead that the transformation of the pond to a swamp indicated a decrease in pore water pressure.⁷ This finding, which we accept, does not bear significantly on Mr McKay's overall conclusion that the slip was caused by water saturation in the area originating from components of Mr Street's drainage system.

[36] Ms Hughes also subjected Mr McKay to careful cross-examination. Much of it was devoted to the issue of negligence, which we will discuss later. Mr McKay confirmed to Ms Hughes, however, his opinion that the flume collapsed before the landslip, increasing considerably the existing scouring occurring at the flume outlet. That was because the water flowed directly on to the slope face, decreasing its strength. A channel would have been scoured, cutting into the surface of the slope.

[37] Ms Hughes explored possible inconsistencies between Mr McKay's original report and his brief of evidence. Mr McKay agreed with Ms Hughes that a number of other factors may have contributed to the slip. They included the slope steepness,

⁷ See [116].

its height, the existence of natural fill, the presence of ground water, a spring and rain. Mr McKay acknowledged that he had observed land-slippages where there were no flumes. Ms Hughes emphasised that the flume had been in place for eight years without a previous failure. However, Mr McKay rejected Ms Hughes' proposition that he was unable to say whether the bank might have failed on 28 February with or without the flume.

[38] Significantly, also, Mr McKay rejected Ms Hughes' proposition that Mr Brouwers' removal of the trees from the top of the bank, a water easement trench, and the water tank installed by Mr Brouwers contributed towards the slope failure. He did not accept that they created significant points of weakness. For example, he said, the weight of the water tank was one per cent of the soil which moved.

[39] Mr Browne was the Brouwers' final expert witness. Mr Browne first visited the site early on 29 February 2004 out of personal interest.⁸ He did not take photographs or make written notes at that time. He is a highly trained geologist in private practice who had previously worked for the Taranaki Regional Council as a scientific officer dealing with surface and ground water resources. He had reviewed the briefs of Messrs Chapman and McKay and of Messrs Stephen Barbarics and Mitchell Dyer, Mr Street's experts.

[40] Mr Browne visited the site again, in a professional capacity, in August 2007. He recorded that:

The present landscape was formed by successive accumulations of debris avalanche material sourced from the volcanic centre. This material occurs as a mixture of clay, sand, silt and bouldery andesite rubble. Humic soils develop throughout the catchment. The landforms are steep and undulating with deeply incised stream gullies. The steepest stream gullies contain thick native vegetation, while ridges and spurs in the catchment have been cleared for agricultural purposes.

[41] Mr Browne concentrated upon the role of the flume. He assumed that it could have failed at any point along its length, but most likely either at its entry or at the right angled bend. Mr Browne's opinion was as follows:

⁸ See above at [14].

Failure of the flume at either point would have resulted in water cascading from either the open channel or over the remaining section of flume towards the base of the bank. The intense flow will have begun to undercut and to undermine the soft sedimentary materials at the base of the slope. This mechanism is hydraulic sluicing.

During the peak flow conditions the undermining could have been rapid in the soft volcanic materials (i.e. tens of minutes to hours).

This finding is consistent with suggestions in two of the expert briefs that hydraulic sluicing occurred to undermine the base of the slope...

Undercutting of the bank continued until the flow receded. The intense nature of the rainfall event and the small catchment area suggest flow rise and recession rates would have been very rapid. With the rapid flow recession the slope was left undercut and hanging.

Over the ensuing period (in the range of minutes to hours) the weight of the hanging bank gradually overcame the shear strength of the materials. A point was reached where the strength of the volcanic materials failed to support the weight of the hanging slope, and the slip was triggered as a single event.

Debris from the sluiced bank was washed away downstream in the torrent.

I consider that the slip occurred after the undercutting was initiated and as a direct result of it. As to when it occurred, it is consistent with my observations to consider that it did so as the flows in the tributary were receding.

[42] Mr Browne also described the events which in his opinion led to the failure as follows:

The effect of diverting the tributary [the tributary was diverted away from its natural course by some 30 metres to directly above the site of the slip]⁹ was to raise the level of the water table in the wetland and in the immediate down-gradient area. This area included all that part of the head of the gully near or closest to the site of the slip. That is, the true left hand side of the gully. There would not have been a similar raised water table on the true right hand side of the gully.

Steady rains in the months and weeks prior to the slip maintained the flow of water through the greater catchment, into the wetland and onto the flume via the culvert. It maintained the saturation of the soils in a lower level of the catchment ... at field capacity or close to it. It maintained the water table which had been raised by the diversion. Raising the water table increased hydrostatic pressures in the saturated zone of the affected area and loaded the slope. The water table would have been sloped down-gradient. Peak flows in the tributary on 28 February 2004 caused the flume structure to fail. After the flume failed, flow was directed at the base of the slope on the true

⁹ See above at [7].

left bank of the gully where it eroded and undermined the softer volcanic materials.

[43] It is no disrespect to Ms Hughes to observe that Mr Browne did not significantly modify or revise his opinion during cross-examination. Again most of her questions were devoted to the effects of heavy rainfall. Mr Browne accepted that he did not undertake a detailed analysis of the rainfall data, working instead on NIWA records for the 24 hours preceding the slip. Also, while Mr Browne conceded that draining the pond would have decreased the pore water pressure, he considered that this reduction would not have been significant given the depth of the pond.

Mr Street's Experts

[44] Mr Street called two experts. Mr Stephen Barbarics was the first. He is a geotechnical engineer employed in private practice in New Plymouth. He has practised in that area for 17 years. He visited the site in September 2006.

[45] Mr Barbarics' written statement briefly rejected the thesis advanced by Messrs Chapman, McKay and Browne that the hydraulic sluicing effect of water flowing from the flume caused the toe of the embankment to wash away, leading to the collapse of the slope. His disagreement was based upon a review of the photographs; in Mr Barbarics' view they provided evidence of a deep seated rotational failure, starting at the top of the slope and following a line that approximates to an arc of a circle, travelling beneath the valley floor and appearing on the floor of the gully. This causes a steep back scarp, with the landslide toe uplifting the valley floor and rotating backwards. We observe that the Brouwers' experts described the collapse in similar terms.

[46] In Mr Barbarics' opinion the conditions for a landslide were in place prior to the date of the landslip. He considered this failure could be attributed to the filling of the gully where the landslip occurred. He found photographic evidence of filling at some stage over the original exposed slope, probably when the area was used for forestry, disrupting the natural flow of water from the gully sides and covering the spring which would naturally drain the wetland area. Mr Barbarics believed that

contributing factors included the exceptionally heavy rainfall, causing the pore water pressure in the already saturated soil to increase and decreasing the shear resistance of the soil within the slope.

[47] By way of interpolation, it should be noted that, while Ms Hughes had earlier questioned Mr Browne briefly about the influence of fill material, she did not seek his comment on Mr Barbarics' principal thesis of slippage caused by water saturation of non-natural fill. The experts had agreed prior to trial that there was up to a third of a metre of fill over the top of the slope and possible fill thick to the west head scarp but were unable to agree on whether it was non-natural or natural debris flow. Mr Browne saw no evidence in the soil profile exposed by the slope of non-natural alterations of cut or fill.

[48] Ms Hughes did not challenge Mr Browne's advice that the fill was of a laharcic or volcanic nature of great antiquity, leaving a stable landscape with strong materials formed from the framework of deposits. He accepted that the volcanic soil was of a patchwork nature. But that was because lahars originate from volcanic cones which flow down mountain slopes and, while initially confining themselves to stream channels, they eventually spread laterally. That spreading mechanism will incorporate different types of material.

[49] Mr Barbarics disagreed with Mr Gudsell's proposition that a failure of the flume elbow or join would have caused immediate scouring on the saturated bank. His rejection was based upon the absence of photographic evidence. However, Mr Barbarics later conceded the "distinct possibility" that water flowing at 300 litres per second out of the flume and over a two metre drop to the valley floor would have an ongoing eroding effect on the foot of the embankment; and that removal of material from the toe would have an effect on the stability of the slope, where it was already suffering saturation from heavy rainfall. Nevertheless, Mr Barbarics adhered to his original thesis that this mechanism would be contributory but not significant; if the contrary hypothesis of sluicing was correct, he said, he would have expected a more localised and shallow slip than the one which occurred - that is, a different failure mechanism within the slopes, manifested by sluicing from the channel which

was left within the debris. Mr Barbarics' position remained that rising pore water pressure in the slope was the primary factor.

[50] Mr Barbarics accepted, however, that, even if the flume had remained intact, discharge of water at 300 litres per second over a two metre drop "would have had a causative effect on the stability of the slope". Mr Gudsell referred to Mr Street's evidence that the flume was at maximum flow when he observed it at 7 pm on 28 February. Mr Barbarics acknowledged that in engineering terms a structure is at risk of collapse when working at its maximum capacity.

[51] Mr Mitchell Dyer also gave evidence for Mr Street. He is qualified in geography and other earth science based disciplines. He is employed as a senior environmental planner. His statement was brief. He focused more on the effect of structures on the Brouwers' land as possible factors contributing towards the slip.

[52] In Mr Dyer's opinion, based upon his observation of the nature of the slip and the alignment of the scarp, the line of weakness provided by decaying tree stumps together with the position and loading of Mr Brouwers' water tank were the two key factors in the nature and size of the slip and thus the position of the scarp. Although he is not an expert in this area, in Mr Dyer's opinion, based upon a post slip site inspection, the evidence was not indicative of slippage resulting from water scouring but rather mass failure.

[53] While we did not have the benefit of seeing and hearing Mr Dyer directly, we agree with Mr Gudsell that the transcript of his answers given under cross-examination suggests a degree of partiality or subjectivity. We add that Mr Dyer's expertise was of limited relevance to this evaluation.

[54] Both Messrs Barbarics and Dyer were of the opinion that Mr Brouwers' acts or omissions in a number of respects contributed towards the failure. However, we record that Mr Street did not plead contributory negligence. Nor did Ms Hughes direct argument towards that effect in either the High Court or on appeal.

Conclusion

[55] In our judgment, the evidence leads to an affirmative finding that the flume was responsible for the slope subsidence. We accept that the flume failed in one or both of the ways outlined by Messrs McKay and Chapman: either at its join with the channel, because of its inability to withstand the pressure of prolonged and sustained water flows; or because its trestles gave way as their foundations were progressively eroded by water escaping through or overflowing from the flume itself. Mr Chapman's evidence about the vulnerability of the joins to failure in these circumstances was not challenged or contradicted. Once the flume collapsed the water poured at high and concentrated velocity directly onto the exposed bank face, quickly creating a channel which scoured and then undercut the slope.

[56] This conclusion on the flume failure mechanism was reinforced, perhaps unintentionally, by Mr Barbarics. He said the storm was a one in 20 year event. As we shall discuss, Mr Street asserted that the flume was constructed to meet the local authority minimum standard for carrying water flows from a storm with a five year return period. Mr Barbarics also accepted that a structure under maximum loading is at risk of failure. On his analysis, the flume was carrying much more than its maximum design load, and for a prolonged period, thus increasing the likelihood of its failure.

[57] Mr Barbarics conceded the distinct possibility that water exiting at high velocity from an elevated level onto bare ground below, even if the flume had not failed, would have had a progressively eroding effect, thereby endangering the slope's stability. Mr Barbarics differed only from Messrs Chapman and McKay as a matter of degree, relegating this factor from significant to contributory in causative terms. It is apparent that we prefer the weighting given by Messrs Chapman and McKay.

[58] In our judgment, the opinions expressed by Messrs McKay and Chapman are also consistent with this circumstantial evidence:

- (1) The gully below the failed slope is of a generally similar gradient, appearance and geological composition to that of the failed area, but there were no other failures elsewhere in the gully or in the wider area surrounding the slip site.
- (2) The flume was situated at or near the centre of the failure area.
- (3) At the peak periods of rainfall preceding failure on 28 February 2004, water was travelling along the open canal into the flume at a rate of 300 litres per second.
- (4) The water exited from the flume outlet at a height of two metres above and directly onto the ground or valley floor.
- (5) Mr Street constructed the flume without formal engineering advice or assistance (but the structure was later approved by the Taranaki District Council) and his description is of a rudimentary structure. As described by Mr Brouwers, the flume was shoddy, with an existing crack in the concrete join between the connection and the structure itself.

[59] Mr Barbarics' contrary opinion that the presence of non-natural fill in the slope itself, compounded by the saturating effect of heavy rainfall, led to this failure, is strained and unconvincing. The other experts found little evidence of non-natural fill. Mr Barbarics' description of the alleged characteristics of the fill was conjectural. By comparison, Mr Browne's description, which was not challenged by Ms Hughes, was of stable volcanic soils, formed progressively by avalanche materials which, significantly, were of a permeable and free-draining nature. And we are unable to accept Mr Barbarics' view that the nature and scale of the slip were consistent with his opinion. We repeat that Ms Hughes did not seek Mr Browne's comment on Mr Barbarics' thesis. We prefer the evidence of Mr Brouwers' experts that the slip's magnitude and contour suggested the intervention of an extraneous trigger. In particular, we accept Mr Chapman's opinion, again unchallenged and uncontradicted, that, while the prolonged rainfall had elevated the moisture content

of the soil within the slip zone, it did not add significantly to the actual free ground water surface, which he described as “a little bit of surface saturation”.

[60] Ms Hughes emphasised in cross-examination and submissions in both Courts the effect of prolonged rainfall on or before 28 February. We accept, of course, that the heavy rainfall contributed to the collapse. On a ‘but for’ assessment, the embankment would not have failed without the rainfall. However, there was extensive rainfall elsewhere in the immediate and wider vicinity, without incident. In our judgment, the heavy rainfall created the conditions for failure, but was not the operative cause of the failure itself.

[61] We will address both causes of action in the light of our factual finding on causation.

Removal of support

High Court

[62] The Brouwers’ first claim, for commission of the nuisance of causing damage by removal of support, is based upon the principles summarised by Cooke J in this Court in *Blewman v Wilkinson* as follows:¹⁰

It has long been accepted that a landowner has a right to enjoy his own land in its natural state, unaffected by any act done by way of excavation on the adjacent or subjacent land. If and when an excavation which has interfered with the support of land by land causes damage by subsidence, the landowner for the time being has a right of action against the original excavator. Liability is strict in that negligence need not be proved...

[63] The Brouwers plead that both their land and the Streets’ land were in their natural state; that their land was supported by Mr Street’s land; and that Mr Street:

... by wrongfully altering and diverting the swamp outlet caused the water discharge from the outlet to remove from [the Brouwers land] its natural support.

¹⁰ *Blewman v Wilkinson* [1979] 2 NZLR 208 (CA), at 209.

[64] The Brouwers plead further that as a result of these allegedly wrongful actions, or in tortious terms the creation of a nuisance, part of their land gave way, subsided and slipped; their right of enjoyment of the land in its natural state was removed; and their land was diminished in value.

[65] In dismissing this cause of action Andrews J found as follows:

- (1) It was doubtful whether the Brouwers' land was still in its natural state following the construction of the barn, water tank and septic tank on the property, applying *Bognuda v Upton & Shearer Ltd*.¹¹ The question of whether, given this change from its natural state, the land would have subsided in any event was not addressed by counsel.¹²
- (2) While Mr Street's actions in digging the channels which conveyed water from the pond to the culvert, and from the pond to the flume, fell within the meaning of "excavation", that part of Mr Street's work probably coped with the water flow and thus there was no finding that this excavation work caused loss of support on the Brouwers' property.¹³
- (3) The flume, being a structure erected on the surface of the land, was not an "excavation", an essential element of the tort.¹⁴ Alternatively, the act of digging channels to form part of the system, facilitating movement of water down the flume structure, eroding the toe of the slip and leading to excavation by erosion, did not amount to such an "excavation".¹⁵
- (4) Even if there was an excavation in either of the ways alleged, it was undertaken at a time when Mr Street owned all the land; that is, prior to the subdivision and sale to the Brouwers. Accordingly, applying

¹¹ *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741 (CA) at 760.

¹² *Brouwers v Street* at [67]–[71].

¹³ At [72]–[76].

¹⁴ At [77]–[78].

¹⁵ At [79]–[82].

Blewman, the Brouwers had no cause of action based on work done before their acquisition of the property.¹⁶

Excavation

[66] Mr Gudsell attempted to bring Mr Brouwers' appeal within the *Blewman v Wilkinson* principles of strict liability by maintaining his primary proposition that Mr Street excavated his land by the act of constructing the drainage system as a whole. He submitted that Andrews J erred in limiting the scope of excavation to the physical area which Mr Street dug out for the channel. He challenged the Judge's finding that, because the channel coped adequately with the flow of water, Mr Street's excavation work did not cause loss. He advanced a thesis that, 'but for' creation of the channels, culvert and flume, there would have been no subsidence.

[67] We endorse Andrews J's rejection of Mr Gudsell's submission. Mr Street's construction of the whole drainage system was not as such the operative cause of subsidence. It did not operate to remove support from the Brouwers' land. The dominant factor, in causative terms, was the failure, in February 2004, of one element of the system - the flume – which was erected above the ground. As a result of this conclusion, we need not address the issue, which Andrews J determined in Mr Street's favour applying *Blewman v Wilkinson*, of whether the Brouwers had a right of action arising from Mr Street's construction of the drainage system well before they purchased.

[68] However, a more relevant issue emerged during Mr Gudsell's oral argument. It is whether the flow of water from the flume join, or over its sides or directly from its outlet, scouring out the bank with such force that it operated like a sluice gun (to use Mr McKay's description), amounted to a removal of support of the Brouwers' land. Ms Hughes submitted to the contrary, arguing that the act of removal must be deliberate, in the nature of an intentional excavation, and that strict liability cannot be imposed for an accidental or unintended failure of a structure.

¹⁶ At [83]–[90].

[69] We acknowledge the novelty of this proposition. But in our judgment, there is no reason in principle to limit strict liability to the act of deliberate excavation. The tort of removal of support is committed, for these purposes, when one property owner uses his or her land in a way that adversely affects the right of another to enjoy his or her own land. In cases of this nature, the law is concerned with the causal relationship between the operative fact or event of removal of support and its consequence or effect of physical damage. In most cases, the physical mechanism will be excavation by digging. However, there is no difference in principle if the loss of support arises from the scouring effects of drainage works constructed in the adjoining land. The focus is on the removal of support through non-natural means.

[70] In this case Mr Street constructed a drainage system on his land. He created the potential nuisance. He had control over the system's maintenance and operation. Failure of a component may have been accidental. But, in our judgment, if that failed component provided the removal mechanism which resulted in interference with the Brouwers' rights of enjoyment of their property, it does not matter whether the causative event is deliberate or unintended. Proof of fault is unnecessary.

[71] There is no New Zealand authority on this point. However, English authority appears to support our conclusion. In *Jordeson v Sutton*¹⁷ a gas company excavated its own land some six feet from the plaintiff's boundary (and over 13 feet from the plaintiff's houses) for the purpose of erecting a gasometer. While undertaking this activity, the company penetrated an underground stratum of quicksand or sand loaded with stagnant water, known as running silt, which extended under a property on which dwellings were erected. The process of pumping away the water from the excavation site caused withdrawal of a large quantity of the running silt from under the adjoining property, subsidence of the surface, and structural damage to the houses.

[72] The majority of the Court of Appeal in *Jordeson* (Lord Lindley MR and Rigby LJ) upheld an injunction issued in the High Court to restrain the gas company.

¹⁷ *Jordeson v Sutton* (1899) 2 Ch 217 (CA).

Lord Lindley MR cited with approval this passage from a decision of the Supreme Court of Massachusetts:¹⁸

Whatever may be true of percolating waters, we think that the defendants had no right to take away the soil of the plaintiff in land which they had not taken under the statutes, and that it is immaterial that the soil was removed by means of pumps from the trench into which it had fallen by its own weight, or had been carried by percolating water. We are unable to distinguish the case from one where the soil falls in from the surface in consequence of an excavation in the adjoining land. The plaintiff, if the facts be as he offered to prove, has been deprived of the lateral support of his land, in consequence of which the quicksand has run from under the surface of his land into the trench, and has been removed by means of pumps, and this has caused the surface to settle and crack. It was the duty of the defendants to prevent this in some manner, if they did not take the plaintiff's land.

[73] This passage, and its application by the majority in *Jordeson*, confirms that the removal mechanism does not need to be confined to digging. In that case the gas company did carry out excavation by digging. But the actual cause of subsidence was the discrete act of pumping away the running silt from the excavation site.

[74] Passages from the dissenting judgment of Vaughan Williams LJ in *Jordeson* may be read as restricting the tort to digging because that activity raises the obvious risk of subsidence.¹⁹ However, on analysis, the Judge was simply emphasising the difference between excavation by digging and extraction by water. That distinction was relevant given English authority to the effect that extraction of water could not amount to removal of support, based upon the landowner's absolute right to drain his own land as he saw fit and regardless of the consequences for others. That distinction is not at issue here.

[75] In *Brace v South East Regional Housing Association Ltd*,²⁰ the English Court of Appeal upheld liability where the causative event was not excavation but demolition of a house. That act did not of itself interfere with the plaintiff's right of support of its adjoining land. But the consequent exposure of the earth to the

¹⁸ At 240, citing *Cabot v Kingman* (1896) 166 Mass Rep 403 (SC), at 405 per Field CJ.

¹⁹ At 249–250.

²⁰ *Brace v South East Regional Housing Association Ltd* (1984) 270 EG 1286 (CA).

atmosphere and sun caused its dehydration, shrinkage and subsidence, and consequent damage to the plaintiff's house wall. Eversleigh LJ observed:²¹

It does not matter from a plaintiff's point of view that support is provided or upon what mechanism it depends but the plaintiff is entitled to have her right against the defendant's land protected against interference. On the facts of this case the defendants had changed their land in a way that in fact weakened the support. The chain of causation passed through a stage where the moisture was directly dried out... The defendants acted in such a way as to interfere with the support that had been provided ... *by altering the conditions which operated to afford support.*

(Our emphasis.)

[76] In a concurring judgment in *Brace*, Dillon LJ emphasised that the removal of support by demolishing the house was the "root cause" of damage giving rise to liability.²² Excavation or extraction of underground water was not required to establish liability. A fortiori, in this case, the root cause of subsidence was removal of support by scouring from a failed flume, not by excavation, but that factor does not absolve Mr Street from liability.

[77] The origins of the tort are to be found in the right of the owner of land in its natural state to enjoy his or her own land free of interference by the acts of an adjoining owner which may deprive the land of support (we are satisfied that the Brouwers' land was in its natural state²³). As the authors of *Gale on Easements*²⁴ observe:

The right of support for land, whether natural or acquired, whether by way of support for land alone or for land and buildings, possessed by the owner of the dominant tenement is not a right to have the whole or any part of the adjacent or subjacent soil left in its natural state, but simply a right not to have the dominant tenement appreciably affected by anything done, however carefully, in the adjoining soil adjacent or subjacent. The obligation of the servient owner is negative, namely to refrain from any act which will diminish support. He is not obliged to take active steps to maintain the thing that gives support.

²¹ At 1288.

²² At 1289.

²³ See below at [90]–[91].

²⁴ Jonathan Gaunt QC and Paul Morgan *Gale on Easements* (18th ed, Sweet & Maxwell, London, 2008) at [10.29].

[78] While *Gale* uses the language of dominant and servient tenements, consistent with acquired rights of property law, the same reasoning applies to the natural right of support for land.²⁵ As we shall discuss, in New Zealand there is no natural right of support from adjoining land purely for buildings (see below at [84] and [85]).

[79] Finally, we refer to Lord Blackburn's statement in *Dalton v Angus*:²⁶

... The owner of land has a right to support from the adjoining soil not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it) but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support.

[80] This authoritative statement reflects the breadth of the principle. While, of course, excavation may be the most frequent or obvious mechanism of removal, none of the authorities limits the application of the tort accordingly. In our judgment the principal basis for imposing strict liability is the act of removal of support, however it is undertaken, subject only to the qualification that the loss of support must arise from a non-natural cause; if the loss arises from natural causes, no tort is committed. As a matter of policy, those who create structures on their land in this way, with knowledge of all attendant risks to a neighbouring property owner including deprivation of support to his or her land, should be under a corresponding duty. Imposition of strict liability is consistent with settled nuisance principles and is a fair and reasonable mechanism for allocating risk.

[81] In *Transco Plc v Stockport Metropolitan Borough Council*, when considering the application of the related principle known as the rule in *Rylands v Fletcher*,²⁷ Lord Hobhouse observed:²⁸

[55] The principle which the rule reflects is also easily apparent. It is that the law of private nuisance recognises that the risk must be born[e] by the person responsible for creating it and failing to control it. It reflects a social and economic utility. The user of one piece of land is always liable to affect the users or owners of other pieces of land. An escape of water originating on the former, or an explosion, may devastate not only the land on which it

²⁵ *Byrne v Judd* (1907) 27 NZLR 1106 (CA) at 1119 per Edwards J and 1124 per Cooper J.

²⁶ *Dalton v Angus* (1881) 6 at App Cas 740 (HL) at 808.

²⁷ *Rylands v Fletcher* (1868) LR 3 HL 330.

²⁸ *Transco Plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 (HL) at 23–24.

originates but also adjoining and more distant properties. The damage caused may be very serious indeed both in physical and financial terms. There may be a serious risk that if the user of the land, the use of which creates the risk, does not take active and adequate steps to prevent escape, an escape may occur. The situation is entirely under his control: other landowners have no control. In such a situation, two types of solution might be adopted. One would be to restrict the liberty of the user of the land, the source of the risk, to make such use of his land as he chooses. The other is to impose a strict liability on the landowner for the consequences of his exercising that liberty. The rule adopts the second type of solution... It is a coherent principle which accords with justice and with the existing legal theory at the time.

...

[57] ... But, where the situation arises as between landowners and arises from the dangerous use of his land by one of them, the risk concept remains relevant. He who creates the relevant risk and has, to the exclusion of the other, the control of how he uses his land, should bear the risk. It would be unjust to deny the other a risk-based remedy and introduce a requirement of proving fault.

[82] In *Blewman v Wilkinson* this Court warned against extending the principle of strict liability in cases of removal of support. As Cooke J observed in that case, the guiding principles in this area were settled when “the law of negligence was in its infancy”.²⁹ His comments, suggesting that a claim in negligence may often be more appropriate, were, however, in a different factual context: the subdivider had engaged others to carry out work on his behalf; and the issue was whether the subdividing owner was liable for excavations made before subdivision where it was manifest to the purchaser of the affected property that the subdivision’s sections had been created by excavation. Richardson J’s comments to similar effect emphasised the policy consideration favouring a fault-based approach where the subdivision involved major earthworks.³⁰ The Brouwers’ claim is distinguishable from *Blewman* not only on the facts, but because the relevant act of removal of support occurred after subdivision and while the affected area was in different ownership.

Extent of liability

[83] The question, which was not addressed directly in argument before us, then is whether Mr Street’s strict liability extends to the losses claimed by the Brouwers.

²⁹ At 212.

³⁰ At 214–215.

The Brouwers' loss was pleaded as the "diminution of [the Brouwers'] land". However, they were not claiming the loss in value of their property in its natural or unimproved state. Instead, their claim was for its loss in an improved state, based upon bare land value of \$250,000 and buildings and other improvements of \$265,000 — a total of \$515,000. Allowing for a recovery of \$255,000 (just above bare land value), the net loss was \$260,000.

[84] In *Bognuda v Upton & Shearer Ltd*, Turner J explained the difference between claims for loss of value of land in its natural state and for damage to a building, both caused by removal of support as follows:³¹

The owner of *land* in its natural state has a natural right to enjoy his own *land*, unaffected by the acts of others in excavating adjoining land, which may deprive it of support. If he enjoys such a right, the owner of a subsiding property will have a cause of action against him by reason of whose acts a subsidence has occurred, irrespective entirely of any negligence upon the part of the excavator...

The owner of *buildings*, contrasted with land in its natural state, cannot, in the very nature of things have any *natural* right to their support, for they are not naturally on the land. This statement must of course be read subject to the qualification that if it can be shown, in the event of a subsidence, that the land would have subsided of its own weight without the buildings upon it, then the owner may include damage to his building as loss consequential upon his natural right to the enjoyment of his land in its undisturbed state, for such a matter should have been foreseen as probable damage by him who removed the support from the land. But any right of support which an owner has for buildings which he or his predecessor has placed upon his land must be an acquired right. Such rights of support may be acquired by grant, or (in some jurisdictions) by prescription.

[Turner J's emphasis]

[85] *Bognuda* is factually distinguishable. But its facts are illustrative of the differing rights and remedies available, depending upon whether a claim is brought for damage to land (and buildings) or damage to buildings alone. Turner J recognised the natural right of owners such as the Brouwers, whose land in its natural state is damaged by removal of support, to sue for consequential loss for damage to buildings, provided they establish that "the land would have subsided of its own weight without the buildings upon it". The reference to a "natural right" to

³¹ At 760–761.

support of land in its natural state is to a right arising automatically as an incident of the ownership of an estate in land, which is protected by the law of tort.³²

[86] The position is different, however, where, as in *Bognuda*, the claim is for damage to buildings alone. A claim can only lie in negligence. In that event, of course, liability is not strict; the plaintiff must prove a lack of care. However, the Brouwers' claim is for loss in land value, consequent upon removal of support of some of their land rendering the house uninhabitable.

[87] Turner J's obiter statement in *Bognuda* is supported by authority. The authors of *Megarry & Wade* state:³³

... It has long been accepted that if it can be shown that withdrawing support would have caused actionable damage even if nothing had been built, the damages recoverable will include any damage to the buildings.

[88] Similarly, the authors of *Clerk & Lindsell on Torts* state:³⁴

If the adjacent or subjacent support is withdrawn so as to cause land to subside, and the subsidence has not been caused by the additional weight of the buildings or other erections upon the land, the landowner is entitled to recover, in addition to damages for the subsidence of his land, damages for the injury to his buildings or other erections although he has no acquired right of support in respect of them.

[89] In *Jordeson v Sutton*, the Court upheld a grant of an injunction to restrain a gas company from causing subsidence of the surface with consequential structural injury to residential properties owned by the plaintiff.

[90] In this case we do not share Andrews J's doubts about whether the land was in its natural state at the time of the slip. The presence of the Brouwers' dwelling and tanks did not operate to change its natural state for liability purposes. The Judge noted that the question of whether the land would have subsided in any event, without the structures the Brouwers' had built or put on it, was not addressed in argument before her.

³² Charles Harpum, Stuart Bridge and Martin Dixon *Megarry & Wade: The Law of Real Property* (7th ed, Sweet & Maxwell, London, 2008) at [27–021].

³³ At [27–022].

³⁴ Anthony M Dugdale and Michael A Jones (eds) *Clerk & Lindsell on Torts* (19th ed, Sweet & Maxwell, London, 2006) at [20–104].

[91] However, consistently with our causation findings, we are satisfied that the presence of the Brouwers' dwelling did not materially affect the collapse. That event was caused by the flume's failure. Mr Street's witnesses did not suggest that the building placed an additional or unnatural weight on or above the slip. The land would have subsided of its own weight, irrespective of the presence of the Brouwers' buildings.

[92] As a consequence of Mr Street's removal of support for the Brouwers' land the building erected on it was rendered uninhabitable and the owners suffered resulting financial loss. Mr Street must be liable for all the Brouwers' losses suffered as a result. Their claim for damages for diminution in value of their property in its improved state is sustainable in principle and fact.

Duty of care

High Court

[93] However, if our conclusion on the first cause of action is wrong, we must consider the Brouwers' alternative claim in negligence.

[94] The Brouwers pleaded that Mr Street owed them a duty not to do or permit any action which might interfere with the natural support of their land; and that he breached the duty and was negligent in seven different ways. Mr Street admitted that he owed a duty but denied breach.

[95] Andrews J held that the standard of care to be applied did not require that the culvert and flume constructed by Mr Street be sufficient to carry water discharge from the swamp at all times, because that would impose a standard of strict liability.³⁵ However, she held that the standard must take into account that the drainage system was constructed to convey water in a high rainfall area.³⁶ The Judge then considered and dismissed each particular of negligence.³⁷

³⁵ At [108].

³⁶ At [109].

³⁷ At [111]–[148].

[96] In particular, Andrews J placed weight upon Mr McKay's admission in cross-examination that the flume when constructed complied with local authority minimum standards. The Judge found as follows:

[141] The appropriate standard against which to measure the construction of the February flume is the minimum standard set by the local Council. As the Supreme Court of Canada said in *Ryan v Victoria (City)*:³⁸

The weight to be accorded to statutory compliance in the overall assessment of reasonableness depends on the nature of the statute and the circumstances of the case. It should be determined whether the legislative standards are necessarily applicable to the facts of the case. Statutory compliance will have more relevance in "ordinary" cases - i.e., cases clearly within the intended scope of the statute - than in cases involving special or unusual circumstances.

This is an ordinary case of a drainage system created in compliance with council minimum standards. Only when "special circumstances" are present will the standard of care in negligence "extend beyond reasonable compliance with the ... [minimum] standard".³⁹ There are no such special circumstances in this case, and so no justification for the creation of a different and inconsistent standard of care from that of the minimum standards. As Mr McKay agreed that the February flume did meet that standard, there is no basis on which I can conclude that it was negligently constructed.

Nature of duty

[97] The first step in our inquiry is to identify the nature of the duty owed by Mr Street. The Brouwers' pleading in this respect is brief and uninformative. We appreciate that Mr Street admitted the existence of a duty to the Brouwers. But the duty must be formulated with due particularity.

[98] Our evaluation starts with Mr McKay's qualified admission that the flume system erected in accordance with local authority requirements was probably adequate "before a house was to be put there". In our judgment, Mr McKay's qualification neatly encapsulates Mr Street's responsibilities before subdivision and sale of a section. He would have been the only party likely to suffer loss if the flume and then the bank subsided when he owned all the land. Mr Street did not then owe an apparent duty to anybody else in relation to the drainage system.

³⁸ *Ryan v Victoria (City)* [1999] 1 SCR 201 (SCC) at 39.

³⁹ See *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA) at [61].

[99] However, subdivision brought new responsibilities for Mr Street. He assumed a duty of care to a potential purchaser.⁴⁰ On orthodox principles of foreseeability, Mr Street knew from that time, given his familiarity with the area and rainfall conditions in Taranaki, that:

- (1) The flume would be required to handle high volumes of water in periods of heavy rainfall.
- (2) Concentration of large volumes of water into a channel would impose heavy loading pressures on an artificial structure.
- (3) The flume was the system's most vulnerable part, given its construction of unlined corrugated iron and suspension on wooden trestles above a steep slope.
- (4) The flume and the outlet were situated along the slope closely proximate to the subdivided property.
- (5) Failure of the flume, or any other part of the drainage system, would expose the neighbouring property to the risk of damage.

[100] The nature of the duty was enhanced once Mr Street learned of and approved the Brouwers' proposal to build a dwelling near the common boundary, immediately above the area where the flume was located. While the risk of subsidence was not affected by subdivision, the risk of loss or danger to a purchaser from failure of the drainage system emerged for the first time. In this respect we accept Mr Gudsell's submission, which he made to similar effect in the High Court, that the gravity of the risk was well understood by Mr Street. He had observed previous slippages in the area. He was aware of the destructive power of large volumes of water draining from the swamp at high velocity. He knew from 1995 that the amount of run-off water entering his land was progressively increasing as a result of clearing vegetation further up the Kaitake Ranges. And he had earlier diverted the outlet to avoid the

⁴⁰ Compare *Blewman v Wilkinson* at 215-216 per Somers J.

risk of damage to his own accessway, creating a potential danger to a future purchaser of that part of his land adjoining the area of the flume or outlet.

[101] In specific terms, the nature of Mr Street’s duty on subdivision was to take all reasonable and necessary steps to ensure that the existing drainage system was sufficiently strong and safe to carry what Ms Hughes called “prolonged continuous rainfall” without endangering the adjoining property. While it may have been reasonable for Mr Street to construct a drainage system in accordance with local authority minimum requirements when he owned all the land, circumstances changed when he subdivided part with the prospect of sale to a third party. That event created new and significant risks, requiring Mr Street in practical terms to carefully review and, if necessary, upgrade the quality and integrity of his earlier design and construction work.

[102] There are no policy grounds negating a duty of this nature. Mr Street obtained a significant financial benefit from the subdivision and sale of part of his property to the Brouwers. Acceptance of a corresponding burden of responsibility and the imposition of a duty on the terms just described is proportionate, fair and reasonable.

[103] In fairness to Andrews J, we add our impression that the importance of the factors of subdivision and sale in assessing the nature and extent of Mr Street’s duty was given considerably more prominence in argument on appeal than in the High Court.

Standard

[104] The second step is to identify the standard of performance reasonably required of Mr Street’s duty. Andrews J was satisfied that this was “an ordinary case of a drainage system, created in compliance with council minimum standards” which fixed the appropriate standard as common law.⁴¹ However, we are satisfied that, in

⁴¹ *Brouwers & Anor v Street* at [141].

these circumstances, something more was required once Mr Street subdivided, justifying the imposition of a higher standard of care.⁴²

[105] It is relevant, as Mr McKay observed, that the minimum standards were set relatively low, to provide for flows from storm events with an Annual Exceedance Probability (AEP) of 20 per cent or one in every five years. In engineering terms, this event is reasonably small, meaning that Mr Street himself took the theoretical risk that every five years, on the AEP calculation, he would have to reinstate or lose some of his land. And, as Mr Gudsell emphasised, the council's minimum standards are just what they are stated to be. They do not purport to provide an appropriate benchmark for all the differing physical conditions existing within the relevant zone.

[106] While admitting that he was speaking with the benefit of hindsight, Mr McKay said that if he was designing a flume on that slope, he would have allowed for a full one or two per cent AEP – that is, a 50 or 100 year return period. He would also have required ground protection, to ensure integrity and protection if the flume overflowed. In our judgment, Mr McKay's hindsight criteria would constitute a bare minimum to meet the changed risks arising on subdivision.

[107] We are satisfied that the necessary standard of performance of Mr Street's duty must be fixed objectively, according to the orthodox criteria of the magnitude of the risk, the probability of its occurrence, the expense and difficulties associated with minimisation or removal of the risk, and any conflicting responsibilities borne by Mr Street.⁴³

Negligence

[108] Before considering whether in fact Mr Street was negligent, it is appropriate to say something more about the drainage system. As noted, Mr Street altered the outlet from the pond shortly after he himself acquired a subdivided part of the larger area in 1995.⁴⁴ He acted in response to previous flooding and erosion problems.

⁴² *Ryan v Victoria (City)* at 34 – 35, 39.

⁴³ *Wyong Shire Council v Shirt* (1980) 146 CLR 40 (HCA).

⁴⁴ See above at [6]–[7].

The purpose of installing the culvert was to allow vehicular access on the track to the house he was constructing. Previously the pond had drained into the gully from a water exit constructed of logs and earth. The culvert itself was an 800 millimetre diameter pipe from an oil field site. The pipe then fed into the open drain and on to the flume.

[109] Mr Street formed an abutment between the end of the open trench and the start of the flume. He poured concrete at the end of the trench and over the flume iron. The concrete was at a maximum depth at the bottom of two to three inches, smeared up the side of the bank.

[110] Andrews J recited Mr Street's description of the flume construction as follows:

[25] I used materials to construct the flume tanalised poles H4 treatment 150 x 25 H3 boards, 100 x 50 tanalised H3 rails, new corrugated iron and assortment of galvanised nails and No. 8 wire. ... The tanalised posts were rammed into the bank they were of a length 1 metre long and rammed into the bank up to 500mm half the length of the post. The 100 x 50 rails were checked into the post and nailed with galvanised 4 inch nails to the post. The poles with the rails ran parallel down the bank approximately 500mm apart. This allowed a sheet of corrugated iron to cup and form a trough longitudinal to the poles to form the flume. ... The concrete formed an abutment between that end of the open trench and start of the flume. The concrete was poured at the end of the trench and over top of the iron at a maximum depth at the bottom of 2-3 inches smeared up the side of the bank, feathering out to nothing and approximately four wheelbarrows of concrete used in this manner.

[111] The Judge also recorded:

[29] Mr Street said that approximately 12-18 months after the flume was erected, he observed a reasonably heavy storm. He noted some splashing in some areas down the length of the flume. At those points he raised the height of the sides of the flume with more corrugated iron and 150 x 25 mm boards, tensioning the tops of those together with No. 8 wire to stop any "bulging effect" happening. He also inspected the structure from time to time, particularly during times of heavy rainfall.

[112] Mr Brouwers said that when purchasing his property he did not take much notice of the open drain and flume because they were on Mr Street's property. He later noted that the join between the drain and flume was cracked and covered in the residue of buried gums. At a later time, when planting trees in the gully,

Mr Brouwers saw that the flume was attached to trees by No.8 fencing wire. He described the flume's construction as "flimsy". And Mr Street acknowledged that he did not undertake any maintenance work on the flume after construction.

[113] Mr Brouwers visited Mr Street's house in July 2001. His purpose was to obtain approval for constructing his building close to the common boundary. Mr Brouwers said of their meeting:

The land closest to our section was practically inaccessible for [Mr Street's] use. He explained there had been a prior slip and he wanted to keep control of the water course. He was still not happy with the then location of the water course. He told me that he intended to realign it and to construct a concrete lined channel of lesser gradient... [Mr Street] had in mind to have his labourer dig the new channel manually and dispense with the corrugated iron flume which led down into the valley. Mr Street said that he was not happy with the way it was. He said he had previously shifted the channel uphill after the previous slip to maintain his access to his house and land.

[114] Mr Street did not deny this account. He initially agreed with Mr Gudsell that he intended to construct a concrete channel to ensure greater slope safety and stability. He later resiled from this admission, saying the only reason for replacement was to improve the structure's visual appearance. He then went a step further, by refusing to acknowledge that the proposed concrete lined channel would be safer than the corrugated iron structure.

[115] While Andrews J did not make an express finding on this issue, Mr Street's revised position is inherently implausible. As Mr Gudsell emphasised in cross-examination, it would be pointless to improve the visual appearance of a structure which was largely out of sight in a bush covered gully, and at best visible to two parties. And a concrete lined channel would plainly be safer than open corrugated iron. Mr Street must have known that the existing flume was vulnerable and required replacement.

[116] The Brouwers pleaded seven particulars of negligence. We endorse Andrews J's rejection of the first four allegations.⁴⁵ The remaining three allegations are that Mr Street:

⁴⁵ At [111]–[125].

- (1) Designed and constructed the flume and trestles in a manner and with materials which he knew or ought to have known would be insufficient and unfit to carry discharge from the swamp at all times.
- (2) Constructed a flume which he knew or ought to have known was unsafe and inadequate for the purpose of discharging water from the swamp outlet at all times.
- (3) Failed to take any or any adequate precautions to ensure that in the event of the failure of the channel and the flume, discharge from the swamp would not saturate and scour the bank providing support to the [Brouwers'] land.

[117] In addition, the Brouwers expressly relied, as evidence of negligence, upon the fact that the open channel and flume caused the bank to become saturated with water and scour, resulting in subsidence and the landslip; rather in the nature of *res ipsa loquitur*.

[118] In summary, Andrews J dismissed the first and second of these three remaining allegations because the flume complied with local authority minimum standards; and dismissed the third because, as earlier noted, she found that the Brouwers had failed to prove that the flume was the cause of subsidence.

[119] However, we have concluded that Andrews J erred in law in setting the standard of performance of Mr Street's duty of care. On our approach, Mr Street was in breach of his duty of care from the dates of subdivision or, at the latest, the sale of a section to the Brouwers. He failed to review the safety and integrity of the drainage system, particularly the flume. It was only designed to cope safely with water flows from a relatively small return storm. Its construction was questionable. Because of his doubts about its ability to withstand sustained and heavy rainfall, Mr Street intended in 2001 to replace the flume with a more effective concrete structure following subdivision. However, he never took that step. Mr Street did not suggest that he was unable to afford the cost of replacement.

[120] The engineers' evidence for the Brouwers as to the structural integrity of the flume is unchallenged and decisive. Mr McKay, who has over 30 years of civil experience, said that, because the flume was subject to heavy dynamic loading, bolts and a large block, which were not used, were necessary to provide anchorage and structural integrity. The dynamic loading caused by heavy rain would "shake" the connection loose.

[121] Mr Chapman also expressed reservations about the connection's integrity. In his opinion, while the join may have acted as a good seal, it would have had minimal capacity to restrain the flume against longitudinal movement. The fact that the flume was suspended on framing, and was not professionally engineered, would compound the problem.

[122] While of course the primary evidence has gone, we are satisfied that the system, which was not designed to cope with heavy and prolonged rainfall, was defective or inadequate, and its failure caused the landslip. The engineering consensus is that the flume was not constructed to meet rainfall conditions which, while severe, were not unforeseen in that area. As we have noted, the storm on 28 February greatly exceeded the flume's design capacity.

[123] Accordingly, we conclude that Mr Street was negligent in failing to review and upgrade the drainage system on subdivision and sale to the Brouwers; that as a result the flume was inadequate or unsafe for the purpose of carrying the rain which fell prior to the landslip; and that as a further result the flume itself failed leading to the collapse of the slope on 28 February 2004.

Damages

[124] As noted, the Brouwers claimed judgment for special damages of \$295,000, being loss of value of their property (although the actual loss was \$260,000), plus another \$6,495 in special damages, being engineering and legal costs relating to sale of the land. Also they claimed general damages of \$50,000.

[125] Andrews J did not make findings on this element of the claim, presumably because she had found adversely to the Brouwers on liability. However, we are able

to fix damages on the Brouwers' unchallenged primary evidence. Mr Gifford's report, assessing loss in value of the Brouwers' property as a result of the landslip at \$260,000, was produced by consent. Ms Hughes' cross-examination of Mr Gifford was brief, and limited to questions about comparative values. She did not challenge his conclusion, or call expert evidence to the contrary. As a result, we accept his assessment.

[126] Before us, Ms Hughes advised that she raised in the High Court a defence that the Brouwers had failed to mitigate. It was generally to the effect that they could and should have borrowed funds to carry out the remedial work necessary to obtain Council approval. However, while all plaintiffs are under a duty to take reasonable steps to mitigate loss, the defendant bears the onus of showing a failure to take reasonable steps.⁴⁶

[127] Ms Hughes did not point us to any evidence in support of this defence. She accepted that Mr Street did not offer the Brouwers any assistance, financial or otherwise, following the collapse. We do not accept that the Brouwers were duty-bound to accept a heavy financial burden, where the prospective benefits were uncertain, in order to minimise Mr Street's liability. This defence of failure to mitigate, faintly argued, cannot succeed. The Brouwers must be entitled to all their claimed special damages.

[128] The Brouwers claimed general damages of \$50,000 on the ground, briefly pleaded, of stress and anxiety. The Brouwers' marriage dissolved before trial. Mrs Brouwers did not give evidence. Nevertheless, we accept Mr Brouwers' account that the event was a source of considerable anxiety and anguish for the family.

[129] Mr Brouwers had invested considerable cost and emotional energy in this project. He had designed and built a family home over two years. His aspirations evaporated with the landslip, and he, his wife and young daughters were forced to vacate their home at short notice and live in temporary and uncomfortable conditions

⁴⁶ *Geest Plc v Lanciquot* [2002] 1 WLR 3111 (PC) at 13–14 per Lord Bingham; *Attorney-General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA).

for some time. Doubtless the landslip and consequential hardship imposed additional burdens on the Brouwers' marriage. It must have been a time of prolonged and deep anxiety for the family.

[130] The assessment of general damages is not an exact exercise. However, by reference to other authorities, we are satisfied that a modest award is appropriate.⁴⁷ In our judgment a figure of \$20,000 is reasonable.

[131] In the result, Mr Brouwers is entitled to judgment against Mr Street for damages as follows:

(a)	Loss in value of property	\$260,000
(b)	Miscellaneous special damages	\$ 6,495
(c)	General damages	\$ 20,000
	Total	\$286,495

Result

[132] We allow Mr Brouwers' appeal. Judgment is entered in his favour against Mr Street for \$286,495 together with interest at the rate fixed by the Judicature Act 1908. Mr Street is ordered to pay costs in this Court for a standard appeal on a Band A basis together with disbursements to be fixed by the Registrar. Mr Brouwers is also entitled to the costs of the proceeding in the High Court, calculated according to category 2B, together with disbursements and witnesses' expenses. If the parties are unable to agree, costs, disbursements and expenses are to be fixed by the High Court.

⁴⁷ Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [25.2.09].

HAMMOND J

Introduction

[133] I have had the advantage of reading in draft the judgment of Randerson and Harrison JJ. I agree with their reasoning and conclusions on both causes of action, and the relief proposed by them.

[134] I propose to make some short observations, which go first to the suggestions made in argument, and the remarks of Cooke J in *Blewman v Wilkinson*,⁴⁸ that strict liability may not be entirely appropriate in this subject-area today. I do not agree with those comments. Second, I also make some observations on the damages issues, which received no attention in the High Court, or indeed in argument before us.

Liability

[135] I first summarise the common law position as I apprehend it to be.

- (1) The right of a landowner to have his land supported laterally by the neighbouring land is an absolute right *inherent in the land itself* and a part thereof.
- (2) The right of lateral support means the *land in its natural condition* is entitled to be held in place from the sides by the neighbouring land.
- (3) The right of lateral support does not include the right to have the additional weight of buildings or artificial structures on the land supported from the sides by the neighbouring land.
- (4) One who by excavation or other means withdraws lateral support from his neighbour's land is liable for the injury done to such land in

⁴⁸ *Blewman v Wilkinson* [1979] 2 NZLR 208 (CA).

its natural condition, regardless of whether that is done negligently. This is because taking away lateral support is an interference with the property right.

- (5) However, when the excavation on one's land is caused by an Act of God, for instance, by extraordinary rainfall, or tidewaters generated by a hurricane, then the owner of that land is under no duty to refurnish the lateral support that was removed by the forces of nature.
- (6) It is the interference, by some non-natural means, with the right of support which is actionable. This will routinely be because of excavation on the defendant's land. But I see no reason to limit the action solely to acts of mechanical excavation. Withdrawal of support could also be caused (as in this case) by a concentrated stream of water being directed at the defendant's land and sluicing away support.

[136] The conceptual basis for liability for removal of lateral support is therefore the injury to the land in its natural condition. It follows from the foregoing that it is important not to conflate the underlying right (the property right of lateral support for land in its natural state) with the means utilised to enforce that right (the bringing of a proceeding in private nuisance).

[137] It is quite true that there has been much debate in modern times over the relationship between the rule in *Rylands v Fletcher*⁴⁹ and negligence.⁵⁰ But the property rules (above) are of real antiquity.⁵¹ They are universally respected in the common law jurisdictions. And, in terms of social utility, they are of some real importance in New Zealand, which is a country with numerous cities and towns built in hilly terrain. This means that persons undertaking land development have to take real care with those developments. That is, where there is strict liability the common law rule has a clear prophylactic benefit.

⁴⁹ *Rylands v Fletcher* (1868) LR 3 HL 300.

⁵⁰ The authorities are noted in Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 517–538.

⁵¹ See for example, *Smith v Martin* (1670) 85 ER 1206 (KB).

[138] Further, I have very distinct reservations about a clear and long-standing property rule being fundamentally realigned, save by Parliament. There would be many facets of the application of the rule to be considered before taking that step. As only one instance, the rights to subjacent support are very important, particularly in water and oil and gas law, and would need to be considered too. They do not arise in this case.

[139] To return to this case, given this body of law the High Court Judge should first have decided, on the evidence, whether this subsidence was the result of a natural event; or whether it had occurred because of the human intervention referred to in the judgment of Randerson and Harrison JJ. It is regrettable that the Judge did not undertake that exercise at the outset; if her Honour had decided that the subsidence was due to natural causes then that was the end of the plaintiff's claim.

[140] However, we have taken the view that we can and should appropriately determine the factual cause of the incident, without remitting the matter back to the High Court. And on our findings of fact, I agree with Randerson and Harrison JJ that there was here both strict liability and, in this instance, negligence.

Damages

The principles

[141] As to the question of damages for a breach of the strict liability right to lateral support, in principle two distinct views could be taken. Each has some merit in its favour.

[142] One view, which for convenience I will call the English rule (also the New Zealand view) permits the wronged landowner to recover both for the injury to the land in its natural condition and for damages to the buildings thereon, the latter as parasitic to damage on the land. The theory behind this is that, liability having been established, then all damage including economic loss which naturally results therefrom should be compensated. There being no question that the damage to both land and buildings flows from the removal of the lateral support, the plaintiff should

recover for both. Because the liability is predicated solely on the damage to the land in its natural condition without the weight of the buildings thereon, such rule does not mean the proprietors of adjoining lands have to furnish support *both* for land and buildings; it simply allows damages for both after the liability is established, based on injury to the land alone. This is a somewhat pragmatic rule, but it strikes me as being the appropriate one.

[143] The other approach – sometimes called the American rule, although some States follow the English rule – is similar to the English rule with respect to the basis for liability.⁵² But damage to the land in its natural condition permits recovery and damages for injury to the land only and no recovery for injury to the artificial structures thereon. The theory of this rule is that to permit the wronged landowner to recover for damage to his buildings is in substance a requirement that the adjoining landowner's land furnish lateral support for both the land *and* the buildings of the plaintiff. But this is not what the underlying rule requires. So this rule is one of strict, consequential logic.

[144] In relation to negligence, all jurisdictions that I am familiar with hold that if there is negligence on the part of the wrongdoer who removes lateral (or sub-adjacent) support, then the wrongdoer is liable for all damages which naturally and proximately flow from his negligence, including damages to both land and artificial structures.

This case

[145] Turning to the facts of this case, the way the pleadings were put was as follows:

18. By reason of the Defendant's wrongful actions:
 - 18.1 Part of the Plaintiffs' Lands gave way, subsided and slipped.
 - 18.2 The Plaintiffs' right of enjoyment of the lands in its natural state was removed.

⁵² Ralph Boyer *Survey of the Law of Property* (3rd ed, West Publishing, St Paul, Minn., 1981) at 271.

18.3 The Plaintiffs' Lands diminished in value by \$295,000.00.

19. The Plaintiffs were unable, by reason of financial circumstances, to reinstate their lands.

20. The Plaintiffs sold the lands in or about 1st day of March 2005 for \$255,000.00.

[146] The pleadings then went on to aver a loss of \$295,000 "being diminution in value of the plaintiffs' lands", from their state prior to the slip. But, as it has been shown and was accepted at trial, the actual loss was \$260,000.

[147] That figure was reached on the basis of a valuation by Kelvin Gifford Valuations Limited (which was not contested) as to the value of the land prior to the slip.

[148] The quantum is now as calculated in the judgment of Randerson and Harrison JJ.

[149] The situation after the slip was that the unique adobe building constructed by Mr Brouwers (which functioned as both residential accommodation and a work unit, compendiously referred to as "the Barn") was undamaged. But, it stood a very short distance from the top of the slip area. The Brouwers moved out, for safety reasons. They tried to come to an accommodation with the Streets over repair work to the slip to try and see it stabilised. Ultimately agreement could not be reached, and in any event by now the Brouwers were having financial difficulties. Mr Brouwers' evidence was that he and his partner Trish "separated ... for financial reasons and I spent the rest of the year living in the Barn without potable water". He tried to get a resolution to the problem of possible instability. The Barn had been finished only literally a few days before the slip. But Mr Brouwers could not get a Certificate of Code Compliance from the New Plymouth District Council because he was required to furnish an engineer's certificate of land stability, and to reinstate a potable water supply.

[150] Eventually, the Brouwers' land was put up for sale by tender. The highest tender price received was \$198,000. But subsequently, by negotiation with one of the non-accepted tenderers Mr Brouwers was able to sell the entire property for

\$255,000. The claim for \$260,000 (as we take it) represents what was compendiously described as a claim for “diminution in value” of the land, from its prior to slip value.

[151] There was no pleading of contributory negligence for the siting of the Barn.

[152] It appears to me therefore that, on the principles I have noted above, the Brouwers are entitled to their claim for diminution in value (but as to \$260,000 – the actual loss, not the \$295,000 initially claimed) both under the head of strict liability and negligence. The Judge did not deal with damages because she did not reach that point. However, the quantum of the claim is not contested. I agree with Randerson and Harrison JJ on the other heads of damages and the other relief proposed by them.

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