IN THE DISPUTES TRIBUNAL **[2011] NZDT 153**

BETWEEN	**ADP Ltd**
	APPLICANT
AND	**JL INSURANCE Ltd**
	APPLICANT'S INSURER
AND	**ZWK**
	RESPONDENT

Date of Order:	16 June 2011
Referee:	Referee Meyer

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the claim is dismissed.

Facts

[1] This is a claim for compensation for losses caused to the Applicant's business when a water main being repaired by ZWK [a city council] burst.

[2] The Council owns a separate business entity, AF, which carried out, inter alia, repairs to water mains.

[3] On 17th February 2009, a leak from the vicinity of a water main valve was noticed in the cobbled footpath outside ADP Ltd's premises. It was reported to the Council. On 18th February, the site was inspected from the surface of the footpath by AF staff who assessed the problem as a low priority in relation to other work commitments at the time.

[4] On 25th February, AF staff attended the site, dug down to the piping and discovered water leaking from a "T" junction between a pipe bringing water from across the street and into the pipe which served the shops along the side of the street on which ADP Ltd is located. That "T" junction terminated a pipe that rose up in a vertical direction rather than horizontally.

[5] Almost as soon as the leaking was observed, the "T" junction was blown upwards by the force of the water from underneath, causing a large volume of water to fountain upwards. This continued for some period of time causing damage to the building (which has been the subject of another claim in the Tribunal between the building owners and the Council) and damage to plant and stock belonging to ADP Ltd.

Issues

[6] The issues to be decided are:

(i) Whether the Council is liable for the damage under either the principle of strict liability under the rule in *Rylands v Fletcher*, and/or liable in nuisance, and/or liable in negligence.

(ii) If the Council is liable under any or all of these principles, what compensation is appropriate?

Law

[7] The relevant law is the law of tort.

Decision

I find that the Council is not liable under any of the areas of the law of tort set out above for the reasons given below.

Rylands v Fletcher

[8] For the purposes of this claim, *Rylands v Fletcher* provides that a property owner is strictly liable for any damage or loss caused through the escape of something accumulated through the non-natural use of land. If it were found to be the case here that the rule applied because the presence of water under pressure in pipes owned by the Council on its land is a non-natural use of land, ZWK would be strictly liable for the damage caused by its escape regardless of any fault on its part or AF's part, provided that the damage done could be regarded as "foreseeable".

[9] However, in the case of *Transo Plc v Stockport MBC* [2004] 2 AC 1, the House of Lords held that the use by a council of a water pipe servicing a block of 66 flats was a natural use of land. Without going into the detail of that case, I accept it as authority that in this case the use by the Council of the footpath area to convey town supply water to business premises in the locality is not a non-natural use of the land and therefore the Council cannot be held to be liable under the rule in *Rylands v Fletcher*.

Private nuisance

[10] Private nuisance involves creating, adopting or continuing a "state of affairs" which threatens or brings about damage or disturbance to land, or which substantially interferes with use and enjoyment of land, in the possession of the applicant. The rule in *Rylands v Fletcher* is but a sub-branch of that area of the law and applies where there has been a non-natural use of the land.

[11] Nuisance generally involves a continuing state of affairs interfering with the occupant's use and enjoyment of the land. However, a one-off event causing physical damage to an occupier's property can be regarded as a nuisance entitling the occupant to the recovery of all natural and foreseeable damage including damage to chattels.

[12] Nuisance also involves a balancing of the rights and responsibilities of the adjoining occupiers. In case, the rights that of the Council to carry out its responsibilities relating to the maintenance of its pipes, and ADP Ltd to quiet enjoyment of the leased property. Nuisance is actionable only if there is a substantial interference with the use and enjoyment of the land and the interference is found to be unreasonable in the circumstances of the case. In nuisance, "reasonable" means more than taking proper care, it signifies what is legally right between the parties.

[13] However, while the Council may have a reasonable purpose in attending to the maintenance of the pipes and that purpose may be statutory in its nature, which could provide the Council with a defence to its actions, it must still go about the fixing of the pipes in a competent and reasonable manner.

[14] In negligence, the emphasis is on the respondent's conduct, and reasonableness is determined by the foreseeability and degree of risk created by that conduct. In nuisance, the emphasis is on a balancing of interests, and the question is whether the respondent has unreasonably interfered with the applicant's interest in the land.

[15] In *The Wagon Mound (No 2)* [1966] 3 WLR 498, Lord Reid stated at 508:

> Nuisance is a term used to cover a wide variety of tortious acts or omissions, and in many, negligence in the narrow sense [ie involving breach of a duty of care in the traditional sense] is not essential. An occupier may incur liability for the emission of noxious fumes or noise, although he has used the utmost care in building and using his or her premises. On the other hand the emission of fumes or noise or the obstruction of the adjoining highway may often be the result of pure negligence on his or her part.

[16] It is apparent that there is a variable standard of liability. Sometimes fault is necessary, sometimes negligence is necessary.

(i) Where damages are sought, and the respondent has created the nuisance, the respondent can be strictly liable in the sense that evidence that he or she exercised all due care and skill and took all reasonable precautions to prevent a nuisance provides no excuse. The duty is not to cause a nuisance, not merely to take care not to cause a nuisance.

(ii) Where damages are sought, and the respondent has not created but continued or adopted the nuisance, negligence must be shown. Thus where the respondent is the occupier of land on which a nuisance has been created by someone else or has arisen naturally, it must be shown that he or she knew or ought to have known of the condition and could reasonably be expected to put an end to it.

(iii) Once liability is established, the test for remoteness is that laid down in *The Wagon Mound (No 2)*. The damage must be a reasonably foreseeable consequence of the activity or state of affairs giving rise to the nuisance.

[17] Thus it seems to me that in negligence the onus is on the applicant, the person harmed, to establish that the respondent was in breach of a duty of care in that it did not go about its activities in a manner that took reasonable steps to avoid causing foreseeable harm to others; whereas, in nuisance, the onus is the applicant to establish that harm was caused by the activities of the respondent and the respondent must then establish that any harm caused was reasonable.

[18] In this case then, to succeed in nuisance, the Applicant must prove on balance that the actions of the Council caused the leak and/or that its actions caused the leak to continue for an unreasonable period of time.

[19] As to the cause of the leak, it is clear that the leak was caused by deterioration in the pipe work, which burst upon the ground being opened up to examine the fault. That action was being carried out pursuant of the Council's rights and duties to maintain its water services to its clients. There can be no blame attached to the workers' actions in the pipe bursting and any sudden damage as a result could not be the responsibility of the Council in that it did not cause the leak in the sense of creating a nuisance.

[20] As to allowing the leak to continue for an unreasonable period of time, there is conflicting evidence as to the actual time taken. Neither party produced a witness who could say with clarity how long the shut down actually took. However, it seems to have taken at least 50 minutes by the Council's reckoning. The issue, therefore, is whether that time was unreasonable.

[21] The Applicant maintains that the Council should have either: shut off the mains supply before undertaking any repairs; anticipated the need to have a plan in place for the prompt shutting off of the mains pressure as burst pipes are always a risk when undertaking repairs to pipe work under mains pressure; or should have parked its truck over the fountaining water earlier to prevent the spreading of damage from the direct fountain effect or flooding. The foreseeable effect of this was that water would get into the premises through flooding, there would be damage to the building from the fountaining, and damage to stock would be exacerbated by a continued flow.

[22] On the other hand, the Council takes the position that burst pipes are rare and that it only pre-emptively shuts off water when there is a real risk of a burst happening, as shutting off supply increases the risk of contaminants getting into the water when the pressure is off and there is a major disruption to surrounding businesses. In this case, the pipe burst just as the situation was being assessed. The assessment may well have resulted in a decision to

close up the hole, and come back and repair at a more convenient time or when the pressure could be turned off.

[23] When the burst occurred, the workmen involved immediately took steps to arrange for a shutdown of the water supply. The immediate supervisor does not seem to have had a map of the valves that needed to be shut down, and a senior manager had to be called to supervise this. The Applicant argues that he should have had such a plan, but it seems to me from the description of the system of supply that senior supervision would have been needed anyway to ensure that further problems did not eventuate. This is because there were seven valves to close and they could not be suddenly closed otherwise a "water hammer" effect could have been created.

[24] While it might seem prudent to have a senior supervisor on site in all such situations, this must be balanced against the Council's experience in carrying out such work. I accept that such bursts are rare which would seem that such close supervision is not needed in all such situations where exploratory excavations are being carried out as contrasted with the situation where a repair under full pressure was being carried out.

[25] The Applicant also contends that if the Council truck had been driven over the fountain of water that would have stopped the damage occurring earlier. However, on this point, I accept the Council's position that this was, possibly, a foolish initiative on the part of the employee due to the potential for damage to be caused to the truck. While the action did stop further damage, and no damage was caused to the truck, it was not a reasonable expectation to expect this action to have been taken at all.

[26] In short, I do not find that the Council has committed a private nuisance in that it did not cause the burst pipe and that it shut off the flow of water within a reasonable time.

Negligence

[27] ADP Ltd takes the position that the Council owes a duty of care to go about its duties to maintain its infrastructure in a manner that does not cause foreseeable loss or harm to

others. The Council was in breach of this duty by not taking reasonable steps to ensure that the potential for harm to nearby properties was minimised by either shutting off the water before commencing the work or ensuring that there was a plan for an immediate shutdown if necessary. A burst pipe was, and is, a foreseeable consequence of working on a pipe under pressure and damage to nearby businesses was a foreseeable consequence of a burst pipe. The degree of risk was exacerbated because of the size of the pipe.

[28] The Council, on the other hand, contends that the pipe was not a large pipe in the sense that it was not a large mains pipe but was a 50mm supply to the immediate premises. Therefore, there was no special risk due to the size of the pipe. Further, while there is an obvious risk of a burst whenever a pipe under pressure is being worked on, in this case what was being carried out was an exploration of the cause of the leakage visible from the surface of the footpath. Once the join had been exposed and the source of the leak identified the pipe suddenly burst, which I accept is a rare event, it could not reasonably have been foreseen in this case. If a decision had been made to commence repairing the leaks under pressure then I would have expected the Council to have either turned off the water first or established a plan for an emergency shutoff if a burst did occur. However, I accept that was not the case here.

[29] In short I find that the risk of a burst was too remote when carrying out exploratory work so the need to either shut down the water or have an emergency plan in place for that particular work was not reasonably required beyond the usual resort to calling for a senior manager to supervise the shut down.

[30] As to the Applicant's position that the truck should have been moved over the fountain sooner, I find, as above, that it was not reasonable to expect the Council to have placed its truck over the fountain at all due to the potential for damage to the truck.

[31] Therefore, I find that the Applicant has not established that the Council was liable for the loss in negligence.