

Potential Common Law Liability for Privately Provided Flood Defences

Keywords

Development, rivers, flood_defence, liability, nuisance, negligence

Abstract

Public bodies have no statutory duty to provide flood defences and do not have funds available to meet all requests for them. This had led to recognition that flood prevention is not something to be left to others and there is now encouragement to householders to undertake “do it yourself” flood defence. Such measures are not without risk of damage to other properties. An investigation has therefore been undertaken to establish whether there is associated legal liability should such damage occur. No cases have been published directly concerning liability for damage resulting from these activities. However the *Doctrine of Precedent* declares that cases must be decided the same way when their *material facts* are the same. Cases are identified which have relevant similar material facts, although not arising from modern “do it yourself” flood defence. The *ratio decidendi* of cases concerning the receipt and passage of naturally flowing water, the increased passage of water to the property of others, and the overtopping or failure of structures that have held back water is examined. These cases are then discussed in the context of home flood defence. It is concluded that protecting one’s property from flooding is legally a relatively safe activity.

Introduction

There has been a tendency over the past century to expect flood defences to be provided by the Environment Agency and its predecessor bodies, and in some cases by local authorities or internal drainage boards. However, although these bodies have had the power to provide defences, they have not had the duty to do so and have certainly not had funding to meet all requests for flood defence schemes. There has therefore recently been:

1. a recognition that flood defence is not something to be left to public agencies alone (House of Commons Select Committee on Agriculture, 1998, §90),
and
2. encouragement of householders to themselves become involved in flood defence of their properties (Environment Agency, 2001; DTLR, 2002).

Bearing in mind the anecdotal advice frequently given to householders (Gray, 1995), but not investigated further here, that it may be best not to clear snow from the footpaths in front of their houses because of potential legal liabilities, an investigation has been made of case law to see whether such advice should extend to involvement in “do it yourself” flood defence.

Individual Property Protection

Following widespread flooding in autumn 2000, the House of Commons Select Committee on Environment, Transport and Regional Affairs (2000, §24) recommended that flood proof construction should be encouraged for use in developments in urban areas at risk of flooding and called for government advice to be issued including:

- conditions on planning permissions;
- incorporation into building regulations; and

- retrofitting of sustainable techniques into existing properties.

In response to this recommendation two documents were issued by the Environment Agency (2001) and DTLR (2002). They were reviewed in Wynn (2002).

A further document (Environment Agency, 2003) provides guidance on the use of temporary free-standing barriers and removable items such as flood boards and air brick covers in the context of a new BSI Kitemark standard for such products. The document is supported by advice sheets (CIRIA, 2003).

The Risks of Providing Flood Defence

The provision of a barrier against the free spread of water carries with it:

- risks of increased flooding to properties upstream or downstream, and
- the risk of sudden inundation if the barrier fails or is overwhelmed.

The paper aims to establish whether there are legal liabilities associated with these risks.

The *Doctrine of Precedent* declares that cases must be decided the same way when their *material facts* are the same (Williams, 1982). The part of a case that sets the precedent is its *ratio decidendi*. Williams says that this can be defined as the material facts plus the decision thereon. Whilst there have not yet been any reported cases relating specifically to the effects of home flood defence, there have been cases spanning nearly three centuries concerning liability for flood damage to property as a consequence of work carried out on neighbouring land. This paper seeks to identify the *material facts* of these cases and consider them in the new context of home flood defence provision.

The paper does not consider statutory requirements such as the possible need to obtain land drainage consent. Introductory guidance on these matters is contained, *inter alia*, in Environment Agency (2003).

Receipt and Discharge of Naturally Flowing Water

A legal distinction is made between water flowing within and outside of defined channels. For the former it was established in the nineteenth century (*Mason v Hill*) that the owner of land upon the banks of a natural water course is both entitled and bound to accept the flow of water past or through his land. He is not entitled to deprive those lower down the stream of its flow nor to pen it back upon the lands of his upstream neighbour. The adjective “riparian” is used to describe the rights and duties arising from the ownership of land adjoining the banks or bed of a river.

The relationship between the rights and duties of neighbours with respect to naturally flowing water outside of defined channels was considered in *Home Brewery Co. Ltd. v William Davis & Co. (Leicester) Ltd.* The sole judge in the case identified a pair of questions of law to be decided:

1. Does the owner or occupier of higher land have a right to discharge water percolating through or over his land onto lower lying land and is the owner or occupier of the lower lying land obliged to accept that water or is he entitled to prevent it entering his land?
2. Could action taken by the owner or occupier of the lower land be held to have committed nuisance in carrying out operations that prevented the natural flow of water from the neighbouring higher ground?

The judge expressed surprise that this was the first time it was necessary for the English courts to consider the first question. He concluded that “the lower occupier has no ground of complaint and no cause of action against the higher occupier for permitting the natural, unconcentrated flow of water, whether on or under the surface, to pass from the higher to the lower land, but that at the same time the lower occupier is under no obligation to receive it. He may put up barriers, or otherwise pen it back, even though this may cause damage to a higher occupier.” The judge stated that the right of the lower occupier to pen back the water is not absolute and went on to consider the related second question of law. Here he established that there may be an action in nuisance if the lower occupier’s use of his land in taking preventive steps was unreasonable and that the resultant damage to the higher ground was reasonably foreseeable.

A further important case concerning liability for mitigation of natural hazards is that of *Leakey v National Trust*. This case concerned liability for landslip. The court decided that there was a general duty on occupiers to do all that is reasonable in the circumstances to prevent or minimise the risk of foreseeable damage to the property of others from the encroachment of natural hazards from one’s land. The relative financial and other resources of the parties was recognised in the judgment as a factor to be considered. In this respect one of the judges illustrated the application of the principle with the resources that a small farmer might reasonably use to reduce the risk of flooding from a stream onto a more wealthy neighbour’s property as an example. In the case of *Home Brewery Co. Ltd. v William Davis & Co. (Leicester) Ltd.* the judge stated that his reading of this example was that it applied “where a condition has occurred naturally on one person’s land which causes him little damage, but might cause his neighbour enormous damage and which would be expensive to remedy.” In

the view of the current author it seems dangerous, and does not logically follow from *Leakey v National Trust*, that a defendant's liability to a plaintiff should be related to the size of the defendant's own loss. The individual nature of the Leakey test suggests that it is likely to keep the courts well occupied. In the recent case of *Green v Lord Somerleyton and others* for example it was held that the duty existed but had not been breached.

Increased Passage of Water to Other Property due to Flood Defences

Case law involving defence against flooding from water flowing outside of defined channels has a relatively long history. In the judgment on *Farquharson v Farquharson* (quoted within the later judgment on *Gerrard v Crowe and another* discussed below) it was stated that "It was found lawful for one to build a fence upon his own ground by the side of a river to prevent damage to his ground by the overflow of the river, though thereby a damage should happen to his neighbour by throwing the whole overflow in time of flood upon his ground, but it was found not lawful to use any operation in the alveus "

In *Nield v London and North Western Railway Company*, a river overflowed into a canal owned by the company. The company placed a temporary barricade of planks to hold back the floodwater but this was outflanked and led to flooding of the plaintiff's premises. The decision was that the defendant company was not liable for the resulting damage, the judgment including the words "...the defendants in no sense brought the water, or caused it to come to the place where the damage happened, but that it came by natural causes, that is, by a heavy fall of rain, and the overflowing of the river, and the configuration of the country, the defendants had the right to protect themselves against

it, and the plaintiffs cannot complain although what the defendants did in so protecting themselves augmented the damage to them.”

In *Maxey Drainage Board v Great Northern Railway Company* it was established that the railway company could legitimately construct an embankment to protect its land from such flooding, even though this caused flooding to other’s land, provided that they had “used reasonable care and skill and usual means for the purpose to do what was necessary to protect their land from damage by anticipated flood”. A similar situation was considered by the Privy Council in *Gerrard v Crowe*, the outcome of which was that there was no liability towards the landowner who suffered greater flooding as the result of an embankment constructed by the defendants. The judgment in this case carefully distinguished it from the earlier case of *Menzies v Earl of Breadalbane* which had shown that a riparian owner cannot lawfully carry out works that obstruct a natural channel with resulting encroachment of the channel onto other’s land. In *Marriage v East Norfolk Rivers Catchment Board* LJ Jenkins states “I think it must be regarded as settled that, to be actionable, an erection must be shown to obstruct a defined channel through which flood water is accustomed to flow, and not merely to prevent flood water from flowing at large over land adjoining the river and thence back into the main stream, although this may be the course where the flood water is accustomed to take.”

Failure of Defences

The possibility of overtopping by water levels higher than the height of defences is perhaps the mode of failure that would immediately come to mind.

A number of cases have examined liability for overtopping of structures provided as, or acting as, flood defences. In *Whalley v Lancashire and Yorkshire Railway Company*,

flooding caused the railway embankment to act as a temporary flood barrier. Fearing for the stability of the embankment the company cut trenches through it allowing flooding of land on the other side of the embankment. The Court of Appeal decided that the company had no right to protect their property by transferring the mischief from their own land to that of the plaintiff.

In *Hudson v Tabor*, where the parties owned adjoining properties with a continuous flood defence wall running along the riverward edge, it was held that, in the absence of evidence of any prescriptive duty, there was no common law duty to maintain the height of sections of the wall for the protection of adjoining landowners.

The final case to be considered, *Adcock v Norfolk Line Ltd.* is one of negligence. The case concerned the defective construction of a temporary sandbag flood defence whose breach led to 99 claims from property owners who suffered flood damage of about £1 million in total. Negligence was proved in the design, direction, construction, supervision, inspection and maintenance of the work, with the regional water authority (who then had equivalent powers and duties to those now held by the Environment Agency) and the sub-contractor (who was effectively working under the direction of the water authority) being apportioned most of the liability.

Discussion of Case Law in Relation to Home Flood Defence

It is unlikely that a householder will attempt to divert the natural channel of a river as was the subject of the *Farquharson v Farquharson* case. Such work would today require the consent of the appropriate land drainage body which would not be forthcoming without thorough investigation of the likely consequences. The cases of

Nield v London and North Western Railway Company, *Maxey Drainage Board v Great Northern Railway Company* and *Gerrard v Crowe* have established that it is acceptable to protect one's own property against flooding even though this may increase the flood threat to others. In practice the increased risk to others from the action of defending a single property will generally be minimal. However this may not be so in the case of defences installed to protect groups of houses, a possibility envisaged in Environment Agency (2003). In spite of the apparent precedents just described, that document points out that the right to take measures against flooding needs to be balanced against ensuring the action taken does not significantly increase the risk of flooding to other properties.

Whilst self interest ought to ensure that all co-operate, of particular relevance to the situation where defences are installed to collectively protect groups of properties is *Hudson v Tabor* which established that there is no obligation on all owners and occupiers to maintain their share of the defences. The case of *Whalley v Lancashire and Yorkshire Railway Company* warns that emergency conditions may not be sufficient reason for removal of barriers. However it could be argued here that, if imminent collapse of the defence system is likely, controlled discharge may be preferable to sudden collapse. Claims for negligence are most likely to occur in situations where group protection is involved. The risk of flooding leading to such claims can be minimised by ensuring that only kite marked products are installed and that manufacturers' instructions for their use are followed. *Adcock v Norfolk Line Ltd.* is a salutary lesson that even experts can be found wanting in the basic task of constructing a sandbag wall.

Conclusion

Common law gives reasonable legal protection to those who need to prevent flooding of their properties. The courts have established that such activities can be carried out without fear of liability for nuisance, even though the risk to others may be increased as a result. There is no liability in nuisance to other members where protection is provided on a group basis. The use of kite marked flood protection products in accordance with manufacturers' instructions reduces the chances of negligence. Bearing in mind the risk to one's own property if the measures are not carried out, it is perhaps legally safer to partake in "do it yourself" flood defence than snow clearing!

Table of Cases

Adcock and Others v Norfolk Line Limited and Others (1993) unreported (transcript from LexisNexis database).

Farquharson v Farquharson (1714) Mor. 12779.

Gerrard v Crowe and another [1921] 1 AC 395.

Green v Lord Somerleyton and others [2003] EWCA Civ 198.

Home Brewery Co. Ltd. v William Davis & Co. (Leicester) Ltd. [1987] QB 339

Hudson v Tabor (1876-77) LR 2 QBD 290.

Leakey v National Trust [1980] QB 485.

Marriage v East Norfolk Rivers Catchment Board [1950] 1 KB 284.

Mason v Hill (1833) 5 B. & Ad. 1

Maxey Drainage Board v Great Northern Railway Company (1912) 106 LT 429.

Menzies v Earl of Breadalbane (1828) 3 Bli NS 414.

Nield v London and North Western Railway Company (1874) LR 10 Exch 4.

Whalley v Lancashire and Yorkshire Railway Company.(1884) 13 QBD 131.

References

Construction Industry Research and Information Association [CIRIA] (2003)

<http://www.ciria.org/flooding> [accessed 29th October 2003].

Department for Transport, Local Government & the Regions [DTLR] (2001), *Planning Policy Guidance Note 25; Development and Flood Risk*, The Stationery Office, London.

Department for Transport, Local Government & the Regions [DTLR] (2002), *Preparing for Floods*, DTLR, London.

Environment Agency (2001), *Damage Limitation: How to Make Your Home Flood Resistant*, Environment Agency, Bristol.

Environment Agency (2003), *Flood Products: Using Flood Protection Products – a Guide for Homeowners*, Environment Agency, Bristol.

Gray, J. (1995), *Your Home and the Law*, Ebury Press, London.

House of Commons Select Committee on Agriculture (1998), *Flood Defence*, Session 1997-1998 6th Report, House of Commons, London.

House of Commons Select Committee on Environment, Transport & Regional Affairs (2000), *Development on, or Affecting, the Flood Plain*, Session 2000-2001 2nd Report, House of Commons, London.

Williams, G. (1982), *Learning the Law*, 11th edition, Sweet & Maxwell, London.

Wynn, P.G.L. (2002), "Flood Defence and the Surveyor: What's New?", *Structural Survey* Vol. 20 No. 4 pp. 117-122.