IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA523/2019
[2021] NZCA 227

BETWEEN	NOTTINGHAM FOREST TRUSTEE LIMITED First Appellant	
	ROGER DICKIE (N.Z.) LIMITED Second Appellant	
	FOREST MANAGEMENT (NZ) LIMITED Third Appellant	
	NOTTINGHAM FOREST PARTNERSHIP Fourth Appellant	
AND	UNISON NETWORKS LIMITED Respondent	

Hearing:	8 September 2020
Court:	Cooper, Clifford and Collins JJ
Counsel:	C T Walker QC, A L Sweeney and I J Thain for Appellants J B M Smith QC and S B McCusker for Respondent
Judgment:	3 June 2021 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is also dismissed.

C The appellants must pay the respondent costs on the appeal calculated for a standard appeal on a band A basis, and usual disbursements. We certify for two counsel.

D The respondent must pay the appellants costs on the cross-appeal on the same basis, and usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] Over a period from December 2010 to August 2016 pine trees growing in a commercial forest owned and operated by the appellants (Nottingham Forest),[1] which had been planted many years earlier, fell onto two electricity lines owned and operated by the respondent, Unison Networks Ltd (Unison). There were power outages to Unison's customers while repairs were carried out.

[2] Unison commenced proceedings in the High Court in relation to one of the affected lines. Its claim was advanced in nuisance, *Rylands v Fletcher* and negligence. It sought damages reflecting the cost of repairs and an injunction to prevent continuing falls onto the line.

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[1] There are four named appellants, who either had a proprietary interest in the forest or were concerned in its operation and management: Nottingham Forest Trustee Ltd, Roger Dickie (N.Z.) Ltd, Forest Management (NZ) Ltd and Nottingham Forest Partnership. With a few exceptions, it is unnecessary to distinguish between these parties for the purposes of this judgment and we refer to them collectively as "Nottingham Forest".

[3] Ellis J found in favour of Unison in both nuisance and *Rylands v Fletcher*.[2] The Judge considered that negligence had not been established. She awarded damages but declined injunctive relief.

[4] Nottingham Forest appeals, asserting that its only potential liability was in negligence and that it could not be liable in nuisance or *Rylands v Fletcher*. It says that since it was not at fault in its management of the forest, Unison is not entitled to relief against it. In the circumstances that arose, Unison was itself liable to meet the costs of repair and suffer what consequences might arise from future tree falls in the vicinity of the line.

[5] Unison counters that the High Court correctly found Nottingham Forest liable in nuisance and *Rylands v Fletcher*. It also cross-appeals, asserting that it should have succeeded on its negligence claim and on its claim for injunctive relief.

Facts

[6] The essential facts can be succinctly stated. The forest comprises a little over 150 hectares and contains at least 30,000 trees. The land was in use as a beef and sheep farm before its acquisition by Nottingham Forest in the early 1990s. The trees are Pinus Radiata and were planted in 1994.

[7] Unison owns two power lines that run through the forest: An 11kV line and a 33kV line. The section of the 11kV line through the forest is 495 metres long and the section of the 33kV line through the forest is 394 metres long. The proceeding concerned damage to the latter line, known as the Esk Feeder (the line). It was established in the late 1960s or early 1970s, and there was no dispute in the High Court that Nottingham Forest knew of its existence at the time the forest land was acquired.[3] There is a corridor around each of the lines, in each case approximately 30 metres wide in total, where no trees have been planted. The nearest tree to the line is planted about 15 metres away from it.

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2 *Unison Networks Ltd v Nottingham Forest Trustee Ltd* [2019] NZHC 2280 [High Court judgment].
3 At [23].

[8] The trees on the edge of the corridor grew to a height that was greater than their distance from the line some time between 2002 and 2008. However, in forestry terms, Pinus Radiata are not at their optimum maturity until they reach a height of 30 metres. On average the trees were 13.8 metres tall in 2002, 20 metres in 2008 and 38 metres in 2018. Harvesting of the trees was not scheduled to start before the end of 2020. The Judge found that by 2010 the trees planted on the edge of the corridor had grown taller than the full distance between those trees and the line. In the circumstances, there was what the Judge described as "a very good chance" that the line would be hit, and damage caused by falling trees.[4] In fact, that began to happen, with trees falling and causing power outages in December 2010 and July 2011. Further, in September 2013, a windstorm resulted in a tree fall causing $20,000 worth of damage to a structure on the line. In addition, there were outages on the 11kV line as a result of tree falls in April 2012 and January and November 2014.

[9] On 27 February 2015, Unison sent the third appellant, Forest Management (NZ) Ltd (FMNZ), a notice referring to potential liability for damage caused by trees falling on the lines and recommending that trees be cleared to prevent further damage to the lines. This was resisted unless there was appropriate compensation.

[10] Two trees fell and hit the line on 24 September 2015 (referred to by the Judge as the "First Strike").[5] The trees were around 31 metres in height and had been growing on a slope on the edge of the corridor approximately 20 metres from the western side of the line. This event resulted in a power outage. Power was not fully restored to the last customer for some 48 hours. On 8 July 2016 another tree on the western side of the line approximately 30 metres in height and growing about 20 metres from the line at the edge of the cleared corridor fell on the line (the "Second Strike").[6] There was a supply interruption of up to 21 hours whilst the necessary repairs were carried out. Following this event, FMNZ agreed to remove about 30 trees as a precautionary measure.

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4 At [25].
5 At [30].
6 At [36].

[11] There was a further event on 6 August 2016 (the "Third Strike").[7] As with the First and Second Strikes, the tree had been growing on the sloped land on the western side of the line. This caused an interruption to the supply lasting up to six days while the necessary repairs, which were delayed as a result of a snowstorm, were carried out. After these events Unison's Chief Executive wrote to the second appellant, Roger Dickie (N.Z.) Ltd (RDNZ), claiming that as a consequence of the Second and Third Strikes Unison had suffered power outages and incurred repair costs of over $133,000. It was said that Unison would hold RDNZ "liable for damage arising from the two … incidents … on 8 July and 6 August", as the damage was:

> … a wrongful interference with Unison's lawful and reasonable use of the land in circumstances where [RDNZ] has failed to exercise the care in the management of trees that a reasonably prudent forestry operator would exercise.

[12] A further event occurred on 5 September 2018 (the "Fourth Strike"),[8] after the present proceedings had been filed. Three further trees fell. Once again, the trees were planted on the slope on the western side of the line. There was a supply interruption of approximately five hours while the necessary repairs were carried out.

[13] The line provides electricity to approximately 380 customers. The four strikes resulted in outages affecting all customers served by the line. Each strike interrupted electricity supply until Unison repaired the line.

[14] Each time the trees fell as a result of what is known as "root plate failure", which occurs when the roots of a tree are insufficient to anchor it in the ground when the soil loosens and no longer holds up the tree, usually following adverse weather conditions. The trees that fell were healthy trees and the strikes followed periods of relatively high winds and heavy rainfall. However, even with regular inspections to identify trees at risk of falling, Nottingham Forest did not and could not identify in advance the trees which fell in the four strikes. Having assessed the relevant expert evidence before her, the Judge said:

> [67] In the end, however, all that can really be taken from the expert evidence (in terms of assessing the risk of any specific tree failing) is that:

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7 At [39].
8 At [44].

(a) healthy plantation pine trees can fail in adverse weather conditions for a number of reasons (including root plate failure);

(b) some risk factors are elevated where trees are grown around a cleared corridor;

(c) each tree fall event adds to the risk that newly exposed trees will fail; and

(d) earlier falls of trees in a particular area might suggest that future falls in that area are more likely.

Unison's claim in the High Court

[15] As noted above, Unison pleaded three causes of action, in nuisance, *Rylands v Fletcher* and negligence.

[16] In respect of the claim in nuisance it was said that the maintenance of the forest by Nottingham Forest had created and continued to create a state of affairs that unreasonably and substantially interfered with Unison's right to the use and enjoyment of the land over which the line is installed by:

(a) allowing trees growing near the line to reach a height at which they could fall onto it;

(b) failing to ensure that the trees were inspected and managed in a way that excluded any risk, or alternatively excluded any material risk, to the line; and

(c) allowing trees to fall onto the line.

[17] Unison claimed that its loss due to the damage caused by the four strikes was reasonably foreseeable by Nottingham Forest.

[18] The *Rylands v Fletcher* claim alleged that one or more of the defendants possessed and controlled the land and the trees planted on it. It was claimed that each of the four strikes caused damage due to:

(a) an escape of something harmful from the forest land, due to a non-natural use of that land; and/or

(b) other interference with Unison's property rights arising from a non-natural use of the land.

[19] It was again pleaded that the damage caused by the four strikes was reasonably foreseeable by Nottingham Forest.

[20] The negligence claim asserted that Nottingham Forest owed Unison a duty to take reasonable care and to exercise reasonable skill in managing and maintaining the trees on their land in order to ensure that none fell onto or otherwise came into contact with the line. It was then claimed that Nottingham Forest breached that duty by allowing trees growing near the line to reach a height at which they could fall upon it while failing to:

(a) implement a regular programme of inspection to identify trees with an "elevated risk of falling" on the line;

(b) prune or harvest the trees at risk of falling;

(c) carry out regular trimming of the trees; and

(d) identify and remedy the risks caused by the trees that ultimately fell causing each of the four strikes.

[21] The pleading alleged a continuing breach of the duty of care by allowing trees growing near the line to reach a height at which they could fall and damage it.

[22] Unison claimed damages in the sum of $228,829, being the cost of remedying the damage caused by the four strikes. It also sought a declaration that the defendants were jointly and severally liable for the costs of remedying the damage to the line caused by each of the strikes. Injunctive relief was also sought, requiring Nottingham Forest to ensure that no tree was of such a height and proximity to the line that it could

fall on it or, alternatively, to ensure that Nottingham Forest operated an inspection and maintenance regime sufficient to ensure that no further trees would fall on the line.

The High Court judgment

[23] The first substantive issue dealt with by the Judge was the question of whether Unison had a sufficient interest in or connection to the land over which the line was installed to enable it to advance a claim in nuisance or *Rylands v Fletcher*.[9] The Judge noted that under the Electricity Act 1992, Unison as the "owner of the works" has a right to own and continue the fixing and installation of the line,[10] and to maintain and upgrade it.[11] In the absence of evidence bearing directly on the issue, the Judge was prepared to assume that given the timing of the placement of the lines on the land, their construction had been authorised either under the Electric-power Boards Act 1925 or the Electricity Act 1968, possibly also relying on powers in the Public Works Act 1928.[12] Further, she considered as a matter of policy that the presence of the lines was sufficient to give Unison any necessary interest for the purposes of nuisance and *Rylands v Fletcher*.[13]

[24] The Judge relied on *Charing Cross Electricity Supply Co v Hydraulic Power Co*,[14] in which the plaintiff's electricity cables laid under the street were damaged by water escaping from the defendant's hydraulic mains, and two judgments of this Court in which infrastructure placed in and under streets relating to the transmission of electricity was held to be rateable property.[15] She noted that counsel for Nottingham Forest, Mr Thain, did not concede that Unison had the requisite interest in land, but had not strenuously argued that these cases should be distinguished on the basis that

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9 We note that while it is generally necessary for there to be a proprietary interest to claim in nuisance (see *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL) at 688 per Lord Goff) that is not the case for *Rylands v Fletcher*. The test articulated by Blackburn J was that a defendant brought some dangerous thing onto *their* land for their own purposes: *Rylands v Fletcher* (1866) LR 1 Exch 265 at 279. A proprietary interest in land has never been a formal prerequisite for a plaintiff to bring a claim in *Rylands v Fletcher*: see John Murphy "The Merits of *Rylands v Fletcher*" (2004) 24 Ox J Leg Stud 643 at 645–650.

10 Electricity Act 1992, s 22.

11 Section 23(1) and (3).

12 High Court judgment, above n 2, at [78].

13 At [80].

14 At [80], citing *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772 (CA).

15 At [81]–[82], citing *Hutt Valley Electric-Power Board v Lower Hutt City Corp* [1949] NZLR 611 (CA); and *Telecom Auckland Ltd v Auckland City Council* [1999] 1 NZLR 426 (CA).

what might properly be regarded as an interest in land in a rating context should not be so regarded for the purposes of a nuisance claim. The Judge concluded that:[16]

> (a) Unison's statutory right (once exercised) constitutes an interest in land in the form of a corporeal hereditament;
>
> (b) the owner of the utility works has the exclusive right to occupy the portion of the soil where the works lie to the exclusion of all others;
>
> (c) the interests of the owner of the surrounding land are ousted so long as the works remain in place;
>
> (d) as the statutory right confers exclusive possession, the utility company's interest in the land is greater than an easement or a license; but
>
> (e) even if no interest in land can be said to exist, as a matter of policy, the existence and importance of the works must mean that Unison is possessed of a sufficient interest to found an action in *Rylandsv Fletcher* or nuisance.

Although Nottingham Forest's appeal challenged these conclusions, Mr Walker QC advised us at the hearing of the appeal that the issue was no longer pursued.

[25] There could be no doubt that Unison's interest had been substantially interfered with by the falling trees. The essential issue then, for the nuisance and *Rylands v Fletcher* claims, was whether Nottingham Forest should be "strictly liable" for the resultant damage.

[26] The Judge noted that in the case of an ongoing interference with a plaintiff's relevant interest in land attributable to a defendant's unreasonable use of their land, liability in nuisance is strict.[17] Further, she wrote that physical damage to a plaintiff's land caused by a continuous or recurring emanation from a defendant's land is sufficient to establish unreasonable use by a defendant.[18] This was to be contrasted with one-off incidents, which are unlikely to be the result of an unreasonable user.[19]

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16 At [83].
17 At [87(a)].
18 At [87(b)].
19 At [87(c)].

[27] The Judge also said that where a one-off incident attributable to a defendant has resulted in damage to a plaintiff's interest, liability in negligence requires fault to be established. However, where the one-off incident is the result of:[20]

> … an isolated escape of something dangerous (a non-natural user) which a defendant has brought onto or accumulated on his land, liability (under the rule in *Rylands v Fletcher*) is strict.

[28] The Judge considered that the statement of claim drew a distinction between liability for the individual tree falls (which had been pleaded in reliance on *Rylands v Fletcher*) and liability for the "state of affairs" created by the trees on Nottingham Forest's land (pleaded in nuisance).[21] She thought the thinking that underlay this approach was that *Rylands v Fletcher* is generally regarded as more apt in cases of "one-off" rather than continuing interferences with a plaintiff's interest in land.[22]

[29] The Judge recorded that in closing submissions counsel for Unison in the High Court, Mr May, had said that the *Rylands v Fletcher* aspect of the claim was not pursued. She said:[23]

> As I understand it, that change in position was predicated on the assumption that both the "state of affairs" and the falling trees constituted nuisance simpliciter. Given that the individual tree falls form the foundation for the damages claim, the concession cannot have been intended to signal an abandonment of the strict liability claim relating to those falls.

[30] Notwithstanding what the Judge described as this "change of position" by Unison, she proceeded to deal with *Rylands v Fletcher*, noting that there would be no prejudice to Nottingham Forest in her doing so, because by the time of Mr May's advice, Mr Thain had already made closing submissions for Nottingham Forest which necessarily dealt with the *Rylands v Fletcher* aspect of the claim.[24] She described Mr Thain's principal position as being that liability for the falling trees could not be strict, whether in nuisance or under *Rylands v Fletcher*.[25]

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20 At [87(e)].
21 At [88].
22 At [71].
23 At [72].
24 At [73].
25 At [73], n 29.

[31] On this approach the Judge proceeded to address Nottingham Forest's liability for the four strikes in terms of *Rylands v Fletcher*. She considered that there were a number of aspects of the factual setting which pointed towards strict liability for the tree falls. She listed these as follows:[26]

> (a) the bulk supply of electricity (and ensuring its continuity) is a matter of significant public importance;
>
> (b) the electricity works (Unison's interest in land) pre-date the planting of the Forest;
>
> (c) while it does not seem that the defendants receive compensation from Unison for the ongoing presence of the works, their presence would logically have influenced the price for which they purchased the land;
>
> (d) the Forest was planted at a time when there was no statutory/regulatory obligation to ensure that trees/branches were located or kept at any particular distance from the works;
>
> (e) the object in planting and growing the Forest is commercial and it is implicit in that endeavour that the trees are to reach a certain (mature) height before harvesting;
>
> (f) it was foreseeable (at the time of planting) that a number of those mature height trees would be within falling distance of Unison's pre-existing electricity works;
>
> (g) it was foreseeable (at the time of planting) that any trees which do fall on the works are likely to do physical damage to the works and that such damage would have both a physical component and a consequential effect for Unison's customers;
>
> (h) it was known (and again was foreseeable) that healthy trees in forests can fall from time to time, for example as a result of weather events and/or soil conditions, and notwithstanding that the trees themselves have no obvious defects; and
>
> (i) at the time of planting Unison had no ability (statutory or otherwise) to require the defendants' trees to be felled or to fell them itself and (accordingly) no way of protecting the works; and
>
> (j) the subsequent promulgation of the [Electricity (Hazards from Trees) Regulations 2003] has not changed that position, because they apply only to encroaching trees.

[32] The Judge thought these considerations all pointed in favour of strict liability for the tree falls. She did not consider that the cases on which Nottingham Forest relied to argue that it should be liable only if shown to be at fault established that

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[26] At [90] (footnotes omitted).

Unison should bear the risk posed to its works by a mature forest which had been "deliberately planted around Unison's existing works for profit and in the knowledge (and intention) that they [would] ultimately grow to be within falling distance of those works".[27]

[33] The Judge held that, analysed in *Rylands v Fletcher* terms, the individual tree falls could be regarded as "one-off" escapes of dangerous things from Nottingham Forest's land.[28] Whilst ordinarily a single healthy tree would not be regarded as dangerous, a different conclusion was warranted in light of the contextual matters she set out, which we have quoted above. A distinction could properly be drawn between one or a small number of trees growing in a domestic setting and a commercial forest planted around power lines. It was the "accumulation" of trees growing to within falling distance of the line which took the activity outside any "natural" use of the land.[29]

[34] The Judge also held that Nottingham Forest was liable in nuisance, as the physical damage caused to the line by "recurrently falling trees" constituted an ongoing, substantial and unreasonable interference with Unison's enjoyment of its interest in land.[30] Alternatively, the deliberate growing of many trees within falling distance of the line constituted an unreasonable use. While a landowner might reasonably be expected to bear the risk posed by trees growing naturally on a neighbour's land, the present situation was not comparable with that. This was not a case where fault needed to be established, beyond the planting of the trees knowing that they would grow to within falling distance of the line.[31] Further, whether liability was founded on *Rylands v Fletcher* or in nuisance "proper", both the damage and Unison's loss were foreseeable.[32] The Judge concluded:

> [96] In short, it seems right in principle that strict liability should follow where both the choice to accumulate the trees in the first place and the ability to ensure that, in the event of a fall, they do not damage Unison's works, lies with the defendants. Unison is powerless to protect itself and its customers from harm (no evidence was called, and no argument made, in terms of any

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27 At [91].
28 At [93].
29 At [93].
30 At [94].
31 At [94].
32 At [95].

> ability Unison might have to insure against the risk). Damage from tree fall was never a risk its predecessor assumed when placing the works on the land.

[35] In view of these conclusions the Judge considered that the only continuing relevance of the "state of affairs" pleading was as a foundation for quia timet injunctive relief.[33] Such relief was unavailable unless the relevant nuisance could be said to be ongoing. This was unlikely in the case of *Rylands v Fletcher* claims because, of their nature, they concern one-off incidents. However, in respect of the nuisance claim, the Judge considered it arguable that the existence of a well-founded fear that the nuisance constituted by the falling trees would re-occur was itself a nuisance.[34] The history of past falls and the evidence given in Court meant that the fear and danger of future falls was well-founded. However, the Judge considered that on balance the risk was not sufficiently strong to justify the grant of a mandatory injunction.[35]

[36] The Judge discussed the claim in negligence only briefly. She observed that it had been pleaded as an alternative to Unison's "primary claims" in nuisance and *Rylands v Fletcher*.[36] She noted further that unless the relevant breach of duty could be said to be planting the trees within falling distance of the line (which had not been pleaded) no fault had been established on the evidence. She thought it was unnecessary to consider this cause of action further.[37]

[37] In a summary, the Judge concluded that:[38]

(a) Nottingham Forest was strictly liable to Unison for tree falls onto the line;

(b) injunctive relief was not appropriate; and

(c) Nottingham Forest must pay damages to Unison in the sum of $195,000.

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33 At [99].
34 At [102].
35 At [117].
36 At [103].
37 At [104].
38 At [160].

The appeal

[38] Nottingham Forest's principal submission on appeal is that the Judge should not have found them strictly liable for the damage caused by their trees falling onto the line.

[39] Mr Walker submitted that the growing of trees, even in a forest, is a natural use of the land and could not give rise to liability under the rule in *Rylands v Fletcher*. Nor could Nottingham Forest be liable in nuisance as, of itself, the existence of trees standing within falling distance of the line was not unreasonable. Mr Walker relied on cases which were cited in the High Court as establishing that liability for tree falls is not strict and requires fault in the management of the trees. The relevant standard for that was the same in nuisance and negligence. He submitted that nothing in the present context justified a departure from the existing case law, and because Nottingham Forest was not at fault in their management of the trees, it followed that they should not have been found liable.

[40] Underpinning Mr Walker's submissions was the idea that trees are ubiquitous, that the tree falls occurred in a forest, that accumulations of trees whether in a forest or in a suburban setting are common and that many trees are planted in the vicinity of property boundaries where they might fall and cause damage. He pointed out that Nottingham Forest had complied with the relevant regulatory regime governing tree distances from utilities,[39] and had conducted regular, reasonable inspections in an endeavour to identify unhealthy trees or those at any specific risk of falling. The tree falls had occurred despite these efforts.

[41] For Unison, Mr Smith QC submitted that Unison has rights proceeding from its interest in land to be free from unreasonable interference, and the physical damage inflicted on the line was sufficient to render the interference caused by the tree falls unreasonable. He argued that strict liability arises where a defendant has created a nuisance and the taking of reasonable care from that point onwards is not relevant.

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[39] Under the Electricity (Hazards from Trees) Regulations 2003, trees must not encroach within prescribed distances from electrical conductors. However, the relevant distance in the present case was only 2.5 m. Regulation 40 provides that the Regulations do not affect claims that the owner of works may have against the owner of trees in respect of any damage caused to works by a tree owner.

This was not a case where the nuisance had been created by someone other than the defendant, where principles based on fault might be relevant.

[42] As to *Rylands v Fletcher*, Mr Smith accepted that the continuing interference by tree falls and the continuing risk of that happening made strict liability in nuisance a more appropriate finding, but contended there could be no question that Nottingham Forest was also liable under the rule in *Rylands v Fletcher.* He submitted Nottingham Forest's argument that since trees are by definition a natural thing their maintenance could not be a non-natural use of the land was incorrect.

Discussion

Nuisance

[43] A private nuisance may be defined as any ongoing or recurrent activity or state of affairs that causes a substantial and unreasonable interference with a plaintiff's land or their use or enjoyment of that land.[40] However, this simple statement of the nature of the tort masks difficulties that can arise in delineating the kinds of interest protected by it and the boundaries between private nuisance, trespass and negligence.

[44] The origins of the law of private nuisance and its distinguishing characteristics were discussed by Professor F H Newark in a well known article "The Boundaries of Nuisance" published in 1949.[41] He referred to the three ways in which the law historically recognised a person could be interfered with in their rights over land, observing:[42]

> Wholly to deprive a man of the opportunity of exercising his rights over land was to disseise him, for which he might have recourse to the assize of novel disseissin. But to trouble a man in the exercise of his rights over land without going so far as to dispossess him was a trespass or a nuisance according to whether the act was done on or off the plaintiff's land. Thus, to go on to the plaintiff's land and demolish a weir was a trespass which gave rise to the action of trespass: to stay on your own land and demolish a weir to the hurt of the plaintiff was a nuisance for which the assize of nuisance was the proper remedy. Nuisance could never be committed on the plaintiff's land: an act done on the plaintiff's land would be disseisin or trespass according to circumstances.

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40 John Murphy *The Law of Nuisance* (Oxford University Press, Oxford, 2010) at [1.05].
41 F H Newark "The Boundaries of Nuisance" (1949) 65 LQR 480.
42 At 481 (footnote omitted).

[45] Thus it is that trespass to land relates to direct intrusions upon land by a defendant, whereas private nuisance deals with indirect or consequential interferences with land affecting a plaintiff's right to use or enjoy it.[43]

[46] A traditional requirement for private nuisance is that there be an emanation from the defendant's land to that of the plaintiff.[44] The concept of "emanation" was explained by the Supreme Court in *Wu v Body Corporate* as follows:[45]

> [123] Emanation is the connecting act between the activities done on a defendant's land and the alleged interference with the use and enjoyment of the plaintiff's land. Emanation requires a transposition of the alleged nuisance (such as noise, dirt, noxious substances or vibrations) from the defendant's property to the plaintiff's property. When the alleged nuisance reaches the plaintiff's property, and substantially and unreasonably interferes with [the] plaintiff's right to use and enjoy his or her land, there will be an actionable private nuisance.

[47] Although the emanation requirement is perhaps more apt in the context of claims based on odours, fumes or noise, the branches that successively fell onto Unison's line here can be described as emanations from Nottingham Forest's land where the trees were growing.

[48] It is possible to distinguish between different kinds of interferences with a plaintiff's land which do not involve trespassing on the land or dispossessing its owner. First, occupiers may do something on their land which interferes with the enjoyment or amenity of the neighbouring land, such as where the defendant's conduct causes nauseating or noxious smells,[46] excessive amounts of smoke or noise,[47] or the infringement of a servitude such as a right to light.[48]

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43 Bill Atkin "Nuisance" in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 533 at [10.2.01].

44 But see this Court's reservations on the emanation requirement in *BEMA Property Investments Ltd v Body Corporate 366611* [2017] NZCA 281, [2018] 2 NZLR 514 at [57] and n 72.

45 *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215. In *Wu*, the Supreme Court held there was an exception to the usual requirement for there to be a "emanation". The Court found that liability in nuisance would have been established on the basis of the abrogation of the plaintiff's "right of access" to his unit: at [131]. However, given the Court found liability established in trespass it did not conclude on liability in nuisance: at [132].

46 Murphy, above n 40, at [1.05] and n 11, citing *Adams v Ursell* [1913] 1 Ch 269; *Wood v Conway Corp* [1914] 2 Ch 547 (CA); and *Walter v Selfe* (1851) 4 De G & Sm 315 (Ch).

47 At [1.05] and n 12, citing *Halsey v Esso Petroleum Ltd* [1961] 1 WLR 683 (QB); *Tetley v Chitty* [1986] 1 All ER 663 (QB); *Matania v National Provincial Board Bank Ltd* [1936] 2 All ER 633 (CA); and *Andreae v Selfridge & Co Ltd* [1938] Ch 1 (CA).

48 At [1.05] and n 13, citing *Colls v Home & Colonial Stores Ltd* [1904] AC 179 (HL).

[49] A second kind of case comprises interferences in which a defendant's actions on its own land result in physical damage to a plaintiff's property. Where the damage resulted from a "one-off" event, liability (at least in the nineteenth century) typically turned on the plaintiff demonstrating a negligent act by the defendant. Thus in *Vaughan v Menlove* a poorly constructed haystack near the boundary of the defendant's property caught fire, and cottages situated on the adjacent property were burnt down.[49] In the Court of Common Pleas, Tindal CJ referred to a requirement for the defendant to exercise a standard of care "such as a man of ordinary prudence would observe".[50]

[50] Reference may also be made to *Black v The Christchurch Finance Co Ltd* in which a fire on the defendants' land destroyed crops, fences and firewood on the plaintiff's property.[51] The principal issue concerned the defendants' liability for the mistakes of independent contractors. The Privy Council proceeded on the basis that the claim was properly brought in negligence. So too, in *Balfour v Barty-King*, Lord Goddard CJ observed that:[52]

> … a person in whose house a fire is caused by negligence is liable if it spreads to that of his neighbour, and this is true whether the negligence is his own or that of his servant or his guest …

[51] These cases were discussed by Conor Gearty in his article "The Place of Private Nuisance in a Modern Law of Torts".[53] He observed that the references in those cases to duty and negligence were not surprising in the context of the gradual emergence of the tort of negligence.[54] He continued:[55]

> It grew out of the older, nominate, forms of tort. A negligent neighbour who damaged your land more resembled a negligent bailee or a negligent driver than a factory owner deliberately emitting smoke and noxious gases into the atmosphere. The negligent act was generally an isolated event: it is difficult to be continuously negligent without becoming desirous of, or at least reckless as to, the damage that is being done. ... So negligence was the chosen tort and it has remained so to this day, covering D's negligent behaviour where it

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49 *Vaughan v Menlove* (1837) 3 Bing NC 468 (Comm Pleas).
50 At 475. We note that the claim was advanced in negligence.
51 *Black v The Christchurch Finance Co Ltd* [1894] AC 48 (PC).
52 *Balfour v Barty-King* [1957] 1 QB 496 (CA) at 504.
53 Conor Gearty "The Place of Private Nuisance in a Modern Law of Torts" [1989] 48 CLJ 214.
54 At 220.
54 At 220.
55 At 220–221 (footnotes omitted).

> damages his neighbour P's property, in the same way as it encompasses many other varieties of fault.

[52] The cases concerning falling trees on which Nottingham Forest relies in the present case can be fitted readily within such an analytical framework. Mr Walker referred first to *Noble v Harrison* in which a branch of a tree growing on the defendant's land overhanging a highway fell, damaging the plaintiff's vehicle.[56] The County Court found that the defendant did not know that the branch was dangerous, and the fall of the branch was due to a latent defect not discoverable by any reasonably careful inspection. Nevertheless, the defendant was held liable in both *Rylands v Fletcher* and nuisance.

[53] On appeal it was held that *Rylands v Fletcher* did not apply. Rowlatt J held that growing a tree was one of the natural uses of the soil, and it made no difference whether the tree was planted or self-sown, and for what purpose it was planted or maintained.[57] To similar effect, Wright J said:[58]

> I do not think it material to consider whether the beech was originally planted (as most boundary trees would be) or whether it grew casually. Such a tree is a usual and normal incident of the English country; it develops by slow natural growth, its branches are not likely to cause danger, even if permitted to expand outwards over the highway. Such a tree cannot be compared to a tiger, a spreading fire, or a reservoir in which a huge weight of water is artificially accumulated to be kept in by dams, or noxious fumes or sewage. I see no reason whatever to apply the principle of *Rylands v Fletcher* to the case now under consideration.

[54] He went on to refer to a statement made in *Blake v Woolf*,[59] cited with approval by the Privy Council in *Rickards v Lothian*,[60] that there was an exception to the rule stated in *Rylands v Fletcher* so that:[61]

> … where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him.

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56 *Noble v Harrison* [1926] 2 KB 332.
57 At 336.
58 At 342 (footnote omitted).
59 *Blake v Woolf* [1898] 2 QB 426.
60 *Rickards v Lothian* [1913] AC 263 (PC) at 280.
61 *Noble v Harrison*, above n 56, at 343, quoting *Blake v Woolf*, above n 59, at 428.

[55] Nor was the defendant liable in nuisance. The mere fact that the branch had been overhanging the highway did not make it a nuisance: it did not obstruct the free passage of the highway, and although the branch had caused damage when it fell, the defendant was not liable because he had not created the danger and had no knowledge, actual or able to be imputed, of its existence.[62] In this respect, Rowlatt J stated that the defendant could be liable for a nuisance constituted by the state of his property only if he had caused it, or if "by the neglect of some duty he allowed it to arise" or if, when it had arisen without his own act or default, he omitted to remedy it within a reasonable time after he became aware or ought to have become aware of it.[63] Further, Wright J considered there could be no liability in nuisance for a "secret and unobservable operation of nature".[64]

[56] Mr Walker also relied on *Darroch v Caroll*, in which leaves falling from overhanging branches of a tree planted near the boundary of two residential properties had caused blockages of water and resultant dampness to the plaintiff's house.[65] A magistrate issued a mandatory injunction requiring removal of the tree from the defendant's land. On appeal, the High Court (then the Supreme Court) varied the injunction to require removal of the overhanging branches, as opposed to the whole tree.[66] Shorland J held that permitting the branches of a tree to overhang a boundary or encroach upon the property of a neighbour was a nuisance. However, removal of the encroaching branches would bring the nuisance to an end. Going further would require some other breach of duty.[67] After reviewing various authorities, Shorland J described the relevant duty of a landowner in respect of trees growing on the land as being:[68]

> … not a duty of insuring his neighbour or users of the adjoining highway against damage from his trees; but … a duty to exercise the care in the management of his trees which a reasonably prudent landowner would exercise.

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62 At 337–338 per Rowlatt J.
63 At 338.
64 *Noble v Harrison*, above n 56, at 341.
65 *Darroch v Caroll* [1955] NZLR 997 (SC).
66 At 1002.
67 At 999.
68 At 1001.

[57] Mr Walker also referred to *Helson v Dear*, in which there were claims in negligence and nuisance concerning two pine trees that fell and damaged a neighbouring house.[69] On the facts, the High Court considered it would have been unreasonable to require the landowner to carry out any inspection of the trees which appeared to be healthy, unless "something occurred that should have put her on her guard".[70] While there was evidence that "a branch or two had fallen from the trees over the years", that was nothing more than could have been expected in the ordinary course of events and there was nothing that should have put the landowner "on enquiry".[71] The Judge accepted that while an escape of something on a single occasion would not ordinarily be a nuisance, there was no reason in principle why it should not be. However, to expect the defendant to have known of the dangerous condition of the trees would have been to go beyond what was required of an "ordinary reasonable prudent landowner".[72] On this basis the cause of action in nuisance could not succeed. The negligence claim also failed, on the basis that the Court considered the relevant duty was the same.[73]

[58] The key factual difference between these cases and the present is that here there has been what the Judge described as a "continuous or recurring emanation" from Nottingham Forest's land causing physical damage to Unison's property as a result of trees planted by Nottingham Forest that would grow within falling distance of the line.[74] This finding underpins the proper analytical approach to liability in the circumstances of this case. The facts show that as a result of successive falls of trees that had grown to a height greater than their distance from the line, there was material and substantial damage to the line, which was unable to function for its intended purpose of conveying electricity until costly repairs were carried out. The ongoing nature of such occurrences puts the case in a different category to those relied on by Nottingham Forest whose facts engaged the law of negligence. As Gearty noted in the passage quoted above, the cases he surveyed generally involved an isolated event, and

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69 *Helson v Dear* HC Wellington CP536/86, 25 October 1988. There had originally also been a claim in trespass but that was not pursued in the High Court.
70 At 6.
71 At 6.
72 At 15.
73 At 16.
74 High Court judgment, above n 2, at [87(b)].

"it is difficult to be continuously negligent without becoming desirous of, or at least reckless as to, the damage that is being done".[75]

[59] In order for there to be an actionable nuisance there must be an interference with the plaintiff's use and enjoyment of its land which is unreasonable. In assessing whether there has been an unreasonable interference, it is necessary in each case to achieve a balance between the competing rights of the plaintiff and the defendant. In one well known statement, Bramwell B said that the law of private nuisance is essentially a "rule of give and take, live and let live".[76] In *Sedleigh-Denfield v O'Callaghan* Lord Wright observed that a:[77]

> … balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with.

Further, in *Hunter v Canary Wharf Ltd*, Lord Goff referred to "striking a balance between the interests of neighbours in the use of their land".[78] And in *Southwark London Borough Council v Tanner* Lord Millett referred to balancing the conflicting interests of adjoining owners.[79]

[60] As Professor Bill Atkin emphasises, the critical question is always whether the interference complained of is unreasonable because it exceeds the level that a reasonable occupier, expected to tolerate the reasonable activities of a neighbour, would regard as acceptable.[80] As to what constitutes a "reasonable" interference, a distinction can be drawn between the activities of a defendant that cause a non-physical interference with the use and enjoyment of a plaintiff's land, and activities that result in non-trivial, physical damage to neighbouring land.[81] Where, as in this case, there has been ongoing and substantial physical damage to a plaintiff's property, that will ordinarily be sufficient, without more, to establish that the interference is unreasonable.[82]

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75 Gearty, above n 53, at 220.
76 *Bamford v Turnley* (1862) 3 B&S 66 (Exch) at 83.
77 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (HL) at 903.
78 *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL) at 693.
79 *Southwark London Borough Council v Tanner* [2001] 1 AC 1 (HL) at 20.
80 Atkin, above n 43, at [10.2.03].
81 *St Helen's Smelting Co v Tipping* [1865] 11 HLC 642 (HL) at 650; *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB) at 691; and *Clearlite Holdings Ltd v Auckland City Corp* [1976] 2 NZLR 729 (SC) at 740.
82 *Clearlite Holdings Ltd v Auckland City Corp*, above n 81, at 740.

[61] We accept that there is a social utility in the growing of trees for forestry purposes, as Mr Walker submitted. However, as Mr Smith countered, there is also of course a very obvious utility in the provision and maintenance of lines for the supply of electricity. But the case does not call for a comparative weighting of one activity against the other. The question here is whether Nottingham Forest's maintenance of trees planted adjacent to Unison's line, close enough to damage it when from time to time they fell, unreasonably interfered with Unison's right to enjoy its property interest in the line.

[62] Given the inevitability (demonstrated by earlier events) of tree falls in and following bad weather conditions, we have no doubt that it was unreasonable for Nottingham Forest to allow the trees to grow to the height at which they would cause physical damage to Unison's line when they fell. In doing so, Nottingham Forest created a state of affairs on its land that caused an unreasonable and continuing interference with Unison's line.

[63] A party responsible for creating a state of affairs that unreasonably interferes with a neighbouring property will be strictly liable for the consequences in the sense that it will not be a defence to show that all reasonable precautions were taken to prevent the activity from causing an unreasonable interference. As was said by Lord Goff in *Cambridge Water Co v Eastern Counties Leather plc*, where the defendant has been responsible for the creation of a nuisance liability is strict, although "that liability has been kept under control by the principle of reasonable user".[83] In the result:[84]

> … if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it.

[64] The principle was also succinctly stated by Lord Hoffmann in *Transco plc v Stockport Metropolitan Borough Council*.[85] He observed:[86]

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83 *Cambridge Water Co v Eastern Counties Leather plc* [1994] AC 264 (HL) at 299.
84 At 299.
85 *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1.
86 At [26].

> Liability in nuisance is strict in the sense that one has no *right* to carry on an activity which unreasonably interferes with a neighbour's use of land merely because one is doing it with all reasonable care. If it cannot be done without causing an unreasonable interference, it cannot be done at all.

[65] He went on to state that a defendant's liability to pay damages is "limited to damage which was reasonably foreseeable".[87] Such foreseeability does not in our view relate to the specific instance of damage, but to the *kind* of damage that has occurred as a consequence of the acts that gave rise to the interference. That conclusion is consistent with the principles concerning foreseeability of damage discussed in *Cambridge Water Co.* After observing that taking all reasonable care will not of itself exonerate a defendant who has created a nuisance from liability (the relevant control mechanism being the principle of reasonable user), Lord Goff continued:[88]

> But it by no means follows that the defendant should be held liable for damage *of a type* which he could not reasonably foresee; and the development of the law of negligence in the past 60 years points strongly towards a requirement that such foreseeability should be a prerequisite of liability in damages for nuisance, as it is of liability in negligence.

[66] This was followed by a brief reference to Lord Reid's judgment in *The Wagon Mound (No 2)*[89] and the conclusion that foreseeability of harm is a prerequisite of the recovery of damages in private nuisance.[90] Lord Goff characterised Lord Reid's discussion of foreseeability as relating to remoteness of damage.[91] We note that, consistently with these cases, in *Hamilton v Papakura District Council* this Court held that in nuisance, as with *Rylands v Fletcher*, foreseeability of the type of damage that occurred is a prerequisite to the recovery of damages.[92]

[67] It is no answer to this to say, as Nottingham Forest does here, that it was not possible to predict which if any trees would in fact fall in the extreme weather conditions that occurred. As noted earlier, the four strikes which form the basis of Unison's claim came after earlier events in which trees fell causing power outages in

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87 At [26].

88 *Cambridge Water Co v Eastern Counties Leather plc*, above n 83, at 300 (emphasis added).

89 *Transco plc v Stockport Metropolitan Borough Council*, above n 85, at [26], citing *Overseas Tankship (U.K.) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617 (PC) [*The Wagon Mound (No 2)*].

90 At [26], citing *The Wagon Mound (No 2)*, above n 89, at 640.

91 *Cambridge Water Co v Eastern Counties Leather plc*, above n 83, at 301.

92 *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA) at [75]–[76].

December 2010, July 2011 and September 2013. The 11kV line was affected by tree falls in April 2012 and January and November 2014. Accordingly, it was obvious that there was a real possibility that ongoing tree falls causing damage to the line would occur. And while it was not possible to predict which individual tree might fall, the reasonable action for Nottingham Forest to have taken was to remove the trees which would cause damage to the line if they fell.

[68] In the circumstances, we have no doubt that the four strikes for which Unison sought damages were incidents involving damage of a type which was plainly foreseeable. Given our earlier conclusion concerning unreasonable interference, we therefore think the Judge was right to find Nottingham Forest liable to pay damages in nuisance given the finding, now not challenged, that Unison had a sufficient proprietary interest to sue.

[69] We do not read compliance with the Electricity (Hazards from Trees) Regulations 2003 as an indication that the activity of Nottingham Forest was reasonable. Nottingham Forest accepted that the Judge correctly held that the Regulations (and in particular reg 40[93]) do not remove common law liability of the owner of trees to the owner of works (defined in accordance with the Electricity Act[94]) for damage caused by tree falls. However, Nottingham Forest's submission was that the reference in reg 40 to damage to works by a "tree owner" (as opposed to "trees") recognises that there must be fault on the part of the tree owner. We doubt that the Regulations were intended to have any impact on common law liability other than to preserve it. In any event, at common law, unreasonable user can be inferred from the fact that ongoing physical damage is caused by the impugned activity.

[70] We note that different approaches have been taken to the issue of whether foreseeability of the risk of harm is a necessary ingredient of liability in nuisance.[95] In the United Kingdom, the Court of Appeal in *Northumbrian Water Ltd v Sir Robert McAlpine Ltd* held that the event which causes the interference with the plaintiff's

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93 See n 39 above.
94 Electricity Act, s 2.
95 See the discussion in Maria Hook "Strict liability in nuisance — a fork in the road" [2021] NZLJ 136.

property must be reasonably foreseeable by the defendant.[96] Thus the respondent was not liable for damage caused by concrete which had leaked into a private sewer, as the Court held there was no reason to think the respondent should have foreseen the possibility that concrete would escape from its development site to neighbouring property.[97] In *PEX International Pte Ltd v Lim Seng Chye*, however, the Singapore Court of Appeal declined to follow that approach, preferring to rely on the concept of reasonable user to control liability in nuisance.[98] Foreseeability of the *kind* of harm, however, remained relevant to whether damages could be recovered.

[71] It is not necessary in this case to choose between these different approaches. On the facts, both the kind of damage and the tree falls which caused it were plainly foreseeable.

Rylands v Fletcher

[72] The "rule" in *Rylands v Fletcher* is based on the statement made by Blackburn J in that case:[99]

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

[73] The decision was affirmed in the House of Lords, but Lord Cairns LC added the gloss that the rule was restricted to circumstances where the defendant had made "a non-natural use" of the land.[100] Where the rule applies, liability is strict and it is not necessary for the plaintiff to prove negligence by the defendant.

[74] The rule was abolished in Australia by the decision of the High Court in *Burnie Port Authority v General Jones Pty Ltd.*[101] But it remains part of the law of

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96 *Northumbrian Water Ltd v Sir Robert McAlpine Ltd* [2014] EWCA Civ 685, [2014] All ER (D) 157.

97 At [19] and [25].

98 *PEX International Pte Ltd v Lim Seng Chye* [2019] SGCA 82 at [53] and [55].

99 *Rylands v Fletcher*, above n 9, at 279, as affirmed by the House of Lords in *Rylands v Fletcher* (1868) LR 3 HL 330 (HL).

100 *Rylands v Fletcher*, above n 99, at 339.

101 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 556–557, holding that the rule in *Rylands v Fletcher* was absorbed by the principles of ordinary negligence.

England and Wales, as confirmed in *Cambridge Water* and *Transco*,[102] and as part of New Zealand's common law, as confirmed by this Court's decision in *Hamilton v Papakura District Council*.[103]

[75] Although the real nature of the cause of action remains controversial, the current orthodoxy, exemplified by *Cambridge Water Co* and *Transco*, sees *Rylands v Fletcher* as a branch or "offshoot" of the law of nuisance, dealing with damage caused by isolated escapes of dangerous things from land. For example, in *Cambridge Water Co* Lord Goff described the rule as "essentially concerned with an extension of the law of nuisance to cases of isolated escape".[104]

[76] The justification and rationale for the rule is seen in the requirement that the defendant has been engaging in a particularly dangerous activity. This was explained in an article by Frederick Pollock, on the basis that:[105]

> … certain things are a source of extraordinary risk, and a man who exposes his neighbour to such a risk is held … to insure his neighbour against any consequent harm not due to some cause beyond human foresight and control.

[77] It is clear that the article of Professor Newark ("The Boundaries of Nuisance"), from which we have quoted above, has also been influential.[106] It was referenced extensively by Lord Goff in *Cambridge Water Co,* and referred to by Lords Bingham, Hoffmann and Hobhouse in *Transco*. In the latter case, Lord Hoffmann said:[107]

> [27] *Rylands v Fletcher* was therefore an innovation in being the first clear imposition of liability for damage caused by an escape which was not alleged to be either intended or reasonably foreseeable. I think that this is what Professor Newark meant when he said in his celebrated article ("The Boundaries of Nuisance" …) that the novelty in *Rylands v Fletcher* was the decision that "an isolated escape is actionable". That is not because a single deluge is less of a nuisance than a steady trickle, but because repeated escapes such as the discharge of water in the mining cases and the discharge of

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102 *Cambridge Water Co v Eastern Counties Leather plc*, above n 83; and *Transco plc v Stockport Metropolitan Borough Council*, above n 85. But not Scotland: see *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC 17 (HL) at 41.

103 *Hamilton v Papakura District Council*, above n 92. This case resolved uncertainty about whether New Zealand courts would follow *Cambridge Water Co v Eastern Counties Leather plc* or *Burnie Port Authority v General Jones Pty Ltd*, following the judgment in *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324 (CA).

104 *Cambridge Water Co v Eastern Counties Leather plc*, above n 83, at 304.

105 Frederick Pollock "Duties of Insuring Safety: The Rule in *Rylands v Fletcher*" (1886) 2 LQR 52.

106 Newark, above n 41.

107 *Transco plc v Stockport Metropolitan Borough Council*, above n 85.

> chemicals in the factory cases do not raise any question about whether the escape was reasonably foreseeable. If the defendant does not know what he is doing, the plaintiff will certainly tell him. It is the single escape which raises the question of whether or not it was reasonably foreseeable and, if not, whether the defendant should nevertheless be liable. *Rylands v Fletcher* decided that he should.

[78] The idea that *Rylands v Fletcher* is an offshoot of the tort of private nuisance has been comprehensively criticised by Donal Nolan who argues that it is based upon a misreading of the case itself.[108] However, for present purposes, and in the absence of any argument that we should not do so, we proceed on the basis that the current law is as set out in *Cambridge Water Co* and *Transco*.

[79] We consider the key issue in this part of the case is whether Nottingham Forest's activity in maintaining the forest can be described as the natural or ordinary use of the land. Just as the concept of reasonable user limits the extent of liability in nuisance, the concept of natural or ordinary use of the defendant's land has been used to control liability in *Rylands v Fletcher*.[109] The classic expression of this principle remains that by Lord Moulton in *Rickards v Lothian*:[110]

> It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased dangers to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

[80] In *Transco*, Lord Bingham said that no ingredient of *Rylands v Fletcher* had provoked more discussion than the requirement expressed in Blackburn J's judgment that the defendant should have brought something onto its land something which was "not naturally there", which was elaborated on by Lord Cairns on appeal when he referred to a "non-natural use" of land.[111] After referring to various articles in which the concept of been discussed, Lord Bingham said:[112]

> I think it clear that ordinary user is a preferable test to natural user, making it clear that the rule in *Rylands v Fletcher* is engaged only where the defendant's use is shown to be extraordinary and unusual. This is not a test to be inflexibly applied: a use may be extraordinary and unusual at one time or in one place but not so at another time or in another place … I also doubt whether a test of

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108 Donal Nolan "The Distinctiveness of *Rylands v Fletcher*" (2005) 121 LQR 421.
109 *Cambridge Water Co v Eastern Counties Leather plc*, above n 83, at 299, per Lord Goff.
110 *Rickards v Lothian*, above n 60, at 280.
111 *Transco plc v Stockport Metropolitan Borough Council*, above n 85, at [11].
112 At [11].

> reasonable user is helpful, since a user may well be quite out of the ordinary but not unreasonable …

[81] As noted earlier, in this case the Judge considered that the individual tree falls could be regarded as "one-off" escapes of dangerous things from Nottingham Forest's land.[113] She considered the accumulation of trees took Nottingham Forest's use of the land use outside any concept of "natural" use.

[82] We are unable to agree with that approach. In our view, the planting and growing of trees for the purposes of forestry cannot be regarded as anything other than an ordinary use of rural land. We would not describe it as a "special use bringing with it increased danger to others".[114] Still less can it be described as "extraordinary and unusual" in terms of Lord Bingham's formulation in *Transco*.[115] The activity is after all widespread in rural New Zealand and permitted by relevant resource management plans.

[83] Further, when they are planted, trees clearly cannot be regarded as dangerous. It is only when the trees in this case grew to a height greater than their distance from the line that there was a risk that they would fall and cause damage. The question of whether there is an ordinary use of land cannot properly be approached on the basis that planting and maintaining trees can be considered an ordinary activity except when they have grown above a certain height so that they pose a danger because of their proximity to a power line. That reasoning would imply that maintenance of trees that were younger or located at a greater distance from the line is an ordinary use of the land, while maintaining taller trees is not. The issue of whether an activity can be described as an ordinary use of land cannot depend on such fine distinctions. We add that such an approach would rob the key limitation mechanism of *Rylands v Fletcher* of its intended effect.

[84] The focus must be on the use being made by the defendant of its land at the time of the tree fall, that is, the "escape". The approach in the High Court effectively elides the question of whether the land use is an ordinary one with the events that

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113 High Court judgment, above n 2, at [93].
114 *Rickards v Lothian*, above n 60, at 280.
115 *Transco plc v Stockport Metropolitan Borough Council*, above n 85, at [11].

resulted in the damage. These are distinct concepts. If they are not kept distinct any activity which involves actions taken by a landowner resulting in damage to a neighbouring property might be brought within the ambit of *Rylands v Fletcher*.

[85] For these reasons we do not consider the Judge was correct to hold Nottingham Forest liable in *Rylands v Fletcher*. In the circumstances it is unnecessary to resolve the issue raised by Nottingham Forest that the Judge should not have held them liable on this cause of action because of the stance adopted by their counsel in his closing argument in the High Court.

[86] However, our conclusion that the Judge was right to uphold the claim in nuisance means that the appeal must be dismissed.

The cross-appeal

[87] Unison filed a combined notice of cross-appeal and memorandum supporting the High Court judgment on other grounds. Two key issues were raised: first, whether the Judge erred in declining to give injunctive relief and secondly, whether Nottingham Forest was liable in negligence.

[88] As matters transpired, Mr Walker confirmed at the hearing that the trees standing within falling distance of the line had been removed between 31 August and 4 September 2020. That was subsequently confirmed by an affidavit of a representative of Nottingham Forest. In the circumstances, Mr Smith indicated that the part of the cross-appeal seeking injunctive relief was abandoned.

[89] That left as the only issue to be argued the question of whether the Judge should have held Nottingham Forest liable in negligence. But that issue was conditionally to be addressed if Nottingham Forest was "not liable in nuisance or *Rylands v Fletcher*". That is consistent with the Judge's observation, presumably reflecting the approach taken at the hearing in the High Court that negligence had been pleaded as "an alternative to Unison's primary claims in nuisance and *Rylands v Fletcher*".[116]

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[116] High Court judgment, above n 2, at [103].

[90] Consequently, although we heard argument on the issue, the question of liability in negligence does not now call for a decision. We think it is preferable in any event that it not be addressed since the Judge dealt with it only very briefly and in conclusory terms:

> [103] Negligence was pleaded as an alternative to Unison's primary claims in nuisance and *Rylands v Fletcher*. It was not the preferred cause of action not just because it requires fault to be established but also because injunctive relief is not an available remedy. And unless the relevant breach of duty could be said to be planting the trees within falling distance of the Line in the first place (which is not pleaded and as to the merits of which I do not comment) no fault is established on the evidence here.

[91] Mr Smith challenged this conclusion of the Judge, pointing out that the duties alleged to have been breached in the statement of claim included a duty to exercise reasonable skill in managing and maintaining the trees in order to ensure that none fell onto, or otherwise came into contact with, the line. He argued that this was a wide enough allegation to embrace all phases of the forestry process including planting, but also managing, maintaining and harvesting trees. He contended this adequately expressed a duty to ensure that trees, given their growth and height, were not too close to the line. He added that even if the duty were defined more narrowly as a failure to identify and remove trees at an elevated risk of falling, Nottingham Forest had not done so.

[92] The difficulty is that the Judge found that no fault was established on the evidence. This was a finding open to her. There is not in fact a specific allegation that the trees had initially been planted too close to the line, and we do not accept the pleading was sufficient to embrace that. Any breach of duty must notionally have arisen years later, and the Judge found that it was not possible to predict individual tree falls.[117]

[93] In all the circumstances we consider the appropriate course to follow is to dismiss the cross-appeal.

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[117] At [106].

Result

[94] The appeal is dismissed.

[95] The cross-appeal is also dismissed.

[96] The appellants must pay the respondent costs on the appeal, calculated for a standard appeal on a band A basis, and usual disbursements. We certify for two counsel.

[97] The respondent must pay the appellants costs on the cross-appeal on the same basis, and usual disbursements. We certify for two counsel.

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