The "measured duty" to love thy neighbour: private nuisance and naturally occurring hazards

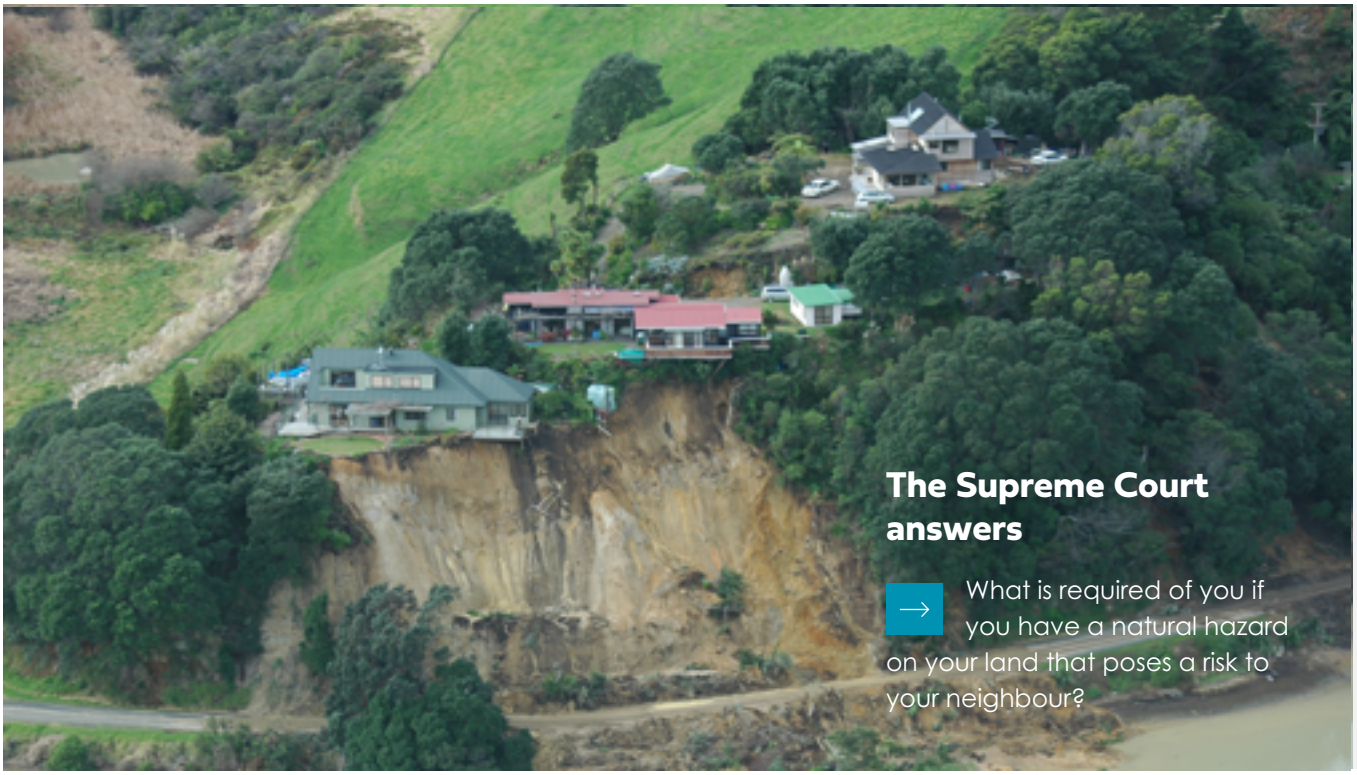
WRITTEN BY MARIA COLE

A Christchurch landowner, whose property sits at the foot of unstable clifftop land purchased by the Crown following the Canterbury earthquakes, has failed in the Supreme Court to obtain damages in "private nuisance" for the risk of further rockfall from the cliffs onto his property.[1] In its decision, the Court looked at liability for a private nuisance and set out the scope of the measured duty owed by one neighbour to another when a naturally occurring hazard poses a risk.

Background

For over 40 years, Mr Young has owned about two hectares of land at the foot of the cliffs at Redcliffs, Christchurch. He invested significantly in developing, landscaping and subdividing it, resulting in five houses being built with gardens. Some of the properties were sold, but the subdivision was still a work in progress when the 2010/2011 Canterbury earthquakes occurred.

1 *Young v Attorney-General* [2023] NZSC 142.



The Supreme Court answers

→ What is required of you if you have a natural hazard on your land that poses a risk to your neighbour?

The February 2011 earthquake caused significant damage to the land and houses, with over 30,000 tonnes of rock and debris falling from the cliffs onto the property, resulting in three of the houses becoming uninhabitable and with repairable damage to the other two. It was found that 72 per cent of the detached rocks and debris came from the cliff face lying within Mr Young's land, and 28 per cent from the neighbours' land above Mr Young's land.

After the earthquakes the cliffs remained unstable and at risk of further collapse. Neighbouring properties at the top of the cliffs and Mr Young's property at the foot of the cliffs were red zoned.[2] The Crown bought the red zoned clifftop properties between 2012 and 2015 and made two "red zone" purchase offers to Mr Young. The second was an improved offer, being a mix of the types of offers being made and included purchasing 100 per cent of the land (without improvements) at the 2007 rating value (the hybrid offer) after deducting the sums Mr Young had received already from the Earthquake Commission and private insurance. Mr Young rejected both offers and brought proceedings in trespass and nuisance.[3]

High Court and Court of Appeal findings

Mr Young asked the High Court for a declaration that the Crown should be required to remove existing rockfall and remediate the risk of further rockfall and/or cliff collapse so that he could return to, reoccupy and restore his property.[4] Alternatively, he wanted damages reflecting the value of his lost property.

The High Court found against Mr Young for three key reasons, which were:

- A claim in nuisance did not

2 After the Canterbury earthquakes, the Canterbury Earthquake Recovery Act 2011 was passed. It categorised greater Christchurch into four zones. Land that was "red zoned" could not be rebuilt on in the short to medium term.

3 The claim is trespass was abandoned.

4 By mid-2015, Mr Young was once again the owner of all the land plus all improvements on it.

necessarily translate to a duty … to fully compensate a plaintiff for the loss. The Judge considered it unlikely that private owners of the clifftop properties would have had to meet the full cost of compensating Mr Young for the lost value, and the Crown should not have a higher standard imposed on it.

- The Judge noted that the source of the damage did not emanate solely from the clifftop properties, so it would be inequitable to place the entire burden on the Crown.
- In looking at what it was reasonable to expect of the Crown, the Judge took into account the Crown's wider obligations following the Canterbury earthquakes and considered the Crown was *entitled to ration its resources to do the greatest good for the greatest number*.

The High Court found that the hybrid offer made by the Crown in 2015 appropriately discharged its obligations to Mr Young.

The Court of Appeal agreed with the High Court's finding that the hybrid offer satisfied the measured duty on the Crown.[5] Mr Young was granted leave to appeal to the Supreme Court.

The appeal to the Supreme Court

By the time the matter came before the Supreme Court, Mr Young was only seeking damages.

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He argued the hybrid offer did not meet the duty of care owed to him. He also argued there were options for remediating the property which would enable him to remain on and use some of his land.

The Crown's view was that:[6]

…the relief Mr Young now seeks assumes that the Crown is obliged to remediate the cliffs, but it argues that remediation is not reasonable in all the circumstances. Rather, its duty of care was discharged by making the hybrid offer in a situation where the only practical option to reduce the effects of the nuisance is in fact for Mr Young to move away from the property. The duty is simply to facilitate Mr Young's relocation. The hybrid offer does that and, in so doing, discharges the Crown's obligation to take reasonable care.

Private nuisance when a natural hazard is involved and the measured duty of care

The Supreme Court confirmed that the appeal before it concerned the scope of liability in private nuisance for a naturally occurring hazard, rather than where the nuisance was caused by a defendant's actions or omissions. A "private nuisance" is *an unreasonable interference with a person's right to the use or enjoyment of an interest in land*.[7]

5 *Young v Attorney-General* [2022] NZCA 391.
6 *Young*, above n 1, at [6].
7 *Young*, above n 1, at [3], citing Bill Atkin "Nuisance" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 579 at 580.

The Court noted that there can be a liability in private nuisance for *harm originating in some natural condition of* [the] *land* (here, the instability of the cliffs) as opposed to the effect of human activity.[8]

After an extensive review of the case law on private nuisance and naturally occurring hazards, the Court concluded that:[9]

> *…there can be liability in private nuisance arising from a natural hazard where the defendant knows or ought to have known of it but does not take reasonable steps to prevent it. In this situation, the defendant is said to continue the nuisance… Where the defendant did not create the private nuisance but rather continues it, that gives rise to faultbased, rather than strict,[10] liability.*

The factors relevant to reasonableness were then considered. The Court said what is *reasonable* requires a factual assessment. Because of the potential for varying circumstances, it stated it was not possible to be categorical or prescriptive about what reasonableness requires and the factors relevant in assessing it. The Court confirmed the duty of a landowner to an adjoining owner is a measured one and requires consideration of what is practicable.

In applying these principles, the Court considered:

- what was practicable;
- the impact of the risk arising from both parties' properties, that is, the hazard was not solely on the Crown's land;
- the comparative financial positions of the parties;
- whether the remedial work would benefit both parties;
- the statutory framework created by the legislation passed after the earthquakes which imposed obligations on the Crown to "rescue" the former owners of the land; and
- the relevance of this being for the public benefit.

The Supreme Court found that to impose an obligation on the Crown to implement the remediation proposal put forward before the lower courts went beyond what was reasonable in the circumstances.

However, the Court did not agree that the hybrid offer was related to whether the Crown had met its measured duty. This was because the context of this matter meant that the making of that offer was not something that would be required of a private landowner.

The Court said that when the relevant matters were considered, nothing was required of the Crown other than to warn Mr Young of the risks posed by the hazard and assist him with access to the property. It had done both of these things. Accordingly, it had met its measured duty to him.

But what of Mr Young?

Although Mr Young's land is currently worthless, there is a final note in relation to Mr Young's position given the Court's decision. The Crown had indicated during the hearing that the hybrid offer remains on the table for Mr Young to accept should he decide to.

8 *Young*, above n 1, at [54], citing Andrew Tettenborn and others (eds) *Clerk & Lindsell on Torts* (24th ed, Sweet & Maxwell, London, 2023) at [19–19].

9 *Young*, above n 1, at [68].

10 "Strict liability" means you are liable, regardless of fault.

About the author:

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