



Liability for Flood – LUG Conference 2013

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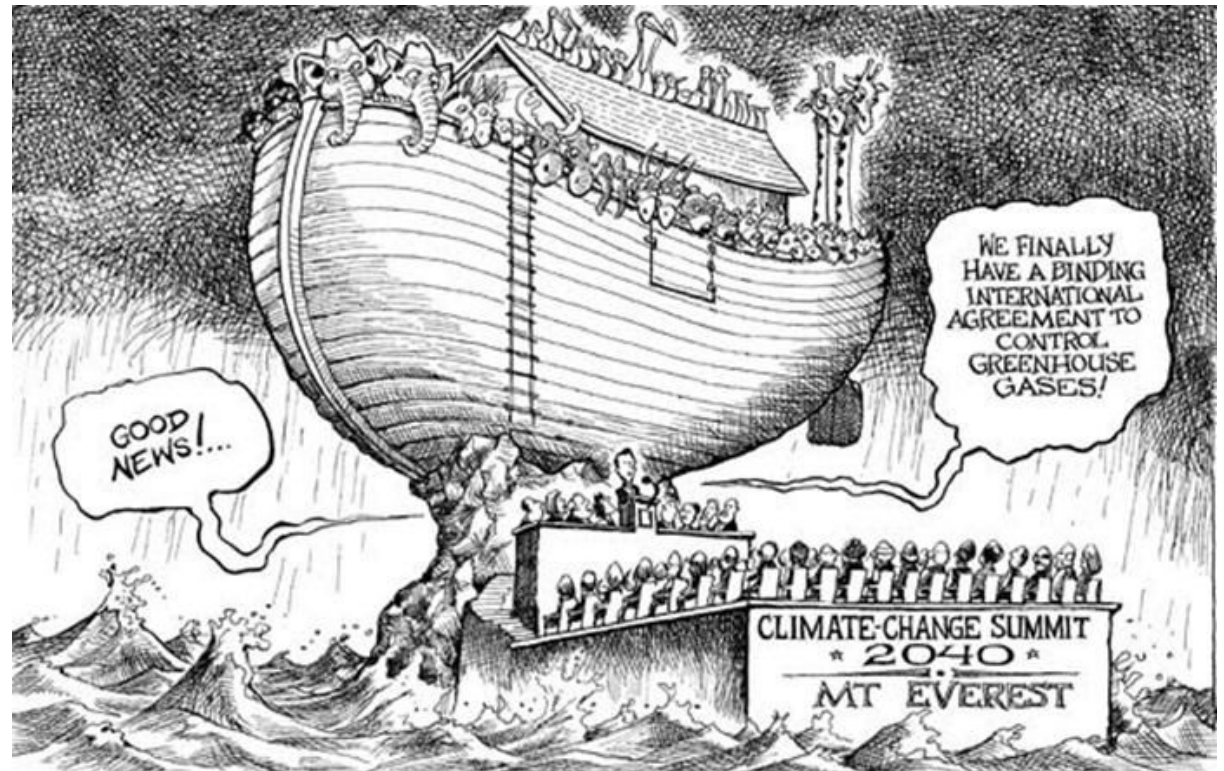
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Liability for flood - contents

- Introductory
- Causes of flooding
- Basis of liability
- Targets
- Examples
- A way to save insurers money?
- Q&A

Liability for flood – climate change?

- Noah
- More recently



Liability for flood – what do we mean by flood?

- Shorter Oxford English Dictionary:
 - an overflowing or irruption of (a great body of) water over land not usually submerged; an inundation; a deluge. A profuse and violent outpouring of water or other liquid; a torrent; a downpour
- Property underwriters: taken from a list of defined perils:
 - storm, flood, escape of water from any tank, apparatus or pipe, impact by any road vehicle or animal, or accidental discharge or leak of water from any automatic sprinkler installation

Liability for flood – what do we mean by flood?

- Case law:
 - water seeping into house to a depth of three inches? No – *Young v Sun Alliance*
 - ingress of water from abnormal rainfall? Yes – *Rohan Investments v Cunningham*
 - water damage resulting from purlin falling on and breaking sprinkler pipe? No – *Computer & Systems Engineering v Lelliott* – flood had to be the result of a natural occurrence
 - 1.4m of water in construction site caused by decoupling of a water main? Yes – *Tate Gallery (Trustees) v Duffy* – no absolute rule requiring a property to be affected by a large volume of water accumulating rapidly. No need for it to be caused by a natural event

Liability for flood – different responses of property and liability insurers

- For property insurers – sole question is whether there is a loss which triggers the policy – meaning of “flood” likely to be vital
- For liability insurers – sole question is whether there is a liability which triggers the policy – meaning of “flood” likely to be irrelevant
- However, what about where property insurers are subrogating and liability insurers are defending the claim?
- More about this later!

Liability for flood – Flood Re

- UK one of few countries where flood is automatically insured under household policies
- Is this a good thing?
- Statement of Principles – Flood Re
- Quote from BIBA

“The point of the agreement is to provide affordable cover for those that need it most and by excluding ‘genuinely uninsurable properties’, those that need it most would not be able to access cover. This could leave them high and dry.”

Liability for flood – natural disaster or man made?

- Noah's flood – entirely natural disaster – no liability
- But where man's activity (or inactivity) causes or contributes to the damage: possibility of liability
- First identify the cause of the flood

Liability for flood – causes of flooding

- Prolonged or severe rainfall
- Coastal flooding
- Failure of flood defences



Liability for flood – causes of flooding

- Dam break
- Canal or embankment failure or overtopping
- Temporary dams created by landslip, weeds, ice, debris and possibly beavers (now reintroduced to Britain)



Liability for flood – causes of flooding

- Sudden rise in temperature causing snow to melt
- Rising groundwater
- Blockage or inadequacy of drains, sewers, culverts or watercourses
- Surface water runoff
- Burst pipes / leaks
- Lack of maintenance
- Building in flood plains
- Climate change

Liability for flood – basis of liability

- Tort – nuisance, *Rylands v Fletcher* and negligence
- Contract
- Statute

Liability for flood – nuisance

- A person commits a nuisance if he does something on his own land which extends to the land of his neighbour by (1) encroaching on it, or (2) causing physical damage to it or property on it, or (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land
- Direct action cases: examples
 - A deliberately drains his land onto his neighbour's land
 - A diverts or blocks a natural stream and causes flooding
 - A diverts or blocks an artificial watercourse or culvert and causes flooding

But: common enemy principle – how to balance self interest and duty to neighbour

Liability for flood – nuisance

- Failure to act cases
 - *Goldman v Hargrave* 1967 – duty on occupiers in relation to hazards on their land (fire)
 - *Leakey v National Trust* 1980 – natural hill slipped onto adjacent property
- Failure to act in flooding cases
 - *Bybrook Barn Garden Centre v Kent CC* 2001 – duty to enlarge old culvert which had become inadequate
 - *Green v Lord Somerleyton* 2002 – medieval man-made lake draining naturally flooded claimant's marshes.

Liability for flood - nuisance

- Questions to ask:
 - has the flooding emanated from other land?
 - has the owner of the neighbouring land failed to act reasonably?
 - has the failure to take such steps as are reasonable caused the loss complained of?
 - was the loss suffered by the claimant a reasonably foreseeable consequence of the failure to act?

Liability for flood – nuisance – statutory sewerage undertaker

- *Marcic v Thames Water Utilities* – claim in nuisance and under Human Rights Act
- Repeated flooding caused by overloading of originally adequate sewer
- Undertaker not liable – statutory scheme provided all remedies there were – the balance between the interests of Mr Marcic and those who'd have to pay for a bigger sewer is better kept by a regulator than the courts
- Mr Marcic should have claimed under the statutory scheme instead



Liability for flood – the rule in *Rylands v Fletcher*

- Arose from the bursting of a reservoir dam
- *A person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it 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*
- Must arise from “non-natural user” of land – way of limiting the application of the principle
- Foreseeability is an essential ingredient - *Cambridge Water* case
- Will normally be wise to bring any claim in nuisance and negligence too

Liability for flood – negligence

- Need breach of duty of care
- If public body responsible, has it a defence of statutory authority?
- Probably not if it carried out what it was authorised to do in a negligent manner

Liability for flood – contract

- Normal principles apply

Liability for flood – statute

- Will occasionally provide remedies, eg S.209 Water Industry Act 1991 for escape from a water undertaker's pipe
- At the same time, may preclude claims at common law, as in *Marcic*



(Herne Hill, burst water main)

Liability for flood – targets

- Statutory bodies
- Local authorities
- Planners
- Utility companies
- Maintenance contractors
- Landowners
- Plumbers
- Construction companies
- M&E consultants
- Managing agents (eg failure to keep heated during winter)
- Landlords
- Developers
- Builders of flood defences/manufacturers of flood defence products
- Those responsible for dams/reservoirs
- Farmers
- Vendors
- Surveyors
- Solicitors (conveyancers)
- Architects
- Engineers

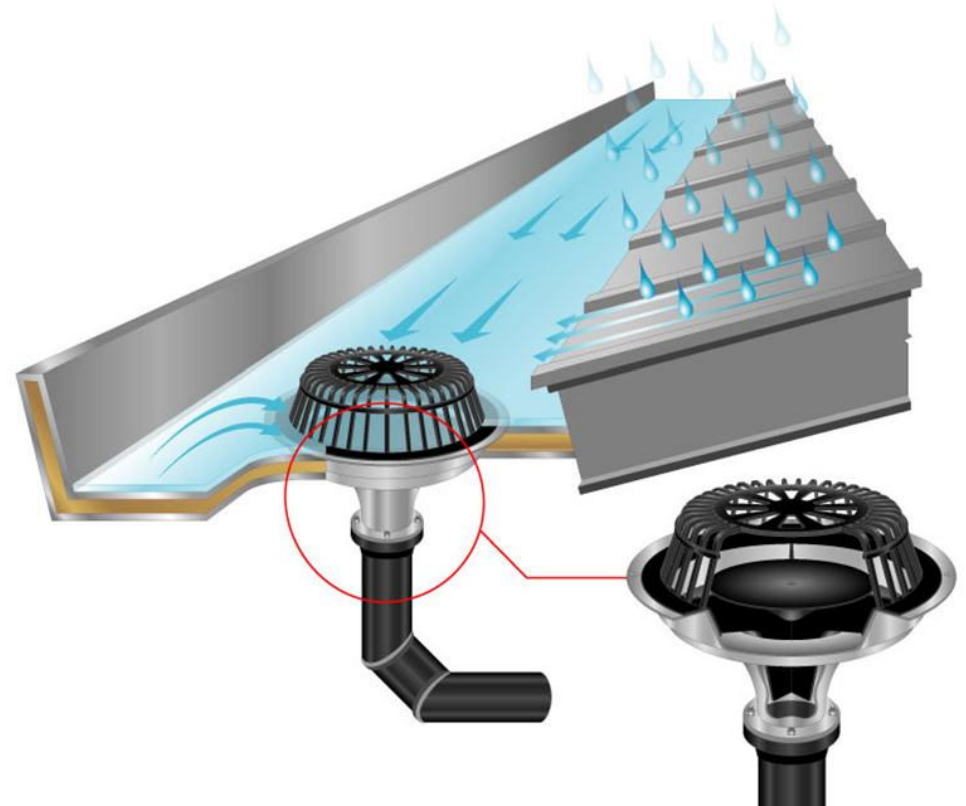
Liability for flood – Magna Park 1994

- Syphonic drainage



Liability for flood – Magna Park 1994

- Intense rainfall in 1994 overtopped valley gutters flooding warehouses
- Syphonic drainage could not cope, nor could the underground drainage
- Targets – manufacturer of syphonic drainage system, designer of underground drainage, architect, main contractor



Liability for flood – Hull 2007

- 95% of Hull below sea level
- 16,000 homes flooded in 240 streets, and many businesses affected
- Potential target: Yorkshire Water - had “improved” Hull's drainage a few years before, but had reduced its capacity in the process
- Also, failure of Yorkshire Water's pumps

Liability for flood – Newburn 2012

- Victorian culvert
- Culvert collapsed, water built up, eventually overtopped and deluged housing development



Liability for flood – Newburn 2012

- Main target: neighbour on whose land the blockage and build up of water was
- If collapse were due to old mine workings, then statutory compensation scheme would apply



Liability for flood – other examples

- BT laying cable across a gully, blocking it
- Basement slab of new construction lifted by rising groundwater after moderate rain – design failure
- Tap left on at top of block of flats, plug in basin
- Contractor installed lighting earthing rod through sewer – liable to affected residents for sewage backing up
- Land owner's failure to keep grating over culvert entrance clear
- Local Authority reducing capacity of overflow channel

Liability for flood – Property Insurers v Liability Insurers

- Costs incurred on both sides
- A drain on insurers collectively
- Does it have to be like this?

Liability for flood – a way to save insurers money?

- Large claims – normal insurer v insurer subrogation to take its course
- Small claims (with no or minimal uninsured losses):
 - pursued, with risk costs become disproportionate, or
 - not pursued because uneconomic
 - since Jackson, less attractive to pursue
- Why no inter-insurer rapid dispute resolution mechanism in the UK?
- US experience
- Good for both liability and property underwriters?

Q&A

