



## Who is obligated to maintain the drain?

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Legal disputes about stormwater drains regularly arise between neighbouring property owners and with local authorities. Often there is uncertainty about whether a drain is public or private and who has obligations to maintain the drain. The recent High Court decision of *Atkinson v Waipā District Council* [2025] NZHC 4025 provides helpful guidance on duties and obligations in relation to drains. It also

gives greater certainty to local authorities when managing stormwater networks that run across private land. In this case, the High Court found that the drain was located on private land. Although the drain was part of the Council's stormwater network, it remained under the control and ownership of the landowner. As a result, the landowner was required to maintain the private drain at their own expense.

## Background

Running through the Atkinson's property is a drain that forms part of the wider Waipā district stormwater network. The Atkinsons were aware of the drain when they purchased the property in 1999, however, they argued that it had not been connected to the public stormwater network until after the purchase. They also claimed that the volume and velocity of water in the drain increased over time, resulting in damage to their property.

The Atkinsons had been protesting the Council's continued use of the drain as part of the public stormwater network for the 25 years they had owned the property. They pursued several avenues, including petitions to Parliament and an application to the Environment Court for an enforcement order. None were successful. In this instance, the Atkinsons sought a mandatory injunction restraining the Waipā District Council from further use of the drain, together with damages of approximately \$2.5 million. The claim was advanced under the torts of nuisance and negligence, and based on "damage" from the discharge of stormwater under the rule in *Rylands v Fletcher*. Long story short, this latest claim by the Atkinsons was also unsuccessful.

## High Court Decision

The central issue in this case was whether the Council had lawful authority to connect to and discharge stormwater into the drain that ran through the Atkinson's property.

Evidence showed that the drain was connected to the public stormwater network between 1970 and 1985, before the Atkinsons purchased the property. When the connection occurred, section 221 of the Municipal Corporations Act 1954 (MCA) and section 448 of the Local Government Act 1974 (LGA 74) authorised councils to lead stormwater into "watercourses". The Court confirmed that the term "watercourse" is not limited to natural streams but also includes "*artificial channels*" (as defined in

the Soil Conservation and Rivers Control Act 1941). The drain in this case therefore qualified as a watercourse.

Sections 218 of the MCA and 445 of the LGA 74 require an owner's written consent prior to the construction of any drain on private property. It followed that, for the connection from the upstream property to the Atkinson's drain, those connecting works must have been constructed with the consent of the owner at the time of its construction. The Court determined that although records of such consent could not be found, it was "inconceivable" to conclude that the local authority would have constructed a piped drain and connected it to the Atkinson's drain without permission.

Given the finding that the drain lawfully ran through the Atkinson's property and remained a private drain, both the nuisance and negligence claims largely fell away. The Court considered that, for a nuisance to exist, there must be conduct beyond the Council's mere use of the drain, such as the causing of unreasonable physical effects, (e.g. flooding or erosion) and these must cause substantial damage. There was no evidence of such effects or damage in this case.

The Court found the *Rylands v Fletcher* claim was misconceived. Liability would require the accumulation or storage of something that poses a special risk if it escapes. Here, no such accumulation occurred, as stormwater merely passed through the property via the drain.

### Concluding comments

This case provides useful guidance for both councils and landowners in relation to stormwater drains on private property. Often historic legislation (and bylaws) need to be carefully checked to determine the statutory framework governing any drain that is part of the stormwater network.

Of note, the Court commented that it would be incorrect to say a drain becomes a public drain simply because it is used for public purposes. That comment calls into question earlier case law suggesting that a private drain can become public in certain circumstances. This leaves some scope for further argument. However, ultimately, it is clear each case must be assessed on its own facts.

If the circumstances outlined in this case sound familiar, or if you would like further advice about a stormwater drain on private property, please do not hesitate to get in touch with a member of our local government team.