

Fire & Flood – an Evening of Nuisance 24 January 2007

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12 King's Bench Walk
Seminar Programme 2007

Fire & Flood – An Evening of Nuisance

Wednesday 24 January 2007

5.30pm - Registration
6.00pm - Seminar
7.30pm - Refreshments

Arundel House
13-15 Arundel Street
Temple Place, London
WC2R 3DX

This is a free event



Aims and Objectives

This seminar will help both solicitors and insurers to assess the appropriate strategy for dealing with property damage claims. One talk will examine the conflict between private nuisance and public ownership that arises where Highways cause property damage; another, the practicalities of recovery under the Civil Liability (Contribution) Act 1978 and a third on the current law of tree nuisance.

Learning Outcomes

This seminar will update and inform current thinking on law relating to nuisance. Delegates will benefit from:

- new ideas on private nuisance caused by public bodies;
- practical advice on recovery from others for property damage;
- updates and reminders of the law of tree nuisance.

CPD Points
1.5

CPD reference
CW/CHRW

Programme

Fire & Flood – An Evening of Nuisance
24 January 2007
5.30pm – 8.00pm

5.30 pm	Registration Tea & coffee
6.00 pm	Introduction by chair Andrew Hogarth QC, 12KBW
6.00 pm	Flooding and the highway Ronald Walker QC, 12KBW Catherine Brown, 12KBW
6.30 pm	Tree nuisance: refresh yourself after a long, hot summer Stephanie Jackson, 12KBW
7.00 pm	Contributions: who to blame and when to do it Freya Newbery, 12KBW
7.30 pm	Drinks reception and canapés
8.00 pm	Close

To book your place, please complete the attached registration form and return to Lexie Adams, Practice Manager at the address below or by email to adams@12kbw.co.uk

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Ronald Walker Q.C. & Catherine Brown
- Session 2 Tree nuisance: refresh yourself after a long, hot summer
Stephanie Jackson
- Session 3 Contributions: who to blame and when to do it
Freya Newbery

Supplementary Papers

- Paper 1 Nuisance Neighbours – how to get someone else to do the work for you
Angela Frost
- Paper 2 *Rylands v Fletcher*: dead or alive?
Lisa Stephenson
- Paper 3 Public Nuisance: The forgotten art
Kweku Aggrey-Orleans



12KBW Seminar: Fire & Flood – An Evening of Nuisance
Wednesday 24th January 2007

Flooding and the highway

Ronald Walker Q.C. and Catherine Brown

CPD Ref: AVV/CHRW

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FLOODING AND THE HIGHWAY

Statutory Framework

1. Section 41 of the Highways Act 1980¹ provides a cause of action for persons using a highway if an accident results from a failure by the relevant highway authority to maintain the highway². By Section 329(1) “to maintain” includes “repair”.
2. Section 58 of the 1980 Act provides a statutory special defence if the highway authority has taken such care as in all the circumstances was reasonably required to secure that the highway was not dangerous for traffic.
3. The statutory duty is owed in respect of personal injury and property damage suffered by users of the highway. The Court of Appeal has concluded that it does not extend to other types of loss or to claimants who do not suffer damage as users of the highway³. Thus an adjoining or

¹ Previously Section 38 Highways Act 1959

² (1) The authority who are for the time being the highway authority for a highway maintainable at public expense are under a duty ... to maintain the highway

³ In *Wentworth v Wiltshire CC* [1993] QB 654 a farmer who lost profit when the road which served his farm became unusable, as a result of a danger resulting from failure to maintain, was unable to recover damages for breach of statutory duty

neighbouring landowner who suffers property damage as a result of a failure to maintain a highway (e.g. because water floods from the highway on to his land) cannot bring a claim for breach of statutory duty based on Section 41. However, for the reasons dealt with below, it may be important to understand the statutory framework relating to highway users and water on the highway in order to determine whether a highway authority is liable in the torts of negligence and / or nuisance in such a case.

4. In *Burnside v Emerson*⁴ the Court of Appeal decided that, where an accident was caused by the presence of water on a highway as a result of a failure by the highway authority to maintain the drainage system which served the highway, this could constitute a breach of Section 38 of the Highways Act 1959 (the predecessor to Section 41).
5. However the speech of Diplock L.J. in *Burnside* appeared to go further. He said at pages 1496-7 (emphasis added):

“The duty of maintenance of a highway which was, by section 38 (1) of the Highways Act, 1959, removed from the inhabitants at large of any area, and by section 44 (1) of the same Act was placed on the highway authority, is a duty not merely to keep a highway in such a state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year

⁴ [1968] 1 WLR 1490

without danger caused by its physical condition. ... "Non-repair" has the converse meaning. *Repair and maintenance thus include providing an adequate system of drainage for the road*; and it was in this respect that the judge found that the highway authority in this case had failed in their duty to maintain the highway."

6. Thus Diplock L.J. appeared to suggest that, not only must drainage systems which form part of the highway be maintained / repaired, but that highways must be provided with a drainage system and / or with an improved drainage system if that were necessary in order adequately to drain the surface of the highway. This interpretation was endorsed by Aldous L.J. in *Thoburn v Northumberland County Council*⁵ who said:

"Section 41 laid upon a highway authority an absolute duty to maintain a highway ... That duty was not confined to repair and included the provision of an adequate drainage system".

7. In *Haydon v Kent CC*⁶ the Court of Appeal (Lord Denning M.R. dissenting) found that the duty to maintain the highway included keeping the highway clear of transient dangers such as snow and ice. However the absolute nature of the duty was said to be qualified such that the highway authority was only in breach if they failed to act reasonably.

⁵ (1999) 1 LGLR 819

⁶ [1978] 1 QB 343

8. Subsequently the House of Lords in *Goodes v East Sussex CC*⁷ concluded that the minority judgment of Lord Denning M.R. in *Haydon* was correct and that the duty to maintain the highway was limited to keeping the fabric of the surface of the highway in good repair. The reference to the duty being limited to the surface of the highway by Lord Hoffmann in *Goodes* followed from his emphatic approval⁸ of the dissenting judgment of Lord Denning M.R. in *Haydon* in which that phrase had been used⁹.
9. The apparent limitation of the scope of the duty to the surface of the highway led to the argument that the reasoning in *Goodes* was inconsistent with a duty to maintain a drainage system and that the decision in *Burnside v Emerson* was no longer correct.
10. In *Hodges v Somerset CC*¹⁰ Hallet J. found against an injured road user on the facts of the particular case, but, having heard argument on the *Burnside / Goodes* issue said:

“I would take some persuading, however, that Lord Hoffmann in *Goodes*, in his typically thorough review of the duty imposed upon an authority to maintain the highway, would refer to parts of the judgments in *Burnside* with approval, as he did, yet overrule another significant part without expressly saying so. It is not absolutely clear from the report of the facts in *Burnside* where the inadequate and improperly maintained drainage system was, but

⁷ [2000] 1 WLR 1356

⁸ *Goodes*, page 1360

⁹ *Haydon*, page 357

¹⁰ [2003] EWHC 1521 (QB)

it must have been part of the fabric of the highway. If, therefore, one reads Lord Diplock's observation, subject to the qualification 'where the drainage is part of the fabric of the highway and in need of repair', this would not be inconsistent with Lord Hoffmann's speech in *Goodes*.¹¹

11. The observation of Diplock L.J. in *Burnside* to which she referred was that at page 1496-7 (see above).

12. This obiter dicta of Hallet J. did not see an end to the argument. In *Department of Transport, Environment & Regions v Mott MacDonald & others*¹² the Department, as the relevant highway authority, sought to recover damages paid by them to road users in respect of accidents caused by allegedly defective highway drainage systems. The defendants were the various agents who carried out maintenance on behalf of the Department. They each took the point as a preliminary issue that there was no breach of Section 41 in particular on the ground that, following the decision of the House of Lords in *Goodes*, Section 41 did not encompass a duty to maintain highway drains.

13. Although in the Court of Appeal Carnwarth L.J. later described the defendants' argument as "a remarkable contention"¹³, at first instance it was successful. HHJ Seymour Q.C. found that the duty was limited to a duty to maintain the surface of the highway and that, even if the Section 41

¹¹ *Hodges*, para 73

¹² [2006] EWCA Civ 1089

¹³ *Mott MacDonald*, para 3

duty had extended to the drainage system, there was no breach if the drains were blocked by silt, debris and vegetation, but the actual structure of the drains was not out of repair¹⁴.

14. The Court of Appeal, however, concluded that the Section 41 duty *did* extend to repairing and maintaining a drainage system which was itself part of the highway.

15. The reference by Lord Denning M.R. in *Haydon* to the surface of the highway itself came from the judgment of Cairns L.J. in *Worcester CC v Newman*¹⁵ in which it was found that vegetation growing in the surface of a highway constituted a breach of the duty to maintain. As Carnwarth L.J. points out in *Mott MacDonald*, in that context (and indeed in the context of the other cases such as *Goodes*), the phrase was apt. There was no question in those cases of a failure to maintain any part of the highway other than the surface.

16. However *Burnside* (which is inconsistent with such a limited scope to the duty to maintain) was binding on the Court of Appeal in *Newman* and there was no authority cited in that case for limiting the scope of the duty to the surface of the highway only.

17. In *Goodes* Lord Hoffmann referred to “keeping the fabric in repair”¹⁶ and Lord Clyde to the “physical or structural condition of the highway”¹⁷. The

¹⁴ *Mott MacDonald*, para 6

¹⁵ [1975] 1 WLR 901

¹⁶ *Goodes*, page 1360

Court of Appeal in *Mott MacDonald* found that the use of these words was deliberate and referred back to the words of Lord Robertson in *Dublin United Tramways Ltd v Fitzgerald*¹⁸:

“What they have got to keep in good condition is the structure or fabric of their part of the roadway. But then the surface is part of that structure or fabric, and, as this is a roadway, a very important part.”

18. Therefore the Court of Appeal in *Mott MacDonald* concluded that:

“the duty is not *confined* to the “surface” of the road; the surface is simply treated as one important part of what is to be maintained, which is the “structure and fabric of the roadway”.”¹⁹

19. Therefore, so long as the drainage system forms part of the highway, the highway authority is under a duty to maintain it.

20. The Court of Appeal went further however. Observing that the word “maintenance” was wider than the word “repair”, and relying in part on a decision of the House of Lords not cited in *Goodes*²⁰, Carnwarth L.J. concluded that the failure to clear a longstanding blockage in a drain, even

¹⁷ *Goodes*, page 1369

¹⁸ [1903] AC 99, pages 109-110

¹⁹ *Mott MacDonald*, para 40

²⁰ *Sandgate UDC v Kent CC* (1898) 79 LT 425

if the drain itself were not out of repair, constituted a breach of Section 41²¹.

21. It is important to note, however, the observation of Lord Denning M.R. that:

“...an icy patch in winter or an occasional flooding at any time is not in itself evidence of a failure to maintain.”²²

22. The assumed facts in *Mott MacDonald* were of a “longstanding blockage”.

The question may well arise as to how longstanding a blockage needs to be before it become evidence of a failure to maintain. Often in periods of heavy rainfall, debris is drawn into drainage systems and may cause blockages. Proving whether the drains were already blocked or only became blocked during a period of bad weather may become important.

23. An application for permission to appeal to the House of Lords by the various contractors was refused in *Mott MacDonald*.

24. The obiter remarks of Hallet J. in *Hodges* suggest, however, that the words of Diplock L.J. in *Burnside* are not to be read as suggesting that there is a duty on a highway authority to provide or improve a highway drainage system. Rather, if there is such a system, it must be repaired and maintained as appropriate. This interpretation is consistent with the fact that the Highways Act 1980, section 100 provides a power, not a duty, to install and improve highway drainage systems. As the House of Lords

²¹ *Mott MacDonald*, para 47-60

²² *Burnside*, page 1494

in *Stovin v Wise*²³ found (as explained by the more recent decision of the House of Lords in *Gorringe v Calderdale MBC*²⁴), there is generally no liability on a public body at common law for a failure to exercise a power. To rely upon the literal words of Diplock L.J. in *Burnside* would be to convert the Section 100 power into a duty.

Flooding from the Drainage System

25. If a highway drainage system has fallen into disrepair or there has been a failure to maintain resulting in a longstanding blockage, it may not be highway users who suffer damage as a result. In particular, where a highway lies on land higher than other surrounding property, the disrepair or lack of maintenance may result in flooding to that neighbouring land. Could a neighbouring landowner bring a claim in nuisance / negligence, even though he is unable to bring a claim for breach of statutory duty for failure to comply with Section 41²⁵?

26. In *Leakey v National Trust*²⁶ the Court of Appeal approved the Privy Council decision in *Goldman v Hargreave*²⁷ and found that an occupier or owner of land owed a duty:

²³ [1996] AC 923

²⁴ [2004] UKHL 15; [2004] 1 WLR 1057

²⁵ See *Wentworth v Wiltshire CC*, above

²⁶ [1980] QB 485

²⁷ [1967] 1 AC 645

“to do that which is reasonable in all of the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one’s neighbour or to his property”²⁸.

27. Whether the hazard was natural or man-made the duty was owed. Although the nature of the claim was probably best described as a nuisance, the distinction between nuisance and negligence was a distinction without a difference.

28. In addressing the question of reasonableness, Megaw L.J. said:

The considerations with which the law is familiar are all to be taken into account in deciding whether there has been a breach of duty, and, if so, what that breach is, and whether it is causative of the damage in respect of which the claim is made. Thus, there will fall to be considered the extent of the risk; what, so far as reasonably can be foreseen, are the chances that anything untoward will happen or that any damage will be caused? What is to be foreseen as to the possible extent of the damage if the risk becomes a reality? Is it practicable to prevent, or to minimise, the happening of any damage? If it is practicable, how simple or how difficult are the measures which could be taken, how much and how lengthy work do they involve, and what is the probable cost of such works? Was there sufficient time for preventive action to have been taken, by persons acting reasonably in relation to the

²⁸ *Leakey*, page 524

known risk, between the time when it became known to, or should have been realised by, the defendant, and the time when the damage occurred? Factors such as these, so far as they apply in a particular case, fall to be weighed in deciding whether the defendant's duty of care requires, or required, him to do anything, and, if so, what.²⁹

29. Applying the principles of *Leakey*, causing or permitting flooding from a highway drainage system could give rise to a claim by a neighbouring landowner. Although a highway authority is not technically the occupier of a highway³⁰, the critical question is likely to be control and responsibility rather than the technical question of occupation³¹.

30. Thus, so long as the drainage system is part of the highway, a claim in nuisance / negligence by a neighbouring landowner for damage resulting from a failure to maintain may well succeed. If a highway authority would have been liable to a highway user for a breach of Section 41 and if it is, or should have been, apparent that a neighbouring landowner was or might suffer damage if the drainage system was not repaired / maintained, it seems likely that a Court would find that the highway authority caused or permitted a nuisance.

31. However, the considerations set out in *Leakey* would, in this context, require the Court to consider similar matters to those in Section 58 of the

²⁹ *Leakey*, page 524

³⁰ *Whiting v Hillingdon LBC* (1970) 68 LGR 437

³¹ Although argued on a different basis, this is consistent with *Bybrook Barn Centre v Kent CC* (see below)

Highways Act 1980. Thus, if a highway authority was able to show that it had acted reasonably to avoid the nuisance, in particular by operating a reasonable system of inspection and maintenance, it might well avoid a finding of liability.

32. Another situation which might arise would not depend upon any failure to maintain a drainage system. If a highway is constructed at a higher level than a neighbouring property, if the capacity of the drainage system is inadequate, water may back up out of gulleys in times of heavy rainfall and cause flooding damage to the adjoining land. The statutory duty of the highway authority is to ensure that the drainage system is maintained so as to keep the highway safe for *users* of the highway. In one sense, therefore, it might be argued that, so long as that duty is fulfilled, the highway authority does not owe a duty to protect other persons from suffering damage.

33. However, if a highway system is designed and / or adopted by a highway authority and is constructed in a way which gives rise to a significant and avoidable nuisance to an adjoining landowner, there appears to be no reason in principle why the normal *Leakey* principles would not apply.

34. Earlier cases took a stricter approach. In *Whalley v Lancashire and Yorkshire Railway Co.*³² an unprecedented rainfall caused water to accumulate against the defendant's railway embankment to such an extent that the embankment was endangered. The defendant therefore cut

³² 13 QBD 131

trenches in the embankment by which the water flowed through and on to the land of the claimant which was on the opposite side of the embankment and at a lower level. The land was damaged to a greater extent than if the trenches had not been cut. The Court of Appeal found that, although the defendant had not brought the water on to its land, and at first instance it was found that the cutting of the trenches was a reasonable action by the defendant, the claimant was entitled to succeed. Although a landowner was entitled to take action to prevent water coming on to his land, once it had done so he was not entitled to take action which had the effect of damaging neighbouring land.

35. Therefore, in designing or adopting a highway drainage system, a highway authority is not entitled to disregard any adverse effect the system may have on neighbouring landowners.

36. *Whalley* followed *Hurdman v North Eastern Railway Co.*³³ which decided that where:

“the defendants have by artificial erections on their land caused water to flow into the plaintiff's land, in a manner in which it would not but for such erection have done, the defendants are answerable for the injury caused thereby to the plaintiff”³⁴.

³³ 3 CPD 168

³⁴ *Hurdman*, page 175

37. It must *be* remembered that both *Whalley* and *Hurdman* were decided at a time when *Rylands v Fletcher*³⁵ liability was in its ascendancy. In recent times the courts have increasingly restricted the application of the rule, thereby avoiding potentially unjust results from the application of the strict liability imposed by *Rylands v Fletcher*. In particular the requirement of a “non-natural” user of the land in order to found liability had been introduced to limit the scope of strict liability.

38. In *Cambridge Water Co. Ltd v Eastern Counties Leather plc*³⁶ the House of Lords opposed the undue narrowing of the scope of the rule by the artificial use of the concept of non-natural user, but in other respects adopted a restrictive approach to the application of the rule. The House of Lords said that the rule should be seen as little more than “an extension of the law of nuisance to cases of isolated escapes from land, even though the rule as established is not limited to escapes which are in fact isolated.”³⁷ Lord Goff, in particular, emphasised his opposition to strict liability otherwise than where imposed by statute³⁸.

39. *Cambridge Water* also moved the law of nuisance closer to that of negligence by finding that:

³⁵ (1866) LR 1 Ex 265

³⁶ [1994] 2 AC 264

³⁷ *Cambridge Water*, page 306

³⁸ *Cambridge Water*, page 305

“foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule.”³⁹

40. The courts have thus been moving in the direction of blurring the distinctions between the causes of action in negligence, nuisance and *Rylands v Fletcher*. and it seems unlikely that liability would be found today in a *Whalley* or *Hurdman* situation without consideration of the *Leakey* factors, even though the end result on the facts of the particular cases may not be altered. Thus, questions of reasonableness, foreseeability, likely magnitude of damage, cost of avoiding damage etc. are likely to be considered, even where there has been an accumulation of water, such as that in a drainage system.

41. However, as Lord Goff said in *Cambridge Water*:

“It is still the law that the fact that the defendant has taken all reasonable care will not itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user”⁴⁰.

42. It will be necessary in any case to scrutinise the technical data relating to capacity and water flows carefully. If the adjoining property would have suffered flooding if the highway drainage system did not exist, it may be difficult for the property owner to persuade a court that, merely because

³⁹ *Cambridge Water*, page 306

⁴⁰ *Cambridge Water*, page 300

the water emanates from a discrete source (the drainage system gully) as opposed to flowing down over and through the land on which the highway is constructed, the highway authority is liable in nuisance.

Watercourses and highways

43. The common law had historically taken a different approach to watercourses as opposed to water which percolates through or over land. As set out below, it was always much easier to bring a successful claim if the source of the damage ~~is~~ was a watercourse.

44. Highway authorities are vulnerable to claims for flooding where a highway passes over a watercourse. If the watercourse passes through a culvert beneath the highway, then any defect or inadequacy of the culvert may give rise to a claim by a neighbouring landowner who suffers flooding as a result.

45. Long before the watercourse reaches the culvert, it may well contain a variety of natural or non-natural debris. Once the watercourse reaches the culvert, that debris can easily cause blockages which result in flooding. The normal *Leakey* principles will apply and a highway authority will need to show that it has a reasonable system for inspecting and clearing culverts. This system will need to take account of the fact that the debris problem is likely to be exacerbated in times of heavy rainfall. A court may well expect that, in addition to periodic timetabled inspections, a highway authority has some kind of emergency / ad hoc system to check vulnerable

culverts when heavy rainfall is expected and to respond to reports of problems.

46. Where debris blocking a culvert is known to be an issue, a court may also take the view that the culvert should have been equipped with appropriate grilles. This is not just a case of fitting a flat grid to the upstream side of the culvert. The size and configuration of the culvert, the nature of the debris expected and the flow of water from the watercourse are factors which are taken into account in producing an appropriate design of grille. Expert evidence may well be required on the adequacy or inadequacy of the grille design.

47. What is the position, however, where there is no problem of debris, but the culvert is itself inadequate?

48. In *Bybrook Barn Centre v Kent County Council*⁴¹ the Court of Appeal considered a culvert which had been constructed to accommodate a natural watercourse. At the time of construction the capacity of the culvert had been sufficient. However over time it had become inadequate. This was due primarily to matters outside the control of the defendant highway authority such as the construction of the M20 motorway and a business park. As a result of the inadequacy of the culvert, the claimant's property was flooded. Had there been no culvert, or if an adequately sized culvert had been in place, there would have been no flooding.

⁴¹ [2001] BLR 55

49. The Court of Appeal endorsed the principle at common law that all a claimant needed to demonstrate in order to succeed was that interference with a natural watercourse by the defendant had caused the damage to the claimant's property⁴².

50. Further, although the defendant argued that there was no liability on a highway authority for non-feasance save pursuant to Section 41 of the Highways Act 1980, Waller L.J. concluded that the principle of non-liability only applied in relation to a failure to maintain the highway. There is no protection from a liability in nuisance in circumstances where a private individual would be liable⁴³.

51. Of most importance, however, was

“the question whether a highway authority which has constructed a culvert to take a natural stream under the highway which has constructed a culvert to take a natural stream under the highway which at the time it was constructed was adequate and thus did not cause a nuisance, and which when built, would not ... reasonably be expected to cause a nuisance, become responsible to enlarge the culvert when factors not their responsibility demonstrate that the culvert is no longer adequate and does now cause a nuisance.”⁴⁴

⁴² *Bybrook Barn*, page 60 para 19

⁴³ *Bybrook Barn*, page 62 para 27-28

⁴⁴ *Bybrook Barn*, page 57 para 3

52. Waller L.J. giving the only reasoned judgment concluded that the decision of the Court of Appeal in *Radstock Co-operative and Industrial Society v Norton-Radstock Urban District Council*⁴⁵ (which was distinguished in *Leahey*) should be confined to its own facts and should not be followed⁴⁶.

53. In *Bybrook Barn* Waller L.J. referred to the authorities culminating in *Goldman* and *Leahey* and concluded that:

“*Goldman* and *Leahey* simply take *Sedleigh-Denfield* a stage further ... But ... the view of Lord Wilberforce in *Goldman* added a further dimension by identifying the considerations which come into play for the purpose of deciding whether it is reasonable to impose a duty on a person to abate what he can see is causing or may cause a nuisance. A defendant is not entitled simply to say that something was not causing a nuisance when it came onto his land or when it was constructed and thus no liability can be imposed on him. A defendant's duty is to do that which it is reasonable for him to do.

That approach, which as it seems to me is consistent with *Sedleigh-Denfield* and with *Goldman*, is inconsistent with the approach of the majority of the Court of Appeal in *Radstock*. ... On the basis of *Goldman* and *Sedleigh-Denfield* it was not appropriate to approach the

⁴⁵ [1968] Ch 605

⁴⁶ No liability for a sewer pipe which was not a nuisance at the time it was laid by the defendant in a river bed running through the claimant's land became a nuisance over time as a result of matters for which the defendant was not responsible

matter on the basis that simply because the sewer was not a nuisance when created it could never become a nuisance thereafter.”⁴⁷

54. As the conclusion of Waller L.J.’s judgment makes clear:

“the test to be applied is that set out by Megaw L.J. in *Leakey* at p.526E”.

⁴⁷ *Bybrook Barn*, page 64 para 42-43

Naturally percolating water

55. The principles relating to water percolating through or over land from higher land to lower land were considered in *Home Brewery Co. Ltd v William Davis & Co. (Leicester) Ltd*⁴⁸. Naturally occurring water drained unchannelled over and by percolation through the plaintiffs' land into a disused osier bed and clay pit on lower, adjoining land. The defendants bought the adjoining land for housing development and filled in the clay pit, thereby erecting a partial barrier against the drainage of water from the plaintiffs' land and causing it to flood. The plaintiffs were forced to install pumps to prevent future flooding from the impeded drainage. The defendants also filled in the osier bed, forcing the water present there back on to the plaintiffs' land.

56. Piers Ashworth QC held that:

“an occupier is under no obligation to prevent water that has come naturally on to his land and has not been artificially retained there or artificially diverted from passing naturally to his neighbour's land”.⁴⁹

57. He went on, however, to find that:

“the common law rule is that the lower occupier has no ground of complaint and no cause of action against the higher occupier for

⁴⁸ [1987] QB 339

⁴⁹ *Home Brewery*, page 346

permitting the natural, unconcentrated flow of water, whether on or under the surface, to pass from the higher to the lower land, but that at the same time the lower occupier is under no obligation to receive it. He may put up barriers, or otherwise pen it back, even though this may cause damage to a higher occupier. However, the lower occupier's right to pen back the water is not absolute ...”⁵⁰

58. Thus, if this decision is correct, unless the water has been accumulated or diverted by the upper landowner, the lower landowner cannot claim in negligence or nuisance for damage caused by naturally flowing water even if the damage is foreseeable and could be prevented by the upper landowner. Although this conclusion appears to be inconsistent with the apparently universal application of *Leakey* to other situations, it maintained the historical distinctions between watercourses and other water. Further, the conclusion of Piers Ashworth Q.C. in *Home Brewery* that the lower landowner had no cause of action in relation to such water was approved by the Court of Appeal in *Palmer v Bowman*⁵¹.

59. As the passage above indicates, Piers Ashworth Q.C. also found that a lower landowner may be entitled to take defensive measures to prevent the water coming on to his land even if this means that the water is retained on the higher land, possibly causing damage to that land.

⁵⁰ *Home Brewery*, page 349

⁵¹ [2000] 1 WLR 842

60. Mr. Ashworth adopted the conclusion of Windeyer J. in the Australian case of *Gartner v. Kidman*⁵²:

"Although [the lower proprietor] has no action against the higher proprietor because of the natural unconcentrated flow of water from his land, he is not bound to receive it. He may put up barriers and pen it back, notwithstanding that doing so damages the upper proprietor's land, at all events if he uses reasonable care and skill and does no more than is reasonably necessary to protect his enjoyment of his own land. But he must not act for the purpose of injuring his neighbour. It is not possible to define what is reasonable or unreasonable in the abstract. Each case depends upon its own circumstances."⁵³

61. Thus, if *Home Brewery* were correct, if rain or other natural water runs over or through land on which a highway runs, the highway authority cannot be sued by an adjoining landowner so long as the water has not been diverted or accumulated on the highway. However, equally, the highway authority may not be able to complain (even if the result is a need to alter or augment the drainage system for the highway), if a lower landowner acts reasonably to prevent run-off coming on to his land and causing damage.

⁵² 108 C.L.R. 12, page 49

⁵³ *Home Brewery*, page 352

62. The Court of Appeal in *Palmer* made no finding as to whether or not this part of the decision in *Home Brewery* was correct. It appeared to be open to question, therefore, whether, for example, a highway authority which builds an embankment to prevent the flow of water from higher ground the highway, but thereby causes damage by flooding to the higher land on the opposite side of the embankment, can successfully argue that, so long as their actions were reasonable to protect the highway, there is no claim. Equally, can a highway authority sue if the embankment is built by a lower landowner and the highway is thereby subject to damage by flooding?

The last word?

63. As might have been expected given the developing history of the law relating to damage by water, in 2002 the Court of Appeal in *Green v Lord Somerleyton*⁵⁴ rejected a submission that *Leakey* had no application to naturally flowing water.

64. This submission had been founded predominantly on the case of *Thomas & Evans Ltd. v Mid-Rhondda Co-operative Society*⁵⁵. In that case the defendant had built a wall alongside a river in order to protect its land (including a highway) from flooding. In the course of building works the wall was taken down. Suddenly the level of the river rose and caused flooding to the plaintiff's land. The Court of Appeal in *Thomas* found that:

“the [plaintiffs] had no right to have the wall erected, they had no right to insist on its continuance, they had no ground of complaint whatsoever against anybody who rightfully took it down ...”⁵⁶

65. *Thomas* was considered in *Leakey* and Megaw L.J. said that:

“the decision itself ... can be justified without any inconsistency with the *Goldman v Hargrave* [1967] 1 AC 645 development of the law. There was nothing whatever which could be described as unreasonable, bearing in mind that an occasional flood in the river

⁵⁴ [2002] EWCA Civ 198

⁵⁵ [1941] 1 KB 381

⁵⁶ *Thomas*, page 393

was foreseeable, in the defendants taking down an old protective wall on their land in order to rebuild it. The fact that a flood happened to come before the wall was completely re-built could not, on any view, of itself give rise to any liability on the defendants.”⁵⁷

66. In *Green* the defendants submitted that *Thomas* was:

“authority for the proposition that where a landowner (A) ... who has by artificial means obstructed the flow of water across his land so that it does not flow onto the land of his neighbour (B) subsequently removes the obstruction – however unreasonably – with the consequence that the natural flow is restored and B’s land is flooded, A is not liable for that damage”⁵⁸.

67. However Jonathan Parker L.J. pointed out that the common law develops over time and, whilst clearly *Thomas* was not decided on *Leakey* principles, he went on:

“*Thomas* is not authority for the proposition that no *Leakey* duty arises in relation to naturally flowing water. ...the exception for which [the defendant] contends would be anomalous and undesirable, and out of tune with current authority.

⁵⁷ *Leakey*, page 522

⁵⁸ *Green*, para 98

Nor, for essentially the same reasons, can I accept [the defendant's] alternative submission based on *Thomas*, to the effect that no *Leakey* duty arises where land is restored to its natural state. In my judgment the nature and extent of the *Leakey* duty, as formulated by Megaw L.J. ..., leaves no room for exceptions of that kind⁵⁹.

68. Thus it would appear likely that in future, regardless of whether the source of flooding is a natural watercourse or naturally percolating water, in relation to the actions or failures to act of landowners (or highway authorities), if those actions / inactions result in damage to their neighbours, questions of liability are likely to be determined by the application of *Leakey* principles

69. The law of nuisance really is becoming much closer to the law of negligence than the judges of the 19th and early 20th century would probably have anticipated.

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⁵⁹ *Green*, para 100-101



12KBW Seminar: Fire & Flood – An Evening of Nuisance
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Tree nuisance: refresh yourself after a long, hot summer

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Tree Nuisance – Refresh Yourself After a Long Hot Summer

1. The Problem

In the spring when deciduous trees start to produce leaves they also need more water. This is taken from the ground around them via their root system. If their water take up is greater than the rainfall the soil will get progressively drier. Certain types of soil will shrink when this happens. These are known as shrinkable clays. Large parts of the UK are built on shrinkable clay (estimates say as much as 60%) and these are particularly concentrated in the South and East including London. In periods with little rainfall, these soils will be subject to movement and the possible movement of any building above them.

Given that there are over 150 million urban trees in Britain including some 400,000 street trees in London, this is a considerable problem. Most of those trees will be within what is considered a “safe distance” from a building. As you can see from the table below, a fully grown London Plane tree would have to be 22 metres from a building in order not to be considered a risk. In an urban area this is unlikely to be the case and most urban trees have the potential to cause damage given the right soil and weather conditions.

Recommended Safe Distances

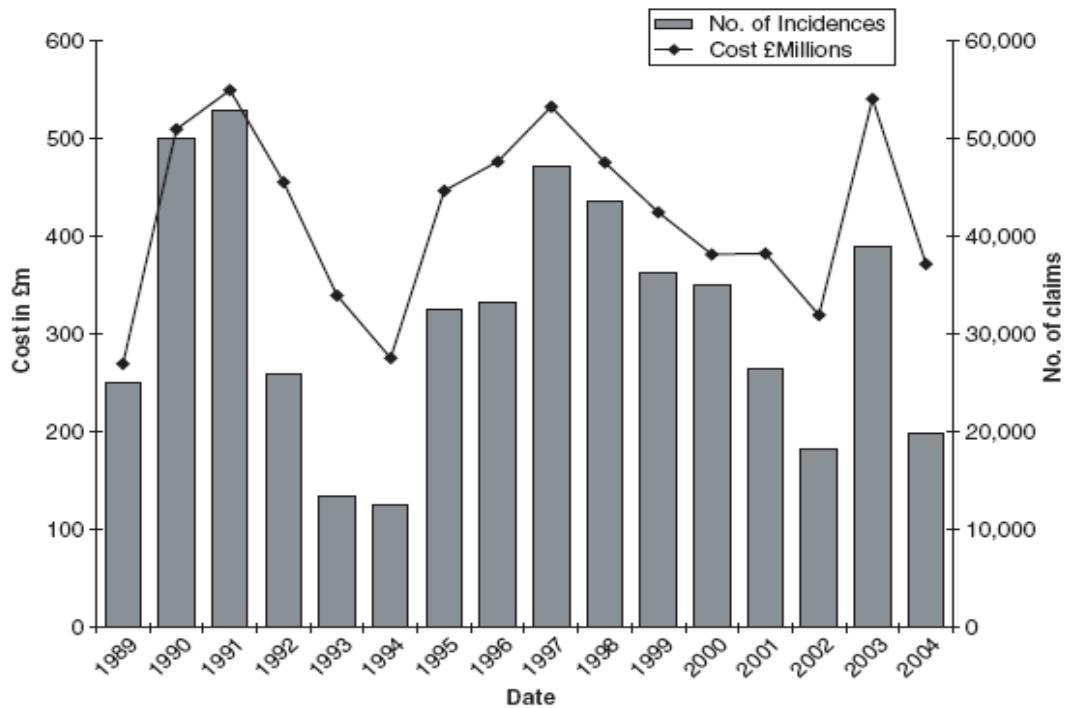
Tree	Height (m)	Distance from House (m)
Oak	24	30
Elm	25	30
Hawthorn	10	12
Ash	23	21
Sycamore	24	17
Birch	14	10
Maple	21	20
Poplar	28	35
Willow		40
Cyprus	25	20
Rowan	12	11
Magnolia	9	5
Walnut	18	14
Laburnum	12	9
Horse Chestnut	20	23
Beech	20	15
Plane	30	22

Source: Royal Botanic Gardens Kew

2. The Cost

Tree root subsidence costs insurers an average of £400 million a year but there are large fluctuations within this. Many years it will be much less but in drought years and the years immediately following a drought it will be much higher as can be seen from the diagram below. The peaks in terms of cost and number of claims follow dry years. The south-east of England experienced its driest period on record in the years 2005 and 2006.

The Cost of Tree Root Subsidence 1989 - 2004



Source: The Association of British Insurers

In 2005 Insurers paid out £292 million. The figures for 2006 are not yet available but they are likely to have increased and to increase again over the coming year.

3. The Legal Framework

The Essential Ingredients

(i) The Claimant must have a “proprietary or other lawful interest in land.”¹

...or put another way “...the Plaintiff in an action for nuisance must show some title to realty.”² In practice this means that action can be taken by a person who is the owner and occupier of land affected by nuisance or a tenant with exclusive possession. Action cannot be brought by family members, licensees or employees. An action may also be brought by the owner of a reversionary interest, providing that the nuisance will affect the value of the reversionary interest.

With continuing nuisances Claimants can recover damages for harm which originated in the name of their predecessors in title – Delaware Mansions Limited v Westminster County Council³ Here, the physical damage to the building caused by the tree roots occurred before the Claimant purchased the freehold. The House of Lords found that

“...where there is a continuing nuisance of which the defendant knew or ought to have known, reasonable remedial expenditure may be recovered by the owner who has had to incur it”⁴

(ii) The Defendant should be in occupation of the land from which the roots grow or be in control of the tree.

The Defendant should be the person who is in a position to abate the nuisance. If the land is occupied by the freehold owner, the situation is straightforward. A

¹ Read v J.Lyons & Co [1947] A.C.156 per Lord Simmons at p.183

² Hunter v Canary Wharf Ltd [1997] A.C.655 at p.688. Lord Goff quoting from “The Boundaries of Nuisance” (1949) 65 L.Q.R. 480

³ [2002] 1 AC 321

⁴ Per Lord Cooke at [38]

tenant is normally responsible for any harm caused by trees to neighbouring property.⁵

Street trees can cause problems. Historically, there have been arguments as to whether the highway authority was the occupier of the land from which the roots grew and whether the property in highway trees vested in the highway authority – see Hurst v Hampshire County Council.⁶

This has now been dealt with by the Court of Appeal decision in LE Jones (Insurance Brokers)Ltd v Portsmouth City Council⁷ In this case the highway authority had delegated its responsibility for trees to the local authority. This was done pursuant to a series of agreements between the highway authority and Portsmouth City Council. The Defendant argued, amongst other things, that the highway authority was the proper defendant. At first instance⁸ HHJ Havery Q.C. held that the lawful exercise of control over the tree, in the absence of ownership, was sufficient to make the defendant capable of liability in nuisance to the Claimant. This was approved by the Court of Appeal. Dyson LJ said:

“ In my view, the basis for the liability of an occupier for a nuisance on his land is not his occupation as such. Rather, it is that, by virtue of his occupation, usually has it in his power to take the measures that are necessary to prevent or eliminate the nuisance. He has sufficient control over the hazard which constitutes the nuisance for it to be reasonable to make him liable for the foreseeable consequences of his failure to exercise that control so as to remove the hazard”

“ In my judgment, it is not necessary to decide whether Portsmouth was an occupier of the highway in this case. What matters is that it

⁵ Edge v Briggs (1961) 178 E.G.261

⁶ [1997] 2 EGLR 164

⁷ [2003] 1 WLR 427

⁸ (2002) BLR 244

had the right and duty to maintain the trees, and that this included, where necessary, the right and duty to reduce their height so as to prevent damage being caused to nearby properties. The agency agreements gave it sufficient control over the trees, both in fact and law, to prevent any nuisance from occurring, and to eliminate any nuisance that did occur.”⁹

(iii) The roots of the Defendant’s tree must have caused harm to the Claimant’s property.

The Defendant’s tree must have caused actual harm to the Claimant’s property. This will normally be established with expert evidence and tree root samples taken in the vicinity of the damage.

The difficulty arises where there are competing causes of damage, such as the Claimant’s poor foundations or the roots of other vegetation owned by the Claimant. In Paterson v Humberside County Council¹⁰ Roger Toulson Q.C. held that the encroachment of roots from the Defendant’s trees was an effective and substantial cause of the damage to the Claimant’s house and that was enough to establish liability, even though it was not the sole cause:

“Other causes are the poor foundations of the property and the drought. The superior quality of construction of 42 Park Avenue may well explain why that property has suffered less damage. But it is sufficient to establish causation that the trees were an effective cause of the damage: Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd. The foundations were not so poor that the damage was bound to happen in any event. That is evidenced by the facts not only that the property had stood for over a hundred years, but also that the structure was in a stable condition at the

⁹ [2003] 1 WLR 427 at p.431

¹⁰ [1996] 12 Const L.J.64

time of the plaintiffs' purchase and for several years after. That being so, the fact that the property had shallow foundations and was therefore more susceptible to damage from soil shrinkage caused by invasion of tree roots is no more relevant to liability than the fact the a plaintiff has a thin skull : *Smith v Leech Brain & Co Ltd*. The roots take their victim as they find it.”

The effect of *Fairchild v Glenhaven Funeral Services*¹¹ on this was dealt with by the Court of Appeal in *Loftus-Brigham v London Borough of Ealing*.¹² In this case the trial judge found that in order to succeed in their recovery action the Claimants had to show that the Defendant's tree roots were “probably the dominant cause” of the damage to their property. He then went on to dismiss their claims because he was not satisfied that this was the case due to the existence of a large amount of vegetation belonging to the Claimants. The Claimants appealed on the basis that the trial judge had applied the wrong test.

Lord Justice Chadwick giving the judgment of the court at paragraph 24 agreed.

“ We are therefore satisfied that the judge erred in his approach to the question of whether the tree roots in law caused the damage complained of. The question that he should have asked himself was that approved by Lord Bingham in *Fairchild*: whether desiccation from tree roots materially contributed to the damage.”

Whether this has had the effect of reducing the burden of proof for causation on Claimants remains to be argued. It may be that “materially contributed” is easier to establish than a “substantial and effective cause”. Lord Justice Chadwick referred in his judgment to *Bonnington Castings v Wardlaw*¹³ and said that it was of particular interest

¹¹ [2003] 1AC 32

¹² [2003] EWCA Civ.1490

¹³ [1956] AC 613

“...because the injury of which the employee complained came from two sources, a pneumatic hammer, in respect of which the employers were not in breach of the relevant Regulations: and swing grinders, in respect of which they were in breach. Lord Reid held at page 621, that in those circumstances the court below had been wrong to formulate the question in terms of which was the most probable source of the disease complained of. The employee had to prove that the dust from the grinders made a substantial contribution to his injury, but (at page 622) that was established by showing that the proportion of dust that came from the swing grinders was not negligible.”¹⁴

“Not negligible would appear to be a lower test than “substantial and effective cause”.

¹⁴ Para 17

(iv) the harm must be reasonably foreseeable

It is now well established that a reasonable person in the position of the Defendant must be able to have foreseen that damage would be caused by the roots. However, this was not the case until the decision of the Court of Appeal in Solloway v Hampshire County Council.¹⁵ In this case the house had been damaged by the roots of a chestnut tree in an adjacent road. Generally the soil in the area was gravel based which was unlikely to be effected by encroaching tree roots. There were, however, a few pockets of clay randomly distributed. One of these was at the front of the Claimant's house. The key issue was whether the pocket of clay was foreseeable. Sir David Cairns concluded

“... it appears to me not surprising that the defendants clearly never directed their minds to the question of whether any particular house in that road was liable to be damaged by such roots. If they had considered the matter, I am of the opinion that they could have reasonably taken the view that any risk of damage was so remote that it could be disregarded. To say that a risk of damage is reasonably foreseeable means that it is foreseeable not merely as a theoretical possibility but as something the chance of which occurring is such that a reasonable man would consider it necessary to take account of it. The risk of being struck by lightning when one goes for a walk is not a reasonably foreseeable risk. I should be prepared to hold that the risk in this case was not a reasonably foreseeable risk.”¹⁶

General knowledge as to the damage caused by tree roots is increasing and it now seems unlikely that a defendant would avoid liability on the basis that it was

¹⁵ (1981) 79 LGR 449

¹⁶ (1981) 79 L.G.R. 449 at p.460

unforeseeable that tree roots would cause damage to buildings constructed on clay. However, it may be possible in areas which are not known to have predominantly clay soils. In L E Jones (Insurance Brokers) Limited v Portsmouth City Council¹⁷ HHJ Havery Q.C. found that there was a foreseeable risk of subsidence in a property if the trees were allowed to desiccate the soil underneath it, when that soil was brickearth overlying Reading beds. There was a dispute between the experts as to the extent that this soil would “shrink” but at its highest it could only be considered to be of medium risk and there had been no previous claims for subsidence along the road in question. It would appear that HHJ Havery was influenced by the fact that some, albeit inadequate, tree maintenance was carried out by the Defendant.

(v) There was something that the tree owner could have done to reduce or eliminate the risk of damage.

This is closely tied in with the question of foreseeability. It was considered at length by Stephenson L.J in Solloway v Hampshire County Council.

“...to have prevented or minimised the plaintiff’s damage would have required correspondence with many of the property owners in the county, wholesale inspection of and boring under properties, and the felling of many trees, which would have put the defendants to very great expense and produced many complaints from property owners upset by warnings or dangers which might not exist and from a wide public deprived, perhaps needlessly, of the amenity provided by trees like those lining Shirley Avenue...Such precautions would not, in my opinion, be reasonable; and no less would have been required, without exceptional good luck, to discover and deal with the pocket of clay

¹⁷ [2002] BLR 244

which unhappily underlay a crucial part of the plaintiff's house before the abnormally long, dry season of 1975/1976 made it too late to stop the subsidence and damage.”¹⁸

Again, this is an argument that is most likely to arise in cases where the soil is not uniformly clay. A Defendant is unlikely to succeed in arguing that it was unreasonable to expect them to pollard or prune offending trees in a clay soil area when such pruning would have minimised the risk to neighbouring properties.

(vi) the works undertaken by the Claimant must be reasonable

The question of what is a reasonable response by a property owner who discovers damage was considered in Delaware Mansions v Westminster County Council. The tree owners were the local highway authority and had been made aware of a potential problem in 1990. They did not remove the tree but instead installed a root barrier between the tree and the building. The owner of the building did not agree that this was a suitable response and went onto underpin the building themselves. The judge at first instance found that the Claimant had acted reasonably in carrying out the underpinning. The case went to the House of Lords who had to consider whether the Claimant had acted reasonably in taking the action that it had. Lord Cooke of Thorndon concluded

“ Having regard to the proximity of the tree to Delaware mansions, a real risk of damage to the land and the foundations was foreseeable on the part of Westminster, as in effect the judge found. It is arguable that the cost of repairs to the cracking could have been discovered as soon as it became manifest. That point

¹⁸ (1981) 79 L.G.R.449 at p.461

need not be decided, although I am disposed to think that a reasonable landowner would notify the controlling local authority or neighbour as soon as tree root damage was suspected. It is agreed that, if the plane tree had been removed, the need to underpin would have been avoided and the total cost of repair would have been only £14,000. On the other hand, the judge has found that, once the Council had declined to remove the tree, the underpinning and piling costs were reasonably incurred, despite the Council's trench...If reasonableness between neighbours is the key to the solution of problems in this field, it cannot be right to visit the authority or owner responsible for a tree with a large bill for underpinning, without giving them notice of the damage and the opportunity of avoiding further damage by removal of the tree. Should they elect to preserve the tree for environmental reasons, they may fairly be expected to bear the cost of underpinning or other reasonably necessary remedial works; and the party on whom the cost has fallen may recover it, even though there may be elements of hitherto unsatisfied pre-proprietorship damage, or protection for the future. But, as a general proposition, I think that the defendant is entitled to notice and a reasonable opportunity of abatement before liability for remedial expenditure can arise. In this case, Westminster had ample notice and time before the underpinning and piling, and in my opinion is liable."¹⁹

In LE Jones (Insurance Brokers) Limited v Portsmouth City Council²⁰ HHJ Havery found that underpinning was reasonable in the absence of an assurance that the trees would be effectively managed. At paragraph 49 he said:

¹⁹ [2001] 3 W.L.R. 1007 p.1019

²⁰ (2002) BLR 244

“ The question whether the underpinning works were necessary bears upon quantum, not liability. As I have said, the underpinning works were necessary unless the trees were to be properly managed. Both parties failed to raise the question of the management of the trees. The claimants may have so failed because of the advice received from their engineers. The defendants may have so failed because they were concentrating on the question of causation. However that may be, given that there was no assurance of management of the trees, underpinning was necessary.”

This was approved on appeal.

In order to recover underpinning costs the Claimant will have to show that underpinning was reasonable in the circumstances.

What is Not Required

Actual Notice

In Kirk v London Borough of Brent²¹ the Defendant persuaded the Judge at first instance that the House of Lords decision in Delaware and in particular paragraph 34 of that decision where Lord Cooke said “...I think that the defendant is entitled to notice and a reasonable opportunity of abatement before liability for remedial expenditure can arise” meant that Claimant’s had to show that they had provided the Defendant with actual notice of the damage caused by

²¹ [2005] EWCA Civ 1701

the tree roots before they carried out any remedial works. The Court of Appeal reversed this decision. Lloyd LJ said at paragraph 26:

“ But it does not seem to me that in paragraph 34 of Lord Cooke's speech he is saying, as a straightforward proposition at any rate, that unless there is notice before the remedial works are undertaken, there is no cause of action for recovery of any damages at all.”

Pill LJ in a short concurring judgment said:

“ I do not accept the proposition advanced by [Counsel for the Defendant], in seeking to uphold the striking out of the action by the judge, that, as a matter of law, where nuisance is created by tree roots there is no liability for resulting damage, unless and until damage has been notified to the tortfeasor. In my judgment, that proposition does not emerge from Delaware Mansions. Thereafter, what can be recovered by an injured landowner is a different question, and it was that question which was considered in Delaware.”

Although notice is not required to establish liability, it may well impact upon the level of damages recoverable, particularly if there was a course of action open to the Defendant which could have avoided the need for underpinning.

Nuisance or Negligence?

The courts have traditionally treated claims for damage caused by encroaching tree roots as claims in nuisance, although there is often little or no difference in

terms of what the Claimant is required to prove between this and negligence. In Lemmon v Webb²² the Court of Appeal held:

“ The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this, an action on the case would lie. Also, the person whose land is so affected may abate the nuisance if the owner of the tree after notice neglects to do so.”

In Solloway v Hampshire County Council²³ Stocker J stated the position as follows:

“ I therefore find that the law which I have to apply to the facts of the present case to be that the duty in respect of the nuisance created by roots arises if the encroachment of those roots is known, or ought to be known, to the owner, occupier, or other person responsible for the tree and its maintenance, if the encroachment is such as to give rise to a reasonably foreseeable risk that such encroachment will cause damage.”

This was approved as an accurate statement of the law when the case went to the Court of Appeal.²⁴

However, it is clear that a property owner owes the owners and occupiers of nearby land a duty of care and claims for damage caused by tree roots are often brought in both nuisance and negligence. Courts rarely comment on the claim in negligence but in Low v Haddock²⁵ HHJ Newey Q.C commented:

²² [1894] 3 Ch 1 at p.24

²³ Unreported at first instance

²⁴ (1981) 79 LGR 449

²⁵ [1985] 2 EGLR 247

“ Nuisance, when knowledge and foresight of consequences are required for it, bears a strong resemblance to negligence; but because it is a continuing wrong, it is much more difficult to establish a limitation defence to it.”²⁶

Lord Cooke of Thorndon in Delaware Mansions v Westminster City Council²⁷ said

“The label nuisance or negligence is treated as of no significance. In this field, I think, the concerns of the common law lies in working out the fair and just content and incidents of a neighbour’s duty rather than affixing a label and inferring the extent of the duty from it”.

Where a claim for tree root damage is founded in nuisance, it appears that an additional claim in negligence adds little. The important point to remember is that although these are nuisance claims, knowledge and foreseeability are required, unlike in many forms of nuisance.

Apportionment

What about situations where roots from the Defendant’s tree and the Claimant’s own vegetation are both in the vicinity of the damage? In Loftus-Brigham v London Borough of Ealing this was precisely the situation. The Claimants’ property had suffered damage caused by subsidence. There were 4 trees which were the responsibility of the Defendant immediately adjacent to the property. There was also a large Virginia creeper in the vicinity which belonged to the

²⁶ P.251

²⁷ [2002] 1 AC 321 para 31.

Claimants themselves. The expert evidence was that the creeper had at least contributed to the damage and it was argued that the court should attempt to make an apportionment between the parties. Lord Justice Chadwick delivering the judgment of the Court said:

“Quite apart from the absence of sufficient material to undertake this task, the Court has no power to take that step. Apportionment in law has to be based on liability, not simply on causation. Since the Judge found that the claimants were not contributorily negligent...they were not liable in law for any part of the damage, whether caused by them or not. Here, as in *Paterson*, Ealing has to take its victim as it finds it.”

Therefore, if the Defendant’s tree has “materially contributed” to the damage and there is no contributory negligence on the part of the Claimant, it is likely that the Defendant will be responsible for the total cost of the remedial works.



12KBW Seminar: Fire & Flood – An Evening of Nuisance
Wednesday 24th January 2007

Contributions: who to blame and when to do it

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CONTRIBUTIONS: POTENTIAL PROBLEMS OF RECOVERY UNDER CIVIL LIABILITY (CONTRIBUTION) ACT 1978

1. If a claimant suffers loss or damage through the fault of more than one person (potential defendants), one of the consequences of joint and several liability is that the claimant can simply choose to sue one of them.
2. The defendant sued may then attempt to make the other potential defendants pay their share. The Civil Liability (Contribution) Act 1978 is there to facilitate the claiming of an indemnity or contribution in circumstances where the other potential defendants are or would be liable to the claimant but are not otherwise liable to the sued defendant (for example by reason of a breach of a contract between them giving a contractual claim for indemnity).
3. The defendants/potential defendants who are jointly and/or severally liable for the same harm are each liable to the claimant for 100% of the loss – if the loss is divisible and the parties have caused different parts of it, then by definition they are not jointly and severally liable.

4. So, what are the potential problems and how do they arise when considering the obvious questions:
Who to sue?
What for (how much for)?
When?
5. Terminology: the procedural rules for the bringing of contribution claims are set out in CPR Part 20, hence “Part 20 proceedings” and if the other potential defendant is not a party to the relevant action, he can be brought in pursuant to Part 20. But, (and once again!), he is called a “Third Party”. See generally CPR PD 20.
6. What about their different relationships to the claimant? It does not matter if the third party is liable in respect of the relevant damage on a different basis to the defendant (see section 6(1) set out below). For example a defendant who is sued by the claimant for breach of contract can claim contribution from a third party who is liable in tort to the same claimant.
7. In assessing what proportion of contribution can be claimed by the defendant from the third party, the Court has a wide discretion - weighing up causative potency and moral blameworthiness. All this usually depends on the specific facts and is outside the matters considered in this talk.

Same damage

8. A threshold requirement for a claim for contribution under the 1978 Act is that the defendant and the third party must be liable in respect of the same damage.
9. The relevant statutory provisions are:

Section 1

(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person **liable in respect of the same damage** (whether jointly with him or otherwise).

(6) References in this section to a person's liability in respect of any damage are references to **any such liability which has been or could be established in an action brought against him** in England and Wales by or on behalf of the person who suffered the damage.

Section 6

(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) **is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).**

10. There is a very wide definition of the sort of damage for which a claimant is entitled to recover compensation under the Act. Damage means any detriment, liability or loss capable of assessment in money terms including things like loss of a chance or bargain, loss of profit and so on (see Forster v Outred & Co [1982] 1 WLR 86.)
11. The question of same damage can be complex and perplexing. The fact that this is not straightforward is illustrated by the question going relatively recently to the House of Lords in Royal Brompton NHS Trust v Hammond [2002] 1 W.L.R. 1397; [2002] 2 All E.R. 801.

12. FACTS: Watkins Gray, architects, appealed against a decision of the Court of Appeal (69 Con. L.R. 145) upholding the decision to strike out their Part 20 notice issued against Taylor Woodrow, contractors, seeking a contribution under the Civil Liability (Contribution) Act 1978 s.1(1) for claims brought against them by the Royal Brompton Hospital. The hospital, which had commissioned major building works, had entered into arbitration with the contractor resulting in a settlement of £6.2 million in favour of Taylor Woodrow. They sought to recoup from Watkins the £2 million it had incurred in costs and fees. The dispute had arisen because the contractors had obtained certificates for extensions of time from Watkins for a 43 week period relieving them of their contractual obligation to pay the hospital liquidated damages for delay. The hospital's claim against Watkins was for negligence in respect of the giving of the extension certificates. Watkins contended that the claim against them arose from the "same damage" as their claim against the contractor.

13. Held, dismissing the appeal, that notwithstanding that the Act was a reforming measure and should therefore be given a broad and purposive interpretation in order to enlarge the category of causes of action capable of giving rise to contribution claims, the words "liable in respect of the same damage" in s.1(1) were to be given their ordinary and natural meaning and could not be interpreted as meaning substantially or materially similar damage. The notion of common or shared liability was at the root of the contribution principle. The hospital's claim against the contractor was for the delay in completing the building, but the claim against the architect was in respect of the hospital's lost opportunity to claim liquidated damages from the contractor caused by the negligent issue of extension certificates. Those claims were fundamentally different and accordingly did not amount to the "same damage" for the purposes of the s.1(1) of the Act.

14. In order to decide whether the Architects and the Contractor were liable in respect of the same damage, it was necessary to analyse the nature of the damage in respect of which the Hospital claimed compensation for each of them. It was “the essence” of the claim in each case which had to be identified.

15. In his judgment in Royal Brompton Lord Hope put the matter this way.

“47 The effect of those words [liable in respect of the same damage] is that the entitlement to contribution applies only where the person from whom the contribution is sought is liable for the same harm or damage, whatever the legal basis of his liability. But the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage. The facts must be examined more closely in order to determine whether or not the damage is the same.”

16. At the conclusion of his judgment Lord Hope said this:

“48 In the present case, for the reasons explained by my noble and learned friend Lord Steyn, the contractor and the architect did not cause the same damage. The basis for a finding that this was so is entirely absent. The harm done by the contractor’s breach of contract was the product of delay in the completion of the contract. The harm done by the architect’s breach of contract was due to the certificates which the architect granted to the prejudice of the rights of the employer under the contract. I agree that the harm, or the damage, which was done in each case was different.”

17. In practice, this means that you must be careful to review whether the similarity between claims of damage is only in really in the way that damages are measured or quantified.
18. EXAMPLE: One of the authorities considered by Lord Steyn was a case of the Alberta Court of Appeal, *Wallace v Litwiniuk* (2001) 92 Alberta LR (3d) 249, where the wording of the Canadian statute was, for all material purposes, identical. There the claimant was injured in a motor collision. Her lawyers allowed her claim to become time-barred. She sued them. They sought a contribution from the driver of the other car. The Canadian court said that the professional negligence claim against the lawyer for the value of the lost claim, was not a claim for the same damage as the claim the injured driver had against the negligent driver in respect of her injuries. And this was so notwithstanding that method of quantification of each claim had similarities. Lord Steyn agreed with this.
19. What is required is a close examination of the facts giving rise to the liability of the person claiming the contribution and the person against whom contribution is claimed. It is not sufficient to have contributed to the same loss. It is not sufficient simply to be able to say that the damages which can be claimed from each party to the contribution proceedings are the same, in the sense of one party's payment of damages reducing the liability of the other party for damages. Something more is required; namely that the **harm** caused is the same.

Reasonable settlement

20. You have identified a third party and you are confident that they would be liable to the claimant in respect of some at least of the same

damage, but it is all taking quite a long time. Meanwhile to keep costs down you are trying to reach an agreement with the claimant on quantum with a view to buying the claimant out and limiting the costs to pursuing the Part 20 claim.

21. There is a need when closing such a settlement to look over your shoulder. Your certainty that the third party will be found liable must not distract you from the important task of making sure the claimant is not overcompensated.
22. The starting point is that as long as you have reached a reasonable settlement with the claimant, even if the third party urges it, the court will not unpick the minute details of it:

Biggin & Co v Permanite

The principles which apply in a case where a defendant is required to indemnify a plaintiff against his liability to a third party and the plaintiff has compromised the claim by the third party, may be summarised as follows:

- (1) the settlement is the limit of what the plaintiff can claim against the defendant;
- (2) the law encourages reasonable settlements, particularly where strict proof would be a very expensive matter;
- (3) in order to establish reasonableness it is relevant to prove that the settlement was made under legal advice. The client himself can do that, but the advisers would not normally be relevant or admissible witnesses;
- (4) the plaintiff must lead evidence, on which there can be cross-examination, as to facts which the witnesses themselves prove and as to what would probably be proved if the action had proceeded, so that

the Court can come to a conclusion whether the sum paid was reasonable;

(5) the defendant may, by cross-examination, seek to show that it was not reasonable, or call evidence which leads to the same conclusion.

He might in some cases show that some vital matter had been overlooked;

(6) if there is evidence at the end of the matter on which the Court can come to a conclusion that the settlement was reasonable in the circumstances, then it should be the measure of damages.

23. But, where there are substantive points which can and should be taken against the claimant, the Biggin principle will not protect you from the third party taking them later and reducing the scale of the settlement to which they are held liable to contribute.

24. There was a stark reminder of this in *Sainsbury v. Broadway Malyan*

J Sainsbury plc (claimant) v Broadway Malyan (a firm) (defendant) & Ernest Green Partnership Ltd (third party)

QBD (OR) (Judge Humphrey LLOYD QC) 31/7/98

In 1984 the claimant ('Sainsbury') was building a new supermarket at Chichester to its own design, and employed the third party ('EPGL') as consultant structural engineer. Due to an excess of work in the in-house architectural department of Sainsbury the defendant ('BM'), a firm of architects, was employed to complete the design. One of the modifications to the original design was a change on the wall dividing the service and sales area, and this modification resulted in the fire proofing qualities of the wall being reduced below the standard required. Copies of the modified drawing were shown both to a representative of EPGL, and to Sainsbury's own architect, neither of

whom commented on the loss of fire proofing. In December 1993 a fire deliberately started in the service area of the store spread into the sales area, totally destroying the whole store. Sainsbury claimed that but for the negligent design by BM the fire service would have been able to contain the fire within the service area, and the sales area would have been saved, and available to continue trading during the reconstruction of the service area. Sainsbury therefore claimed damages against BM in respect of the rebuilding costs of the sales area, loss of profits during the reconstruction period, interest and costs, amounting in all to over £14 million. BM admitted negligence, and settled the claim for a total of just over £7 million, including interest and costs. BM then brought these third party proceedings against EPGL for a contribution, claiming 50 per cent.

HELD: (1) No reasonable structural engineer in the position of EPGL would have spotted the effect of the design change on the fire proofing qualities of the wall, and therefore EPGL were not negligent, and were under no liability to make a contribution. (2) However, if EPGL had been negligent then drawing the fault to the attention of BM would have resulted in its correction, and on that finding, there would be sufficient causation to support a claim for contribution. (3) The correct apportionment between BM and EPGL was 87.5 per cent to BM and only 12.5 per cent to EPGL. (3) **If the fire proofing had been adequate there was only a 35 per cent chance that the fire service would have been able to contain the fire to the service area, and therefore to that extent the settlement was unreasonable, as it should have proceeded on the basis of "loss of a chance" of 35 per cent.** (4) **The failure of Sainsbury's own architect to spot or comment on the effect of the design change amounted to contributory negligence on the part of Sainsbury, giving rise to another 20 per cent reduction in damages recoverable.** (6) BM

were not entitled to recover a contribution to the costs element of the settlement. (7) When all these factors were considered the quantum of EPGL's contribution would be assessed at £479,560.

25. Those highlighted parts of the judgment were obiter, but they are a good illustration of the points a third party may be entitled to make within the contribution claim. In the lead up to settlement the loss adjusters may be concentrating on detailed questions of quantum, but there is also a need to examine critically whether there are arguments on contributory negligence or causation which ought to be pursued against the claimant.

Limitation/When to sue.

26. It will not usually matter if claimant's claim against third party would be statute barred - unless it is the actual right of action that has been extinguished.
27. The time limit for making contribution claims under the Act is contained in Section 10 of the Limitation Act 1980. This section provides for a two year period of limitation. There are alternative dates from which this period of two years can run, as set out subsections (3) and (4) of Section 10.
28. The date when the right to recover contribution accrues is known as the "relevant date". When does time start ticking? There are two alternatives – judgment or settlement. The main proceedings may have been concluded by way of a judgment (or an award made on arbitration) or they may have been settled prior to the issue of proceedings.

29. If the main proceedings were concluded by way of a judgment then look at s10 (3) of the Limitation Act 1980 which says:-
(3) If the person in question is held liable in respect of that damage--
(a) by a judgment given in any civil proceedings; or
(b) by an award made on any arbitration;
the relevant date shall be the date on which the judgment is given, or the date of the award (as the case may be).
For the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.
30. What if there is a judgment on liability with damages to be assessed and then a later judgment on quantum? Does the two year period run from the earlier judgment on liability with damages to be assessed or the later judgment on quantum? This was the issue recently addressed by the court of appeal in **Aer Lingus v (1) Gildacroft Limited, (2) Sentinel Lifts Limited** [2006] 1 W.L.R. 1173; [2006] 2 All E.R. 290;
31. The facts of the case were that on the 27th January 1998 an employee of Aer Lingus was seriously injured by a malfunctioning lift. The lift was installed by Gildacroft Limited, the primary contractors, and Sentinel Lifts the subcontractors. In November 2000 the injured employee brought proceedings against Aer Lingus, Gildacroft and Sentinel. In May 2001 he obtained judgment against Aer Lingus with damages to be assessed. In June 2001 the employee discontinued his claim against Gildacroft and Sentinel. There was then a further agreement with Aer Lingus that was embodied in a consent order dated 3rd October 2003 for judgment in the sum of £490,000. On the 4th February 2004 Aer Lingus commenced contribution proceedings against Gildacroft and Sentinel. If the 2 year period ran from the date of the judgment on liability with damages to be assessed then Aer Lingus's claim for contribution was out of time.

32. The court of appeal overruled the trial judge and held that the 2 year period ran from the date of the judgment on quantum and not from the date of judgment on liability. Rix LJ:-

“The judgment or award referred to in the Limitation Act 1980 s.10 (3) as setting the relevant date for the running of time against a tortfeasor who sought contribution under the Civil Liability (Contribution) Act 1978 was a judgment or award that ascertained the quantum, and not merely the existence, of the tortfeasor's liability.”

33. What if the main (or threatened) proceedings were concluded by way of settlement?

34. Section 10(4) of the Limitation Act 1980 sets out the limitation period that applies when the main proceedings are concluded by way of an agreement. S10 (4) says:-

(4) If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made.

35. The effect of this subsection is that if the main proceedings are concluded by way of an agreement the relevant date for starting the 2 year period is the earliest date on which the **amount to be paid is agreed** that is so whether liability is admitted or not.

36. Of course, two years can go by quickly if you are caught up in liability negotiations with potential third parties.

14th January 2007

FREYA NEWBERY



12KBW Seminar: Fire & Flood – An Evening of Nuisance
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Nuisance Neighbours – how to get someone else to do the work for you

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Nuisance Neighbours – how to get someone else to do the work for you

It is common in cases of nuisance neighbours to think of seeking an injunction from the civil courts to prevent the recurrence of the nuisance. However there are alternatives. As a result of anti-social behaviour legislation local authorities now have fairly wide powers to tackle nuisance behaviour. In this article we set out some of the ways to get the problem resolved through the powers of the local authority and thereby avoid the costs and risks involved in seeking injunctive relief.

ASBO'S

Perhaps the most high profile of measures is the Anti-Social Behaviour Order.

ASBO'S –what they are and how they are obtained

Asbo's were introduced by section 1 of the Crime and Disorder Act 1998. Then the Police Reform Act 2002 introduced the power to make asbo's on conviction in criminal proceedings, in county court proceedings and interim orders.

Anti-social behaviour is given a wide meaning and is behaviour that “causes or is likely to cause harassment, alarm or distress to one or more people not of the same household” as the perpetrator.

Asbo's are civil orders and remain so irrespective of the nature of the issuing court.

The civil nature of the orders means that hearsay and professional witness evidence can be heard.

Applications can be made in the magistrates' court by relevant authorities, which includes local authorities, registered social landlords, housing action trusts and the police.

There is a two-stage test to be satisfied before a court can make an asbo:

First: the relevant court must be satisfied so that it is sure that the defendant acted in an anti-social manner, that is to say a manner which caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself. The criminal standard of proof therefore applies at stage one.

Second: the order must be necessary to protect persons from further anti-social acts by him. This stage does not involve a standard of proof but is an evaluation or judgment. You might recall that authorities have successfully obtained asbo's against a farmer who allowed his pigs to escape onto other's land, a pensioner for stealing vegetables from allotments and another pensioner for feeding pigeons.

Asbo's are for a minimum of 2 years and can be issued for an indefinite period pending a further order. They can be varied or discharged on application by either party but can not be discharge in the first 2 years without the consent of both parties.

Penalties for breach:

Maximum 5 years imprisonment, community order, absolute discharge, fine, compensation order, deferred sentence.

The criminal standard of proof applies to breach proceedings.

Applications in the County Court

Both applicant and person against whom the application is made must be party to 'principal proceedings' such as an eviction. Where the relevant authority is not a party they may make an application to be joined to the proceedings. The procedure for such an application is set out at CPR 65.24.

Where the person alleged to have committed the anti-social behaviour is not a party but the relevant authority considers that his anti-social acts are relevant to the proceedings the authority can apply to have him joined. The relevant procedure is set out at CPR 65.23.

A county court can make an order, where the two-stage test is satisfied, where the principle proceedings involve evidence of anti-social behaviour.

So who can help and how?

There is an anti-social behaviour coordinator in each local authority.

Evidence gathering is for the applicant authority however presenting the authority with a diary of incidents or photographs of eg littering, graffiti, escaping pigs etc ensure that the authority takes notice of the complaint and has a basis from which to conduct investigations.

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High Hedges

Another area which seems set neighbours at loggerheads is the issue of hedges because:

- No permission is needed to plant a hedge in your garden.

- There are no general restrictions on how high you can grow your hedge. The rules that govern the height of boundary walls and fences do not apply to hedges.
- While common law rights entitle neighbours to cut overhanging branches back to the boundary line they cannot reduce the height of a hedge unless the owner agrees.

Fortunately, anti-social behaviour legislation has provided a mechanism for resolving such disputes.

The law giving local Councils powers to deal with complaints about high hedges is contained in Part 8 of the Anti-social Behaviour Act 2003 ("the Act") and the High Hedges (Appeals) (England) Regulations 2005.

These make provision for local Councils to determine complaints by the occupiers of domestic property adversely affected by evergreen hedges over 2 metres high. Council's are able to charge a fee for this service, to be paid by the complainant. They may also reject the complaint if they consider that insufficient effort has been made to resolve the matter amicably, or that the complaint is frivolous or vexatious.

The Council may, if they consider the circumstances justify it, issue a notice requiring the owner or occupier of the land where the hedge is situated to take action to remedy the problem and to prevent it recurring. This is known as a "remedial notice". Any remedial notice may be enforced through criminal prosecutions or by the Council entering the land and carrying out the necessary work if the owner or occupier fails to do so.

Under the terms of the Act, Councils can only consider a complaint if it satisfies the following criteria:

- it must relate to a high hedge as defined in the Act;

- the hedge must be on land that is owned by someone other than the complainant;
- it must be affecting a domestic property;
- the complaint must be made on the grounds that the height of the hedge is adversely affecting the reasonable enjoyment of the domestic property in question; and
- it must be brought by the owner or occupier of that property

Section 66 of the Act defines a high hedge as follows:

(1) In this Part “high hedge” means so much of a barrier to light or access as—

*(a) is formed wholly or predominantly by a line of two or more evergreens;
and*

(b) rises to a height of more than two metres above ground level.

(2) For the purposes of subsection (1) a line of evergreens is not to be regarded as forming a barrier to light or access if the existence of gaps significantly affects its overall effect as such a barrier at heights of more than two metres above ground level.

(3) In this section “evergreen” means an evergreen tree or shrub or a semi-evergreen tree or shrub.

It is for each Council to determine which department will deal with such complaints and therefore the appropriate department to contact will vary from Council to Council.

The following is a checklist of the information the Council will expect the complainant to provide:

- their name, address and other contact details;
- confirmation that the address relates to a domestic property;

- the name and address of the occupier of the land where the hedge is situated, together with similar details for the owner of the land in question (if different and if known);
- a location plan showing the hedge, the garden and the property that is affected;
- photos of the hedge, preferably with a figure for scale;
- confirmation that the hedge is more than 2 metres above ground level and comprises predominantly evergreen or semi-evergreen species;
- outline of the steps taken to settle the dispute by negotiation, with copies of relevant correspondence or other papers;
- details of how the height of the hedge is adversely affecting the reasonable enjoyment of the affected property.

Noise Nuisance

It is possible that a noise nuisance does not qualify as antisocial behaviour because it does not cause harassment, alarm or distress or it is caused by a business enterprise not an individual. In such circumstances the local authority may still be able to help because of its obligations and powers under the Environmental Protection Act 1990.

The Anti-social Behaviour Act 2003 introduced a new power for environmental health officers to close premises where a public nuisance is being caused by noise coming from the premises. These powers, available from 31 March 2004, complement the powers of the police to close premises causing noise nuisance or disorder, updated in the Licensing Act 2003.

Provided the “noise emitted from premises” is such as to be “prejudicial to health or a nuisance”. The local authority have a duty to take steps to abate the nuisance. This is the effect of s79 (1)(g) of the Environmental Protection Act 1990.

On receipt of a complaint officers will try to resolve the matter informally.

If a formal investigation finds evidence of statutory noise nuisance, officers have a discretionary option to defer serving a noise abatement notice for 7 days if they think persuasion and mediation will engender greater co-operation or if they think serving an immediate notice will aggravate the situation (s80 EPA as amended by s86 Clean Neighbourhoods Act 2005). Deferring the serving of an abatement notice will also enable a local authority to use the Noise Act 1996 instead if it chooses.

A noise abatement must be served following a 7 day deferment if:

- the noisemaker cannot be persuaded to desist or restrict occurrences of the nuisance;
- the local authority is satisfied that a statutory nuisance continues to exist, or is likely to occur or recur, after the seven day deferral period.

The notice will require the abatement of the nuisance or will prohibit or restrict its occurrence or recurrence. It can also require a person to carry out works, or take other steps to stop the noise nuisance.

Where noise does not stop, the local authority may itself put a stop to the nuisance and recover the costs. This includes the power to seize and remove any equipment, which is being or has been used in the emission of the noise in question.

This latter possibility is not available in the civil courts because an injunction can only prevent the recurrence of a tort it can not remove the tortfeasors property as a means of doing so.

Angela Frost



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Rylands v Fletcher: dead or alive?

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Rylands v Fletcher: dead or alive?

This article will examine the rule in *Rylands v Fletcher*¹; is it still alive and to be pleaded, in addition to a claim in negligence and/or private nuisance? Or has it long-since been buried by subsequent jurisprudence? The article will set out the rule in *Rylands* itself and then examine how subsequent jurisprudence has modified and/or limited it.

The rule in Rylands v Fletcher:

The defendant in this case owned the Ainsworth Mill in Lancashire, acquired in 1839. He wanted more water and arranged to have a reservoir² built by a team of independent contractors on the nearby land of the Earl of Wilton. The plaintiff had leased mining land from the Earl of Wilton and sunk a pit in 1850. In 1860, soil-blocked shafts gave way allowing water to flood from the reservoir underground and into the plaintiff's mine.

Blackburn J indicated in *Rylands* that,

'We think that the true rule of law is, that the 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 in at his peril; and if he does not do so, is

¹ (1868) LR 1 Ex. 265

² The *Rylands* situation itself would now be governed by the Reservoirs Act 1975, which imputes strict liability for damage caused by water escaping from reservoirs which hold at least 25,000m³ above ground, together with an inspection regime during construction and periodically thereafter.

prima facie answerable for all the damage which is the natural consequence of its escape.’

Therefore, *Rylands v Fletcher* established liability when 3 distinct elements are present:

- Bringing something onto land, and/or collecting or accumulating that thing;
- The known potential for harm or escape (that the potential mischief is ‘likely’);
- Liability for the consequences without fault.

Subsequent case law:

A stream of case law is of assistance in clarifying Blackburn J’s original statement and arguments doubting the very existence of the rule:

(1) *Rickards v Lothian*³

This case expanded on the element of ‘likely’ mischief where Lord Moulton reviewed the point that the use of land must be ‘special use bringing with it increased danger to others’ and ‘not merely...the ordinary use of land.’ In this case a blocked basin in a block of flats which overflowed was held not to come within the rule in *Rylands*.

(2) *Read v Lyons*⁴

This case clarified the fact that there must be an ‘escape’ to land in occupation by someone other than the defendant. When the plaintiff was injured by an explosion from a shell in a munitions factory in 1942, as both the

³ [1913] AC 263

⁴ [1947] AC 156

explosion and the injury took place on the defendant's land it was outside the rule. The House of Lords indicated that there was no general principle of strict liability for ultra-hazardous activities, outside *Rylands v Fletcher* or negligence.

(3) *Cambridge Water Co. v Eastern Counties Leather plc*⁵

This case involved the gradual seepage of chemical solvents from a tannery into the water course, with no suggestion of negligence and, given the state of the knowledge at the time, no foreseeability of the hazard. The court held that *Rylands* could not apply in the absence of a *foreseeable* danger – i.e. a tempered form of strict liability. The court concluded that if foreseeability is a requirement of nuisance then it must also be a mandatory requirement under *Rylands v Fletcher* if *Rylands* is based on nuisance, rather than being a distinct principle. Lord Goff in *Cambridge Water* concluded that *Rylands* was simply an application of the law of nuisance and that foreseeability was required. *Cambridge Water* therefore saw *Rylands* as a branch of nuisance with little life of its own.

(4) *Transco plc v Stockport Metropolitan Borough Council*⁶

This case, heard in the Technology and Construction Court, concerned the collapse of the utility company's embankment due to a gradual leakage from the water supply serving 66 flats. Although the quantity of water was considerable and the damage extensive it was held that there had been no extraordinary or unusual use of land in that the water supplies were domestic, albeit many multiples of domestic supply.

The court, notably Lord Bingham, discussed three options for the rule in *Rylands v Fletcher*. One would be to abandon it and deal with cases in negligence alone. This was rejected for a number of reasons, including the fact that to do so might leave a vacuum for a number of cases, however small,

⁵ [1994] 2 WLR 53

⁶ [2003] UKHL 61

where it is just to ascribe no fault liability, and which are not covered by statute. The second option would be to extend the scope of the rule to cover all ultra-hazardous activities, but this was said to be the role of Parliament rather than the courts. The third, and chosen route was to retain the rule and state the principles to achieve greater clarity for future application. It was specified that the rule was 'a sub-species of nuisance' thus (i) there must be two occupations of land involved and (ii) there could be no claim for death or personal injury, it being a land based tort reliant upon, and relating to, interests in land. These natural consequences of the link with nuisance were reinforced by reference to *Cambridge Water* and *Hunter v Canary Wharf Limited*⁷. The Human Rights Act may well, in time, prohibit this traditional and important characteristic of nuisance (and, by extension, *Rylands* on the 'sub-species of nuisance' construction) in allowing those without proprietary interests an equal right of claim.

Given that no-fault liability was in question it was stressed that the mischief or danger test should not be easily satisfied – it must be something that the defendant knew, or should reasonably have known, would give rise '...to an exceptionally high risk of danger or mischief should there be an escape.'

(5) *LMS International Ltd v Styrene Packaging and Insulation Ltd*⁸

This case involved the spread of fire, arising from the storage of inflammable chemicals, from the defendants' property to the claimants'. Coulson J noted that both cases and texts had long indicated that fire (other than in domestic grates and fireplaces) was a 'dangerous thing' and where use of land was non-natural, open to a *Rylands v Fletcher* claim. In summary of the position on fire, the court noted that the common law had long given strict liability where fire spread from one occupier's land to another's, the Fire Prevention (Metropolis) Act 1774 providing a defence where the fire had started accidentally. In some fire cases it was argued that to allow the claim to succeed under *Rylands v Fletcher*, i.e. no fault liability, was incompatible with

⁷ [1997] AC 655

⁸ [2005] EWHC 2065

the 1774 Act defence. Coulson J agreed with Thornton, J in *Johnson v BJV Property: Rylands v Fletcher* only applies in cases of hazardous/non-natural use of land –foreseeability of potential danger is required which would include any occurrence of fire beyond simple ‘accident’, consequently to allow the application of *Rylands* is simply a restatement of, and certainly compatible with, the common law.

Coulson J found that the claim in *Rylands v Fletcher* had been made out: ‘Indeed it seems to me that this is the sort of case to which, even in its modern, restricted form, the rule should plainly and obviously apply.’

Conclusion:

So, to conclude the rule in *Rylands v Fletcher* is still alive, despite the best efforts of *Cambridge Water* to suffocate it, subject to tests of foreseeability and non-natural usage. This gives ample scope for discussion over what precisely is foreseeable or non-natural. Although many areas are now, and increasingly will be covered by legislation⁹, common law liability, in its various forms, is still being used by claimants, particularly in the area of environmental damage. Many cases at present are adequately catered for by the provisions of negligence and/or nuisance but the rule in *Rylands v Fletcher* has an enduring role in rare instances.

All the possible situations where it will be appropriate for *Rylands* to be available to assign liability, cannot be guessed at but, as has been concluded in the House of Lords, its continuance is assured.

Lisa Stephenson

⁹ See the EC Commission’s White Paper on Civil Liability for Environmental Damage, COM (2000)



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Public Nuisance: The forgotten art

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PUBLIC NUISANCE: The forgotten art.

1. Public nuisance can be defined as an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of a right belonging to him as a member of the public. An action in public nuisance is open to individual claimants and public authorities, provided that the damage suffered is over and above the general inconvenience and injury suffered by the public, is direct and substantial.
2. To public highway authorities (in declaratory proceedings or contribution proceedings), an action in public nuisance could be effectively employed to establish the liability of occupiers whose properties adjoin the highway, individuals who cause obstructions on the highway and / or carry out dangerous excavations immediately adjacent to the highway.
3. Unlike a case of private nuisance (namely infringement of the Claimant's interest in property without direct entry by the Defendant) or negligence, a claim in public nuisance has the advantage of being able to be established without needing to prove the existence and breach of a duty of care. All that is required is proof of the public right.
4. The Court of Appeal case of Wandsworth London Borough Council v Railtrack plc [2002] 2 W.L.R. 512 illustrated the effective use of public nuisance as a cause of action by the Claimant highway authority in declaratory proceedings to abate a public nuisance.
5. In that case feral pigeons roosting under the Defendant's railway bridge were fouling the pavement below the bridge causing considerable inconvenience to pedestrians and expense to the Claimant highway authority who chose to clean the said area of pavement. It was the Claimant's case that the Defendant was liable in

public nuisance (as well as private nuisance and negligence). The Defendant denied liability instead seeking to allow the local authority to install pigeon-proof netting at the local authority's expense.

6. At first instance the judge found for the Claimant in public nuisance. On the appeal by the Defendant, Kennedy LJ highlighted the following:
 - a. That in the case of a public nuisance the liability of the landowner did not depend on whether the nuisance was created by his own or a third party's activities or by natural causes; (In this case wild pigeons.)
 - b. That if the owner was aware (or presumed to be aware) of the existence of the nuisance, had the means and opportunity to abate it and had failed to do so, then he was liable.
 - c. That a claim in public nuisance could, unlike a case of private nuisance or negligence, be established without proving the existence and breach of a duty of care.
 - d. That the existence of a general statutory power under s 74 of the Public Health Act 1961 enabling the Claimant to abate the nuisance themselves did not imply a duty on them to do so at public expense, nor did it absolve the Defendant from their clear legal duty to abate it and pay damages.

7. The upshot of the case is to suggest that in cases involving public nuisance in order to establish liability a Claimant has to establish:
 - a. That the matters complained of constitute a hazard i.e being dangerous or materially affecting the comfort and convenience of the public on the highway.
 - b. That the adjoining landowner / occupier, has knowledge of the hazard.
 - c. That the landowner has not taken reasonable steps to prevent the foreseeable effects of the hazard.

8. Particularly with no requirement on a Claimant to identify a duty of care or the unreasonable use of land by the landowner, local authorities should find public nuisance an easier cause of action to establish.

Kweku Aggrey-Orleans