

Leakey v National Trust:¹ a high water mark for flood liability?

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The hydrologic cycle from a lawyer's perspective

As a child I remember being fascinated by the simplicity and completeness of the iconic image of the hydrologic cycle that speaks volumes as to the movement of water around our planet. Water evaporates from the seas, rivers and lakes; it gets put back into the air by transpiration from plants and then circulates in the clouds above our heads before being deposited as precipitation. It in turn percolates by force of gravity through the ground, flows in rivers down to the sea and bubbles back to the surface in springs; so continues the cycle.

As a lawyer several decades older I look at this iconic image with different eyes. I know that the land upon which the water falls and percolates belongs to corporations, individuals, charities and governments. I appreciate that water can be both a blessing and a curse. I understand from experience that when people suffer loss they tend to want to blame someone else and to be compensated accordingly.

Thus, the law has to answer some grown up and complex questions that arise from this image. In terms of rights, the question will be, who is entitled to the water that flows naturally over and under land? In terms of liability, the law has to determine the circumstances in which a person can be held responsible for the damage that water causes when it passes from the land under his control to that of his neighbour. It is with the second inquiry that this article is concerned.

'Everyone for himself' versus 'neighbourliness'

As Lord Wright recognised in the leading case of *Sedleigh-Denfield v O'Callaghan*,² 'a balance has to be maintained between the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with'. The more difficult but essential task of the law is to tell us how that balance is to be struck. It is trite law that the answer is rooted in the idea of 'reasonableness between neighbours', although that tells us little as to what behaviour might be reasonable in any given situation.

In addressing this balance there has long been a tension between two opposing concepts. I will refer to these competing concepts as 'everyone for himself' versus 'neighbourliness'. What I want to address is the question as to which of these two concepts is more dominant in the law

relating to flooding as it stands today: in other words, which is more likely to influence the striking of the balance in any particular case?

I seek to show that the 'everyone for himself' ethos remains largely dominant in water cases, despite the introduction of the measured duty of care in *Leakey*³ and the increasing assimilation of concepts of neighbourliness within the law of nuisance. I say that is a good thing too, which encourages efficient use of land.

The dominance of the autonomous proprietor

The 'everyone for himself' theory asserts that landowners are entitled to use and exploit their respective properties, provided that such use is not unreasonable. The concept of 'reasonable user', which lies at the heart of the law of nuisance, closely aligns with the theory. By corollary, these same landowners bear responsibility for protecting their own properties from the elements and are not entitled to expect others to do so for them. The 'no liability' rule for non-feasance for natural nuisances was, it has been said, based on notions of expediency and self-help.⁴

The modern law of nuisance finds its genesis in a dissenting judgment of Scrutton LJ in *Job Edwards Ltd v The Company of Proprietors of the Birmingham Navigations*,⁵ which, in its recognition of a duty of care towards one's neighbour, implicitly rejects the totality of the *mantra* of 'everyone for himself'. However, the majority in that case held that the owner of abandoned mining land on which a fire had been started by trespassers was not liable to adjoining owners to take steps to put out the fire. The dominance of the prevailing 'everyone for himself' ethos is clearly evident in the majority judgments. Bankes LJ asked:

Why, as between two entirely innocent parties, should the one in whose interest an expenditure is required in order to abate a danger to himself not be the person to bear the necessary expenditure?⁶

In *Goldman v Hargrave*⁷ the Privy Council recognised the historical predominance of the 'everyone for himself' theory. It was said there that the law was: 'for long satisfied with the conception of separate or autonomous proprietors, each of which was entitled to exploit his territory in a "natural" manner and none of whom was obliged to

¹ *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 (CA).

² [1940] AC 880 at 903.

³ Note 1.

⁴ As stated by Jackson LJ in *Vernon Knight Associates v Cornwall District Council* [2013] EWCA Civ 950 at [37].

⁵ [1924] 1 KB 341.

⁶ *ibid* at 350.

⁷ [1967] AC 645 at 647.

restrain or direct the operations of nature in the interests of avoiding harm to his neighbours'.

Historically, the law's response as to where the balance was to be drawn in relation to water was to be found in a body of specific rules that had been developed over time, largely over the course of the 19th century. The rules were pragmatic, clearly delineated and rooted in the idea that a proprietor could consider his own self-interest, provided he did not actively interfere with the natural order of things. For example, an owner or occupier of land had no right to interfere with or redirect the flow of a natural watercourse.⁸ If he erected artificial watercourses or other artificial erections that redirected water onto his neighbour's land, he would likewise be liable for ensuing damage.⁹ In addition, he had no right to remove floodwater which was on his own land and direct it onto his neighbour's land.¹⁰

On the other hand, a landowner generally owed no duty to his neighbour to take positive steps to protect his neighbour's land from natural hazards, including flood water. This is well illustrated in *Thomas and Evans Ltd v Mid-Rhondda Co-operative Society Limited*,¹¹ where a riparian owner had erected a wall alongside the river bank to prevent flooding onto his own land. He subsequently took down part of the wall in the course of wider building operations. Halfway through those operations, when there remained gaps in the newly constructed wall, the river flooded and his neighbour's land was damaged. The neighbour's claim failed on the basis that he had no right to protection from the river in the first place and therefore could not complain when the wall was taken down. Sir Wilfred Greene MR opined that, if such a duty existed, a person putting up a flood defence on his own land would act at his peril because, by erecting it, he would be conferring upon his neighbour rights to insist he should never remove the defence.

The long-standing 'common enemy' rule or defence is itself a paradigm application of the 'everyone for himself' theory. Water was seen as a 'common enemy' in respect of which each owner was entitled to protect his own land by erecting sea and other flood defences, otherwise than in an established watercourse, even where that would increase the volume of water flooding onto his neighbour's. As Lord Tenterden CJ put it in *R v Commissioners of Sewers for the Levels of Pagham*:¹²

... each landowner for himself, or the commissioners acting for several landowners, may erect such defences for the land under their care as the necessity of the case requires leaving it to others, in a like manner, to protect themselves against the common enemy.¹³

The meteoric rise of the 'neighbour principle'

So stood the law until the middle of the 20th century but times have changed and the law has moved on. The last century saw great changes in our legal system, such as the development of the 'neighbour principle' in the law of negligence. In turn, this impacted on the law of nuisance, which to a large extent has been assimilated within this general trend. No longer, it is said, can landowners and occupiers act largely out of self-interest. In some circumstances, at least, they are expected to act to protect their neighbour's land from the forces of nature.

The key decision that paved the way for this change was that of the House of Lords in *Sedleigh-Denfield v O'Callaghan*,¹⁴ which approved the earlier dissent of Scrutton LJ in *Job Edwards*.¹⁵ In *Sedleigh-Denfield*, trespassers had placed a culvert in a ditch on the respondent's land. The culvert was defective in that a grate had been placed in the wrong place, with the result that the culvert became choked with leaves in heavy storms, which in turn caused flooding on the appellant's land. The respondent was held liable even though it had not installed the culvert itself. In other words, the respondent had a duty in respect of a non-natural hazard that had been placed on its land by a trespasser once it knew or ought to have known of its existence. In that case all that was required was 'the very simple step' of placing a grate in the proper place.

Having allowed the 'neighbourliness' concept to take hold in this way, it was only a matter of time before the duty to take steps to abate artificial hazards of which the occupier of land knew or ought to have known was extended to naturally occurring hazards, as subsequently happened in *Goldman v Hargrave*¹⁶ and *Leakey v National Trust for Places of Historic Interest or Natural Beauty*.¹⁷

In some respects the logic behind the extension of liability to natural hazards is hard to fault, particularly considering that it is not easy to draw clear distinctions between 'natural' and 'artificial' hazards. This was recognised in *Green v Lord Somerleyton*,¹⁸ which concerned flooding over marshes emanating from a man-made lake constructed in medieval times through ditches that were found to be artificial watercourses of great antiquity. It was said that, in the context of the English landscape, any distinction between natural and artificial features was an inherently uncertain foundation upon which to rest a decision as to the existence of a liability in nuisance.

8 *Greenock Corporation v Caledonian Railway* [1917] 1 AC 556.

9 *Hurdman v NE Railway Co* (1878) 3 CPD 168; *R H Buckley & Sons Ltd v N Buckley & Sons* (1898) 2 QB 608.

10 In *Whalley v Lancs and Yorks Ry Co* (1884) 13 QBD 131, for example, by reason of unprecedented rainfall a quantity of water was accumulated against the defendant's railway embankment. In order to protect its embankment the defendant cut trenches in it, through which the water flowed onto the plaintiff's land, resulting in damage. The defendant was liable on the basis that it had no right to transfer the mischief, even though it had not brought the water onto the land in the first place.

11 [1940] 1 KB 381 (CA). Likewise, an occupier of land had no cause of action against the occupier of higher adjacent land for permitting the passage of natural, unchannelled water over or through the higher to the lower land: see *Smith v Kendrick* (1849) 7 CB 515. In *Home Brewery Co Ltd v William Davis & Co (Leicester) Ltd* [1987] 1 QB 339 at 346 D–E, it was expressly recognised that it is perhaps doubtful that this principle is still good law in its widest application in light of *Leakey* (n 1).

12 (1828) 8 B & C 355.

13 *ibid* at 361.

14 Note 2.

15 Note 5.

16 Note 7.

17 Note 1.

18 [2002] EWCA Civ 198, (2004) 1 P & CR 33.

However, the extension of the duty to act in relation to hazards brought about by the forces of nature, including naturally flowing water, constituted a very real expansion of the scope of potential liabilities of those who control land. The consequences in respect of water took some time to be fully appreciated. For example, even as late as 2002, it was held at first instance in *Green v Lord Somerleyton*¹⁹ that the *Leakey*²⁰ duty did not apply to naturally flowing water, although that decision was reversed by the Court of Appeal on the basis that no sensible distinction could be drawn between unreasonably allowing fire to escape and unreasonably allowing floodwater to do so.

The first instance judge there had held that naturally flowing water was not a hazard at all. This idea, although rejected by the Court of Appeal, also finds a voice in the following *dicta* in *Home Brewery Co Ltd v William Davis & Co (Leicester) Ltd*:²¹

Although in one sense water is water and always has the same properties it does not always have the same effect. Floodwater can properly be described as a common enemy, but water as such is not an enemy of man or beast or land. Indeed, in most circumstances, water can be described as a common friend. Certainly the human race could not survive long without it. Rainwater is generally beneficial and the same can be said of rainwater percolating naturally through the ground.

The problem with *Leakey*

The difficulty is not so much in the recognition of a duty but rather with defining the scope of the duty, particularly if naturally flowing water is treated as a hazard. Left unameliorated, the recognition of the duty of care could work serious injustice the other way, as Megaw LJ in *Leakey*²² recognised in giving the example of the small and relatively poor landowner whose stream had a propensity to flood onto the land of his much wealthier neighbours. The duty upon the controller of land is therefore a 'measured one', which requires that he take such steps as are reasonable in all the circumstances to reduce or abate the risk of certain hazards judged by reference to his own circumstances.

The law post *Leakey*²³ is now easy to state but rather less so to apply. The duty is 'to take such steps as are reasonable in all the circumstances to prevent or minimise the risk of injury or damage to the neighbour or his property of which the occupier knew or ought to have known'.²⁴ Of course, that begs the question as to what it is reasonable to expect the controller of land to do or not to do in any given situation.

The assimilation of the law relating to artificial and natural hazards and the inclusion of water as a hazard has essentially done away with a distinct and hard-edged set of rules for determining liability for flood damage in favour of a more far-reaching inquiry, which requires the judge to carry out a 'somewhat daunting and multi-factorial assessment'.²⁵ It is questionable whether this is a positive development. The breadth of the *Leakey*²⁶ principle means that, whilst it has the flexibility to produce just outcomes in particular cases, the law is in danger of becoming unpredictable.

In the context of land, it is important that owners and occupiers can anticipate and make provision for the obligations imposed on them by virtue of such ownership and occupation. Likewise, occupiers of land should be entitled to understand what standards of behaviour they can objectively expect from their neighbours.

The idea that the scope of the duty should depend on the particular resources or circumstances of individual litigants does not fit easily with the idea that the law ought to lay down objective standards of behaviour. An owner of land should bear the legal burdens that come with that ownership, regardless of his means. After all, the basis upon which liability is imposed is the 'possession and control of the land from which the nuisance proceeds'.²⁷ If an owner of land cannot afford the 'cost' of land ownership or occupation, it is open to him to divest himself of it. If the owner of land is not skilled or well enough to carry out a task that an occupier of his land might objectively be expected to perform, it could with some force be said that the landowner ought to employ someone else to do it for him, rather than expect his neighbour to take up the slack.

That is not, however, what *Leakey*²⁸ says, given the express reference to the relevance of the respective means of the parties in determining the scope of the liability. Arguably however, the emphasis on a broad brush approach might be said to require simply an objective assessment as to the likely means of the owner or occupier of any particular parcel of land. In a later case the idea that one landowner could plead lack of means to increase the burden on the other was itself described as not only 'unjust, unfair and unreasonable' but also as 'unneighbourly'.²⁹

The Court of Appeal has also recently expressed misgivings as to the appropriateness of taking the availability of insurance into account in determining the scope of the duty.³⁰ This point remains to be decided. Arguably, adopting a very broad brush approach, it might be relevant to consider whether a particular class of litigant (such as the householders in *Lambert v Barratt Homes Limited*³¹) could

19 *ibid.*

20 Note 1.

21 Note 11.

22 Note 1.

23 *ibid.*

24 The circumstances to be taken into account include his knowledge of the hazard, the extent of the risk, the practicability of preventing or minimising the foreseeable injury or damage, the time available for doing so, the probable cost of the work involved and the relative financial and other resources, taken on a broad brush basis.

25 *Vernon Knight Associates v Cornwall District Council* (n 4) at [37] (Jackson LJ).

26 Note 1.

27 *Sedleigh-Denfield v O'Callaghan* (n 2) at 903 (Wright LJ).

28 Note 1.

29 See *Abbahall Ltd v Smea* [2003] 1 WLR 1472 (Munby J), where the owners of a flying freehold and adjacent premises beneath it were held liable to contribute to the repair of the roof in proportion to the relative benefits they each derived from it (in that case 50:50).

30 *Vernon Knight Associates v Cornwall District Council* (n 4) at [70] (Sir Stanley Burnton LJ) and at [47] (Jackson LJ).

31 [2010] EWCA Civ 681.

be expected to take out insurance to cover the risk of flooding. However, in the current climate it is unsafe to assume that all such householders will be able to obtain such cover or maintain it in future. The insurance status of a litigant is generally not a relevant factor in deciding questions of liability; it is said to be *res inter alios acta*. To allow the existence of insurance cover to influence findings as to liability would be to put the cart before the horse and to penalise those who take out insurance in favour of those who do not. It could also impact on the insurance market artificially.

Imposition of a *Leakey* duty: the exception to the norm?

The findings of liability in *Leakey*³² and *Goldman*³³ arguably constitute the exceptions rather than the norm. In *Goldman*, the hazard was a burning tree that had been struck by lightning. The defendant was aware of the fire and had actually taken steps to contain it once the burning tree had been felled. However, he negligently adopted the wrong method of containment. He should have put the fire out by the simple expediency of dousing it with water but instead he tried to let it burn itself out. The winds picked up and the fire from the burning remains of the tree spread to his neighbour's buildings, causing extensive damage.

In *Leakey*,³⁴ the hazard was a naturally occurring mound in Somerset that had developed cracks and from which soil and rubble was liable to fall onto the plaintiffs' properties. The plaintiffs had pointed out the hazard to the National Trust and had asked it to do something about the mound, which it refused to do. As a result of further natural erosion, part of the mound collapsed, thereby causing extensive damage to the plaintiffs' cottages. The steps required to abate the same were not extensive and were well within the means of the National Trust.

In some cases the existence of a duty is likely to be so obvious that it will go without saying, as in *Goldman*³⁵ and – albeit to a lesser extent – in *Leakey*³⁶ as well. One can readily see why the courts in each case strove to find a cause of action that would fit the bill. If the owner has knowledge of the hazard which, if left unabated, is likely to cause substantial damage to his neighbour, he has a duty to carry out simple and straightforward acts that would prevent such damage: for example, the simple act of replacing a defective grate in *Sedleigh-Denfield*³⁷ or the stamping out of a fledging fire as in *Goldman*.³⁸ It would be strange if the law did not recognise the existence of such a duty. It is the ease of carrying out the act demanded by the law contrasted with the dire consequences of inaction that is key. This is especially so if the neighbour is not himself in a position to act to abate the threat.

32 Note 1.
33 Note 7.
34 Note 1.
35 Note 7.
36 Note 1.
37 Note 2.
38 Note 7.

The turning of the tides

In other cases the *Leakey*³⁹ formulation will not always produce a clear answer. It is not surprising, therefore, that the courts have sought to find answers by referring back to earlier case law. This has resulted in the courts straining the old doctrines in order to reinterpret them consistently with the *Leakey* 'measured duty of care'.

For example, the outcome in *Thomas*⁴⁰ was reinterpreted in *Leakey* as being consistent with an application of the measured duty of care. The risk of a flooding event was such that the riparian owner could not reasonably foresee that a flooding event would occur during his reconstruction works and had not breached any duty in carrying out those works in the manner in which he did. This amounted to a neat trick, but one that nonetheless ignores the underlying acceptance of the 'everyone for himself' theory in the reasoning given for the earlier decision.

In turning back to the earlier cases, the old tensions between the competing concepts of 'everyone for himself' and 'neighbourliness' resurface. This can be seen no more clearly than in *Arscott v Coal Board*,⁴¹ in which the Court of Appeal sought to 'reinterpret' the common enemy defence as an example of the resolution of the balance between 'self-interest' and 'duty to neighbour' on the basis that the limitations on the common enemy defence were themselves 'partial guarantors of reasonable user'.⁴²

In *Arscott*⁴³ the coal authority had raised the level of a floodplain in Aberfan by applying colliery spoil heaps to it, primarily in order to create community playing fields. This in turn meant that water that would otherwise have flooded the plains instead flooded a nearby housing estate, causing a great deal of loss and damage to a number of households. The common enemy defence was held to apply with the result that the authority avoided liability for the resulting flooding, even insofar as that was foreseeable.

Therefore, it can be seen that the Court of Appeal in *Arscott*⁴⁴ essentially reverted to the 'old rules' to find the answer but in so doing 'rebranded' them as achieving the 'right balance', consistent with *Leakey*.⁴⁵ The case provides welcome certainty in relation to a landowner's ability to erect flood defences, but does leave the law in respect of liability for flooding somewhat lacking in coherence.

Despite the spin put on the case by the Court of Appeal, the tension between the two competing views is clearly evident when one compares the outcomes in *Leakey* and *Arscott*. The law may, depending on the circumstances, require a landowner to erect or maintain flood

39 Note 1.

40 *Thomas and Evans Ltd v Mid-Rhondda Co-operative Society Limited* (n 11).

41 [2004] EWCA Civ 892, [2005] Env LR 6.

42 The limitations on that rule are threefold: (1) the rule does not justify interference with the alveus or established watercourse; (2) does not entitle a landowner to pass on the flood once it has come onto his land; and (3) the works must be reasonable and limited to what is required to prevent the flood.

43 *ibid.*

44 *ibid.*

45 Note 1. The court in *Arscott* recognised that the common enemy rule represented a 'pragmatic drawing of the line' and that the departures from the general rule would to some eyes look 'fragile'.

defences on his land in order to protect his neighbour but, on the other hand, provides that the landowner is free to build defences on his land that result in his neighbour's land being flooded.

Likewise, *Home Brewery Co Ltd v William Davis & Co (Leicester) Ltd*⁴⁶ is another example of a post *Leakey* case in which the court took account of the earlier authorities in order to reach a decision on the facts. In that case, naturally occurring water drained unchannelled over and by percolation through the plaintiff's 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 plaintiff's land and causing it to flood.⁴⁷ It was held that the defendant had no obligation to accept the naturally occurring water draining into the osier bed and clay pit from higher land and was entitled to take steps consistent with its reasonable user of the land to prevent it entering, even though that caused loss to the occupier of the higher land.

The decision can therefore be seen as a paradigm application of the 'everyone for himself' theory and is one that closely correlates with the common enemy rule. The filling in of the land with a view to its development was a 'reasonable' user by the defendants and they had no liability so far as that development erected a barrier against the water flowing downstream. The deputy High Court judge there read the *Leakey* and *Goldman* 'measured duty of care' as not applying to cases where 'all the landowner is doing is exercising his right to reject water coming on his land and is doing so in a reasonable manner'. In other words, the old rules provided the answer, not the *Leakey* measured duty of care.

Perhaps the true analysis is that no single theory or doctrine can answer all the questions we require answers to. The law of nuisance is 'protean'. It was said in *Arscott*⁴⁸ to involve a 'constellation of themes', namely (a) a bias in favour of natural user, subject to its being no more than reasonably enjoyed; (b) a bias (effectively a conclusive rule) against non-natural user where that involves the escape of something noxious onto a neighbour's land; (c) a bias against the harbouring of a danger, a hazard on one's own land whether the hazard is natural or man-made; (d) and no liability without reasonable foreseeability of damage. The *Leakey*⁴⁹ measured duty, viewed thus, is just one star in a wider constellation.

This reformulation is more helpful than the nebulous concept of a measured duty of care. It does allow back into the equation the idea, deeply rooted in liberal property theory, that each proprietor is entitled to exploit his own land for his own purposes, provided he acts within

reasonable bounds. The indications are therefore that, like the fire in *Goldman*,⁵⁰ the 'everyone for himself' theory continues to smoulder and in fact underpins much of the recent case law.

The narrow application of *Leakey* in water cases

Even where judges have applied the *Leakey*⁵¹ measured duty of care directly to flooding cases, the decisions demonstrate a reluctance to impose liability for non-feasance. For example, in *Green v Lord Somerleyton*⁵² the Court of Appeal held that the duty did not on the facts extend to an obligation to maintain barriers against occasional flooding from the defendant's marsh to the claimant's marsh. In that case the costs of taking the necessary steps would have been disproportionate to the damage likely to be caused if the neighbouring land was flooded intermittently. Further, whilst a joint effort to clear certain watercourses would have substantially reduced the risk of flooding, clearing the defendant's stretch would have been of questionable effect unless the claimants had done the same.

Likewise, in *Lambert v Barratt Homes Limited*,⁵³ surface water flowing from land belonging to Rochdale Metropolitan Borough Council on occasions flooded the claimants' properties, causing damage. The Court of Appeal reversed a first instance finding that the local authority had breached a measured duty of care, holding that the council's duty did not extend to constructing drainage ditches and a catchpit at its own expense. Local authorities were under a degree of financial pressure and held their funds for public purposes. The claimants as householders were likely to be insured and had a remedy against the construction company that had built their houses. On the facts, therefore, no duty was owed.

In the most recent case, *Vernon Knight Associates v Cornwall Council*,⁵⁴ the Court of Appeal held that a duty of care was owed by a highway authority in respect of maintenance of a highway drainage installation. However, the finding of liability was not unexpected; the decision is very much on a par with both *Sedleigh-Denfield*⁵⁵ and *Bybrook Barn Garden Centre Ltd v Kent County Council*,⁵⁶ in that the flooding arose from failings in an artificial drainage installation that were known about.

In that case, the local highway authority's employee responsible for maintenance on the ground was aware that this was a flooding hotspot. Indeed, his usual practice at times of heavy rain was to break off from other work and drive straight over to the 'hotspot' so that he could remove any debris from the gratings over gullies. However, on two occasions he did not follow his normal practice and as a result flooding occurred, which damaged the claimant's adjoining holiday park. The council was held liable for the

46 Note 21.

47 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 already present there back onto the plaintiff's land; that 'squeezing out' lasted for about five years. So far as that development resulted in additional water being discharged from or rather squeezed out of the defendant's land onto the plaintiff's land, it did amount to actionable nuisance on well established principles.

48 Note 44.

49 Note 1.

50 Note 7.

51 Note 1.

52 Note 18.

53 Note 31.

54 Note 4.

55 Note 2.

56 [2001] BLR 55.

flooding in nuisance. In a sense the council's own practice was used against it as indicative of the standard of practice which it was reasonable for it to follow. Viewed another way, it could be said that the flooding had been caused by operational negligence. There is nothing particularly radical or surprising about the finding of a breach of a duty of care in this case, in my view.

There are other indications that the courts are unwilling to extend the *Leakey*⁵⁷ principle too broadly so as to impose overly extensive duties of care as between neighbours. A clear example of this is *Holbeck Hall Hotel Ltd v Scarborough Borough Council*,⁵⁸ in which the Court of Appeal overturned a first instance decision imposing liability on the council in respect of a catastrophic subsidence of a cliff within the council's ownership that caused extensive damage to an adjoining hotel on the basis that the local authority could not have foreseen the extent of the risk to the hotel without commissioning extensive geological investigations, which it was not obliged to do.

This decision limits the potential scope for imposition of liability on the basis of *Leakey*⁵⁹ since the defendant must have actual or constructive knowledge of not only the hazard but also the particular risk it poses. The same principle is likely to apply to restrict liability for flooding where the risks, or at least of the extent of the risks, cannot be said to be reasonably foreseeable in the absence of more detailed hydrogeological investigations. Even if a particular locality is prone to flooding, it may very well be said that a more catastrophic flooding event at such a locality was not such as could reasonably have been foreseen.

As can be seen from the discussion above, there are also signs that the courts are uncomfortable with investi-

gating or taking into account the relative means of individual litigants⁶⁰ or the extent to which they would be able to obtain insurance cover, preferring to adopt rather more objective standards.⁶¹

Going round in legal and hydrological circles

So where does all this leave us? The answer is probably not very far from where we started. Although *Leakey*⁶² is welcome insofar as it imposes a duty in relation to true hazards that can be dealt with using minimal effort and/or expense, on the whole it has brought with it an acceptable level of unpredictability into an arena where rights and obligations ought to be certain. The *Leakey* duty is so broadly framed that it says little as to the actual duties owed by neighbouring owners to each other as regards naturally flowing water. It is therefore not surprising that the courts have found themselves turning to earlier decisions to find answers in particular cases.

Therefore, the results in any given cases are likely to be similar if not the same. However, the pathways to establishing liability are less certain and transparent than they were before. Furthermore, the broadness of the *Leakey* duty will have encouraged or required neighbours to litigate to resolve disputes, usually at great expense to themselves. That is an unwelcome development in itself. Why should litigation be necessary? On closer reflection it can be seen that the *Leakey* principle has done little to shift the underlying dominance of the 'everyone for himself' ethos that has been so strongly entrenched in our water law for more than 200 years.

57 Note 1.

58 [2002] QB 836.

59 Note 1.

60 See *Abbahall Ltd v Smea* (n 29), where the owners of a flying freehold and adjacent premises beneath it were held liable to contribute to the repair of the roof in proportion to the relative benefits each party derived from the roof (in that case 50:50). It was held that it was not reasonable to reduce the financial liability of one party based on that party's financial circumstances.

61 *Vernon Knight Associates v Cornwall District Council* (n 4) at [70] (Sir Stanley Burnton LJ) and at [47] (Jackson LJ).

62 Note 1.