Contributed articles
Water and flooding

Common law liabilities for flood damage: "Flood me, Flood me not"*

William Upton, MA(Cantab), LLM (Cantab), Barrister.

At a glance

- Flood damage is considered a "natural nuisance"
- Landowners owe a 'measured duty' in negligence and nuisance to take reasonable steps to prevent natural occurrences on their land from causing damage to neighbouring properties
- Landowners have a right to protect their property against a common enemy (such as flooding) but they do not have a right to pass such an enemy on to the land of a neighbour
- However, the common law does not operate in a vacuum, and statutory schemes must be taken into account when considering liabilities in nuisance and negligence

Introduction

1 The common law approach to the issue of liability for damage from flooding has been adapted across the years. A great degree of pragmatism seems to have crept in, as a matter of legal policy.

2 I want to concentrate on two particular cases from the Court of Appeal that reveal where the law now stands:

a The way in which *flood damage as a "natural nuisance"* was considered in *Vernon Knight Associates v Cornwall Council* [2013] EWCA Civ 950; [2014] Env. L.R. 6;
b How the court in *Arscott v Coal Authority* [2004] EWCA Civ 892 considered how far you can go in defending your land –or the extent of what is known as *the 'common enemy' rule*;

And then there is the inevitable question –

c *How far can we blame the regulators?*

3 These are essentially cases about nuisance law, and negligence, where issues about reasonable foreseeability arise. It is only in cases where there is an extraordinary risk to neighbouring property, or an 'unnatural' use of land, that the strict liability principle in *Rylands v Fletcher* [1861-73] All ER Rep 1 will apply (except in Scotland, where Scots law has never adopted this principle and liability is still fault-based). *Rylands* was a reservoirs case, it should be remembered, and one that today would mainly be governed by its own statutory regime under the Reservoirs Act 1975.

4 Whilst I cannot cover it here, it is also worth recalling that property rights about the existing use of watercourses and drains will be relevant when considering flooding disputes between landowners. Although there is no property in water, the riparian owners have certain rights and duties regarding the upstream and downstream owners of the riverbank.

Flood damage as a "natural nuisance"

5 Some commentators have referred to flooding as a 'natural nuisance', and this is a useful distinction that the courts have also acknowledged. Most nuisance cases concern manmade nuisances, where the courts take a tougher line.

Indeed, it is this distinction that means that I will not analyse the extensive consideration given to nuisance law in *Lawrence v Fen Tigers* [2014] UKSC (a case about noise nuisance, although there is of course an overlap).

6 In summary, a "measured duty" of care in nuisance or negligence has arisen as the standard for the duty imposed upon occupiers to remove or reduce hazards to a neighbouring occupier. The 'measured' duty only extends to a duty to do or facilitate what is reasonable to expect of the occupier in his or her own circumstances. Any duty to act arises as soon as the landowner becomes, or should have become, aware that the hazard has come into existence. Thus the scope of this type of duty of care is very fact specific.

7 Jackson LJ has recently commented that "*the judge is required to carry out a somewhat daunting multifactorial assessment*" in this situation. This refreshingly-honest comment arose in the course of his judgment in *Vernon Knight Associates v Cornwall Council* – an appeal about the Council's liability for the flooding of a caravan park that was downhill from a known flooding 'hotspot' on the local highway network. In the course of his judgment, Jackson LJ provides a whistlestop tour through the relevant cases, starting with the simple original rule that a landowner who stood by and did nothing was not liable:

> "Part 5: The law
> 36 A discrete body of law has developed concerning the extent of a landowner's liability for natural nuisances. "Natural nuisances" is a term used by some commentators to describe nuisances which are caused by the operation of nature rather than any act of the landowner (see, for example, *Clerk and Lindsell on Torts*, 10th edn, Ch.20).
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> 37 The original rule was that the landowner was not liable for non-feasance in respect of natural nuisances. As the Lord Chancellor observed at the start of his speech in ***Rylands v Fletcher*** (1886) L.R. 3 H.L. 330, if the accumulation of water on the defendant's land had flowed onto the plaintiff's land by operation of nature, there could have been no liability. This "no liability" rule was accepted across the common law world. It was based upon notions of expediency and self-help. Way *132 C.J., in the South Australia Supreme Court, pointed out the difficulties of imposing a positive obligation on landowners in ***Havelberg v Brown*** [1905] S.A.L.R. 1 at 11:
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> > "Should such a legal duty apply in all cases, irrespective of age or sex? Should it be made applicable in spite of the absence or illness of the owner, or in the case of a fire out of his sight or without his knowledge? Is it to apply to a man who is weak or unskilful? The slightest reflection must show anyone how difficult it would be to frame a law that would be applicable to all cases and anyone who has seen, as most of us have, the frequent bush fires in the hills adjacent to Adelaide will understand that there really is no necessity for any such law. People not only extinguish dangerous fires from self-interest, and for the preservation of themselves and their families, but in the summer we see every week the whole countryside turning out and using the utmost endeavours to prevent danger to life and injury to the property of others."
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> 38 Society has changed over the last century and the common law, as always, has adapted to those changes. There is now liability on landowners for non-feasance in respect of natural nuisances. Nevertheless the common law rules imposing such liability still bear the imprint of an earlier age. The landowner's liability is described as a "measured duty" and it is subject to qualifications not usually found in the law of tort.
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> 39 Two major decisions mark the development of the common law, namely ***Sedleigh-Denfield v O'Callaghan*** [1940] A.C. 880 and ***Goldman v Hargrave*** [1967] A.C. 645. In *Sedleigh-Denfield* the House of Lords held landowners liable for the escape of water which they could have prevented by taking a simple and obvious step. In reaching this momentous decision the House of Lords approved the dissenting judgment of Scrutton L.J. in *Job Edwards Ltd v Birmingham Navigation Proprietors* [1924] 1 K.B. 341. The House of Lords' decision was widely welcomed by textbook writers and commentators.

40 In ***Goldman*** the Privy Council, on an appeal from the High Court of Australia, held the defendant liable for the escape from his land of fire caused by a lightning strike. Simple precautions were available to extinguish the fire, which the defendant had failed to take. Lord Wilberforce, delivering the judgment of the board, described the measured duty of the landowner in cautious terms at 663–664. The standard was what it was reasonable to expect of the occupier in his individual circumstances. The court had to take into account the defendant's resources and abilities, as well as the fact that the hazard had been thrust upon him through no fault of his own. Lord Wilberforce said that what was needed was "a balanced consideration of what could be expected of the particular occupier as compared with the consequences of inaction".

41 In ***Leakey v National Trust for Places of Historic Interest or Natural Beauty*** [1980] 1 Q.B. 485 the National Trust was held liable for soil and rubble falling from its land onto the plaintiffs' properties. In the course of a lengthy judgment Megaw L.J. held that Goldman represented the law of England as well as Australia. Both Shaw and Cumming-Bruce L.JJ. agreed, although Shaw L.J. expressed substantial misgivings as to the course which the law of England was taking.

42 Megaw L.J. discussed the scope of the defendant's duty at 524–527. He stated that the defendant was required to do no more than was reasonable to prevent or manage the known risk of damage. This involved consideration of a host of factors concerning the foreseeable risk, the available preventive measures and the resources of the defendant.

43 In ***Holbeck Hall Hotel Ltd v Scarborough Borough Council*** [2000] Q.B. 836 the Court of Appeal overturned an official referee's decision that the owner of an undercliff was liable for a landslip which damaged the plaintiffs' hotel. Stuart-Smith L.J. delivered the leading judgment, with which Schiemann and Tuckey L.JJ. agreed. Stuart-Smith L.J. examined the scope and extent of the defendant's measured duty in considerable detail. He derived assistance from the House of Lords' decision in *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605. Caparo was a case in which auditors were held to owe no duty of care to potential investors, a key consideration being that it was not "fair, just and reasonable" to impose such a duty. Stuart-Smith L.J. adopted this test for a new purpose, namely as an aid to determining the scope of a landowner's measured duty in respect of natural nuisances. He attached particular significance to the fact that the defendant in the instant case could not have foreseen the extent of the risk to the hotel without commissioning extensive geological investigations. He concluded that it was not fair, just and reasonable for the defendant's duty to extend that far.

44 In ***Delaware Mansions Ltd v Westminster City Council*** [2001] UKHL 55; [2002] 1 A.C. 321 both the Court of Appeal and the House of Lords held a highway authority liable for damage which the roots of one of its trees were causing to nearby buildings. Lord Cooke of Thorndon (with whom Lord Steyn, Lord Browne-Wilkinson, Lord Clyde and Lord Hutton agreed) stated that the extent of the defendant's duty was determined by reference to "the concepts of reasonableness between neighbours (real or figurative) and reasonable foreseeability". He regarded the resources and abilities of both the claimants and the defendant as relevant matters.

45 In ***Green v Lord Somerleyton*** [2003] EWCA Civ 198 the Court of Appeal held that similar principles applied where naturally flowing water caused damage to the property of a nearby landowner. In that case floodwater emanated from the defendants' marsh and caused damage to the claimant's marsh. The Court of Appeal, applying the concept of reasonableness between neighbours, held that the defendant's duty did not extend to an obligation to maintain barriers against occasional flooding.

46 In ***Lambert v Barratt Homes Ltd*** [2010] EWCA Civ 681 surface water flowing from land belonging to Rochdale MBC on occasions flooded the claimants' properties, causing damage. The Technology and Construction Court judge in Leeds held Rochdale liable for breach of its measured duty, but the Court of Appeal reversed that decision. Sir Anthony May P., delivering the judgment of the court, said that the council's duty did not extend to constructing drainage ditches and a

catchpit at their own expense. He noted that the council had funds far in excess of those available to the individual claimants. On the other hand local authorities were under a degree of financial pressure. Their resources were held for public purposes and were not generally available for the benefit of private persons. The claimants as householders were likely to be insured. Furthermore they had a remedy against the construction company which had built their houses.

47 I must confess to some doubt as to whether the availability of insurance is a relevant consideration, as stated in [22] of *Lambert* . I prefer to leave open for future decision whether the observations in [22] of *Lambert* concerning the relevance of the availability of insurance are sound.

48 In a number of the authorities courts have observed that in this area of law the defendant's liability in nuisance is effectively the same as his liability in negligence: see e.g. *Leakey* at 514G–H and *Delaware* at [31].

49 Where then does the law now stand in relation to the liability of land owners for non-feasance in respect of natural nuisance? I would not presume to paraphrase the vast body of learning which has accumulated on this topic. Nevertheless I extract from the authorities discussed above the following principles which are relevant to the determination of this appeal:

(i) a landowner owes a measured duty in both negligence and nuisance to take reasonable steps to prevent natural occurrences on his land from causing damage to neighbouring properties;

(ii) in determining the content of the measured duty, the court must consider what is fair, just and reasonable as between the two neighbouring landowners. It must have regard to all the circumstances, including the extent of the foreseeable risk, the available preventive measures, the costs of such measures and the resources of both parties; and

(iii) where the defendant is a public authority with substantial resources, the court must take into account the competing demands on those resources and the public purposes for which they are held. It may not be fair, just or reasonable to require a public authority to expend those resources on infrastructure works in order to protect a few individuals against a modest risk of property damage.

50 Thus it can be seen that the judge is required to carry out a somewhat daunting multifactorial assessment. That is not surprising. In 1905 Way C.J. of the South Australia Supreme Court warned that this would be the consequence if the common law should develop in the way that it subsequently did."

8 On the important point of principle, about the standard of care to be expected, Jackson LJ stated at [63]:

"Whilst I accept that there are limits on what can be expected from local authorities in relation to flood prevention, I do not accept that the judge applied too high a standard of care in the present case. He properly took into account all the relevant circumstances. Although he was carrying out a multifactorial assessment, he properly highlighted those factors which were particularly significant. I therefore reject the council's first and principal ground of appeal"

9 As Jackson LJ noted, he was not trying to paraphrase all of the earlier statements of the law in the principles he set out. Indeed, the case of *Sedleigh-Denfield v O'Callaghan* [1940] remains very useful in this context of liability for flood damage, and not just because it was about a culvert. It introduced the idea that a landowner could 'adopt' a nuisance although he or she had not created it. So, whilst the landowner was unaware of the existence of the culvert on his land, once he was aware of it, and took no action when it became blocked with leaves and debris, he was held liable. It was not just that he could have prevented the escape of water by taking a simple and obvious step.

10 But liability has also arisen not just for accidental blockages but also when the drainage of an area changes. In *Bybrook Barn Garden Centre v Kent County Council* [2001], the KCC's culvert under its highway had been in place for some years. It was adequate for the purpose when it was built, but not when the new development of a business park caused the amount of water to increase. The culvert became inadequate for the increased levels. The Court of Appeal applied the principles in *Leakey* and held the highway authority liable. Once the KCC were aware that the culvert was inadequate, it was under a duty to do what was reasonable to prevent the flooding.

11 This measured duty will continue even when you are already subject to flooding. But that brings us on to the next issue – the diversion of flood waters.

Diversion of flood water away from land

12 Problems caused by flooding have been seen as a common enemy to all landowners, and there is a long line of cases going back to the eighteenth century which have considered the extent of the landowners' rights to defend their land from it. The Court of Appeal considered the extent of the "common enemy" rule in the context of more recent tort cases in *Arscott v Coal Authority* (coal waste deposited on low-lying land to create raised playing fields near Aberfan, causing flooding elsewhere). As Royce J stated at first instance (2003) EWHC 1690 (QB) at [27], the law is that:

> "An owner or occupier of land is entitled to use or develop his land so as to prevent flood waters coming onto his land. If in times of flood waters which would have entered his land in consequence damage another's land – that does not provide a cause of action in nuisance…"

13 Laws LJ added:

> "…you are entitled to protect yourself against the common enemy's incursions; but if the incursion upon your land has already happened or is about to happen, you may not export it to your neighbour. This is a pragmatic drawing of the line."

14 Having considered the development of the common law on this point, including the rule that prohibits interference with the alveus (an established watercourse - even if dry for part of the year or from time to time - as opposed to a flood plain), he concluded his consideration of this point by saying:

> "39. …[*Whalley v Lancs and Yorks Ry Co* (1884) 13 Q.B.D. 131] illustrates a point of departure in the policy of the law: the point between those situations where the landowner must accept a burden in favour of his neighbour, and those where he is entitled to protect his own land, even at his neighbour's cost."

15 As Laws LJ stated [at 38], there is a great difference between a right for a landowner to protect his property against a common enemy (as occurred in the older cases of *Nield* and *Pagham Commissioners*), and a right to pass such an enemy on to the land of a neighbour. His analysis is open about the policy issues behind this distinction.

> "40 It is a point of departure which to some eyes will look fragile, as perhaps will the distinction between the alveus and the flood plain. But both of these, in the context of the common enemy rule, are mechanisms to achieve the balance which, as Lord Wright said in Sedleigh-Denfield , "… 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". So it is at this point, as it seems to me, that the common enemy rule can be seen to conform with the general law of nuisance. …

and he continued:

> "… It represents a resolution of the balance between self interest and duty to neighbour which, in the broad context of land use of which it is a particular instance, makes up the body of law called nuisance. …"

before saying:

> "… I have said ([6]) that it was agreed on all hands that there was no issue of "reasonable user" of Grove Fields by the respondents [raising the level of the ground] relevant to the claim against them in nuisance. That is right; but it is only so, in my judgment, because the limitations of the common enemy rule—no interference with an alveus , no discharge from one's own land—are themselves partial guarantors of reasonable user. Where works done to protect land from the common enemy are within these limits, they may be considered a natural use of the land which is prima facie also a reasonable use. They might still be actionable if they were in some way excessive: as, for instance, might have arisen if Grove Fields had been raised to a height in excess of what was needed to prevent its being flooded, and the extra height was an independent cause of damage to the Pantglas Fawr estate.
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> "41 On the facts of this case, it is clear that the two limitations are met; clear also that any additional height of the infill did not at all contribute to the damage to the appellants' properties."

Human Rights and Flooding?

16 In *Arscott*, the Court of Appeal was also asked to consider if the "common enemy" rule is in principle contrary to the European Convention on Human Rights, Art. 8 and Protocol 1 Art. 1. The Court considered that the rule strikes a proper balance "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" (to quote Lord Wright in *Sedley-Denfield*) and "between the interests of persons whose homes and property are affected and the interests of other people, such as customers and the general public" (to quote Lord Hoffmann in *Marcic*). This latter formulation in terms engages the balance between private right and public interest. The rule also satisfies the fair balance principle in *Sporrong & Lönnroth v Sweden* (1982).

Statutory intervention

17 There is insufficient time to do more than touch on the statutory rules which have been introduced from time to time to supplement the common law. But the common law does not operate in a vacuum, and the regulators have extensive powers to take action to help prevent flooding and to deal with it when it arises.

18 Some of these powers are of longstanding. Hence, a statutory nuisance exists where "any part of a watercourse... is so choked… as to obstruct or impede the proper flow of water and thereby cause a nuisance". (Public Health Act 1936, s.259(1)(b))

19 Obstructions are also covered – for instance that, no person shall, except with the consent of the Environment Agency, erect, or carry out any work of alteration or repair on any structure in, over or under a watercourse which is part of a "main river" if the work is likely to affect the flow of water in the watercourse or to impede any drainage work. Nor shall any person erect or alter any structure designed to contain or divert the floodwaters of any part of a main river except with the consent of and in accordance with plans and sections approved by the Agency. Should any such work be done then the Agency may remove, alter or pull down the work and recover the expenses incurred in doing so (Water Resources Act 1991, s.109). Consent or approval may not be unreasonably withheld.

20 In certain areas – especially where there are navigations, canals and drainage boards – there will be local legislation that needs to be considered. In the case of

the Thames in London, there are the series of Metropolitan Flood Acts that govern much of the riparian owners' responsibilities – in addition to those that apply to 'main rivers' under the Water Resources Act 1991.

21 In certain areas, the result of this statutory intervention is that the common law may have been excluded. One of the most dramatic examples of this is the case of *Marcic v Thames Water Utilities Ltd [2003] UKHL 66.* The House of Lords had to consider whether the sewerage undertaker was liable at common law for its failure to take action where foul and contaminated floodwaters came out of a combined sewer into Mr Marcic's garden because its sewerage system had inadequate capacity. Whilst the statutory regime did provide a limited statutory compensation process for those suffering from this sort of damage, Mr Marcic sought to argue his case in nuisance (and human rights). Despite his success in the Court of Appeal, the House of Lords decided that the sewerage undertaker was not liable. Parliament had provided an elaborate regulatory system, which balanced the competing private and public interests, and the common law should not impose obligations that were inconsistent with it. Indeed, it is notable that whilst sewerage undertakers are responsible for the content of their sewers, they have no wider responsibility for land drainage or for the state of watercourses.

Liability for the Drainage Authorities

22 In the light of recent flood events, the Land Drainage authorities, including the Environment Agency, have been in the firing line. The Agency does have a general supervisory role, and it does have the statutory powers to seek to remove obstructions and to maintain flood defences. It also has the powers to do works to improve any existing watercourse to prevent or alleviate flooding (WRA 1991, s.165 - and where "injury" is sustained by any person because of this work, the Agency will be liable to make "full compensation to the injured party").

23 But there is no statutory provision which imposes a duty on them to use their powers. The courts will be reluctant to do so- as the cases on highway authorities and the fire brigade have shown. It may be arguable that they have acted irrationally *(Stovin v Wise* [1996] AC 923), or that they made the situation worse *(Capital Countries v Hampshire County Council* [1977] QB 1004). But, in the absence of negligence, a failure on the part of the Agency is unlikely to give rise to a cause of action.

24 We may of course be about to see a revisiting of these issues. But there is good and strong House of Lords authority to the effect that carrying out work (to a damaged flood wall) so inefficiently that the flooding continued for 178 days rather than a reasonable 14 days-length, did not make the authority liable to the farmers whose land was damaged (*East Suffolk Rivers Catchment Board v Kent* [1941] A.C. 74). The damage suffered by them was due to natural causes.

25 In summary, the only duty owed by a public authority to any member of the public is not to add to the damages which that person would have suffered had the authority done nothing.

* This paper is based on William's presentation at the UKELA Water Working Party Seminar on Flooding in association with the Chartered Institution of Water and Environmental Management on 29 September 2014.

William Upton is a barrister at 6 Pump Court (Chambers of Stephen Hockman QC) specialising in planning and environmental law. Will is a former Council member of UKELA, and continues to co-chair the Planning and Sustainable Development Working Party.