PLA SOUTH COAST GROUP

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ON FLOODING AND ABSTRACTION

"As she said these words her foot slipped, and in another moment, splash! she was up to her chin in salt-water….

I wish I hadn't cried so much!" said Alice, as she swam about, trying to find her way out. "I shall be punished for it now, I suppose, by being drowned in my own tears! That will *be a queer thing, to be sure!"*

From Alice in Wonderland: The Pool of Tears, by Lewis Carroll

1. *"Flood" includes any case where land not normally covered by water becomes covered by water.*
2. *It does not matter for the purpose of subsection (1) whether a flood is caused by –*
    a. *Heavy rainfall,*
    b. *A river overflowing or its banks being breached,*
    c. *A dam overflowing or being breached,*
    d. *Tidal waters,*
    e. *Groundwater, or*
    f. *Anything else (including any combination of factors).*
3. *But "flood" does not include –*
    a. *A flood from any part of a sewerage system, unless wholly or partly caused by an increase in the volume of rainwater (including snow and other precipitation) entering or otherwise affected the system; or*
    b. *A flood caused by a burst water main (within the meaning given by section 219 of the Water Industry Act 1991)*.

Section 1, Flood and Water Management Act 2010

Introduction

1. It is reassuring to know that someone, somewhere, has taken the time and effort to apply the precision and ingenuity of parliamentary draftsmanship in order to define, at least for the purposes of the FWMA 2010 if no other, what is meant by a flood (and what it is not).

2. At common law, on the other hand, it has been said that the precise meaning of the word "flood" is "*a matter of some uncertainty"* (*Wisdom's Law of Watercourses* 6th

Ed. at 3-38). It is "*thought*" to mean "*a large and sudden movement of water which arises in some abnormal and violent situation*". Thus in *Young v Sun Alliance and London Insurance Ltd* [1976] 3 All ER 561 it was held that a gradual seepage of water did not involve a flood. In case you are wondering, Mr Young's home was built on meadow land, and over the course of two years water slowly accumulated to a depth of three inches in his lavatory. His claim against his insurers in respect of this "flood" did not succeed.

3. It seems to me, and I assume that even the insurers in Mr Young's case would agree, that what Yorkshire and Lancashire (to name just two counties) have just experienced qualifies as flooding. If anyone were in any doubt, here are some pictures:

Similar scenes have become almost familiar in recent years, remembering what has happened in Gloucestershire, the Somerset Levels and elsewhere in the South West.

4. In this short talk I sketch out some of the pertinent features of public and private law as they relate to flooding and to owners of riparian land in particular. A "Classic Gentleman's Residence, in a Beautiful Riverside Setting, parts of which date back to the 14th Century in the county of Berkshire" [1] may tempt a slew of readers of Country Life and Knight Frank aficionados, but it is as well to understand some of the rights and liabilities that lurk beneath the surface.

5. As well discussing water overground, I hope to deal also with water underground. This relates to damage caused to neighbours by the deliberate abstraction of underground water, how that activity is treated by the common law and more recently by s.48A of the Water Resources Act 1991.

Part 1: Flooding

Public law: Statutory flood defence and the Environment Agency

6. According to Bates on Water and Drainage Law, "*four principles of land drainage law have been identified. The first is that responsibility for flood defence rests primarily with individual riparian owners but because it is unreasonable to expect individuals to carry out large scale works there has been a co-ordination of effort leading to the present local and national statutory schemes*….".

7. The national body charged with co-ordinating and managing flood defence and water resource management country wide is the Environment Agency. It was created as a body corporate by the Environment Act 1995 ("the EA 1995"). The EA 1995 gave the Environment Agency various executive powers by reaching back into the Water Resources Act 1991 ("the WRA 1991") and the Land Drainage Act 1991 ("the LDA 1991"), which had for those intervening years governed the now

[1] Toad's modest description of Toad Hall, in Alan Bennett's adaptation of Wind in the Willows for BBC Radio 4

dissolved (pun unintended) National Rivers Authority. Those Acts are now further amended by the Flood and Water Management Act 2010 ("the FWMA 2010").

8. Because effective drainage requires proper outfall from river systems, it is a matter of some importance that there is a single authority responsible for the management of "main rivers". The Environment Agency is that body, and main rivers are those watercourses shown as a main river on a map prepared by the Minister (originally MAFF, now DEFRA). The River Severn and River Avon are main rivers.

9. Most of the Environment Agency's powers are contained in the WRA 1991, but this is often done by importing powers that belong to other bodies, known as drainage boards, under the LDA 1991. "Drainage", in the LDA 1991, is defined as including, *inter alia*, "*defence against water (including sea water)*"; and by s.21 of that Act provides [emphasis added]:

> *(1) This section applies to any obligation to which any person was subject, before the commencement of this Act, by reason of tenure, custom, prescription or otherwise, except an obligation under an enactment re-enacted in this Act or the Water Resources Act 1991.*
>
> *(2)* ***If any person—***
> ***(a) is liable, by reason of any obligation to which this section applies****, to do any work in relation to any watercourse, bridge or drainage work (whether by way of repair, maintenance or otherwise); and*
> *(b) fails to do the work,*
> ***the drainage board concerned may serve a notice on that person requiring him to do the necessary work with all reasonable and proper despatch.***
>
> *(3)* ***Subject to section 107(2) of the Water Resources Act 1991****, the powers conferred by this section shall not be exercisable in connection with a main river, the banks of such a river or any drainage works in connection with such a river.*
>
> *(4) If any person fails, within seven days, to comply with a notice served on him under subsection (2) above by the drainage board concerned, the board may do all such things as are necessary for that purpose.*
>
> *(5) Any expenses reasonably incurred, in the exercise of their powers under this section, by the drainage board concerned may be recovered from the person liable to repair.*

10. S.107 of the WRA 1991 then provides*, inter alia*:

> *(1) This section has effect for conferring functions in relation to main rivers on the [appropriate agency] which are functions of drainage boards in relation to other watercourses.*
>
> *(2) Notwithstanding subsection (3) of section 21 of the Land Drainage Act 1991 (power to secure compliance with drainage obligations), the powers of the [appropriate agency] in relation to a main river shall, by virtue of this section, include the powers which under that section are exercisable otherwise than in relation to a main river by the drainage board concerned; and the provisions of that section shall have effect accordingly.*
>
> *…*
>
> *(5) In this section—*
>
> *(a) references to the exercise of a power in relation to a main river shall include a reference to its exercise in connection with a main river or in relation to the banks of such a river or any drainage works in connection with such a river; and*
>
> *(b) expressions used both in this section and in a provision applied by this section have the same meanings in this section as in that provision.*

11. "Drainage" is defined in from s.72(1) LDA 1991 as including, *inter alia*, "*defence against water (including sea water)"*. "Main river", "banks", and "drainage" are all defined by s.113(1) WRA 1991. "Drainage" has the same meaning as it does under the LDA 1991, and "banks" means *"banks, walls or embankments adjoining or confining, or constructed for the purposes of or in connection with, any channel or sea-front, and includes all land and water between the bank and low-watermark"*.

12. Thus, where a riparian owner is a person "liable…to do work…in relation to [a] drainage work (whether by way of repair, maintenance or otherwise) [s.21(2) LDA 1991], he or she is susceptible to enforcement action by the Environment Agency [s.107 WRA 1991]. Whether and what a riparian is required to do may be governed by particular or unique local legislation or bye laws. For example, in London riparian owners of land alongside the River Thames are responsible for executing and maintaining "flood works" under s.6 of the Metropolis Management (Thames River Prevention of Flood) Amendment Act 1879.

13. To the extent that there may be any dispute whether works proposed by the EA will be a "drainage work" then s.113(2) WRA 1991 provides that that question be referred to the Minister for Agriculture, Fisheries and Food (now DEFRA), or if either party so requires, to arbitration.

14. Absent a referred dispute of that nature, and assuming that a responsible owner simply does not carry out the work, the EA has the power to carry out the work and recover the expense against the owner. All that is required for the EA to take such a step is to serve a notice requiring that the necessary work be done with all reasonable and proper despatch, and allow seven days for compliance with the notice.

15. On a practical note, if a party is required to carry out works under statutory direction, it is worth investigating the possibility of financial assistance from the Environment Agency. The simple power to make grants is granted to the EA by s.16 of the FWMA 2010, but the Act makes no provision for the circumstances or detailed guidance as to the exercise of that power. As far as I am aware that is a matter of DEFRA and Environment Agency policy.

Private law: Flooding, flood defence and nuisance

16. There are a clutch of 19th century cases which set the scene in terms of the rights private owners have in taking steps to protect their own property from being flooded.

17. In *Trafford v The King* (1832) 8 Bing 204 concerned the River Mersey and a canal that passed over it via an aqueduct, near the junction of a brook called Chorlton Brook. The canal had been built in 1763. From the 1770s and onwards owners of land along the banks of the river had raised mounds, or "fenders" so that when the river level was raised by flood the water was forced away from their lands and against the sides and foundations of the aqueduct. This damaged the aqueduct; had it not been for the erection of the fenders the water would have flowed over the riparian land and away from the aqueduct. A claim was brought in nuisance. The court required a jury to make various finding of facts and remitted the matter, but in his ruling Tindal CJ said:

> *…there appears no doubt but that at common law the landholders would have the right to raise the banks of the river and brook from time to time, as it became necessary, upon their own lands, so as to confine the flood-water within the banks, and to prevent it from overflowing their own lands; with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons…*

18. The House of Lords, in *Bicket v Morris* (1866) 30 JP 532 was concerned with the extent of works encroaching onto bed of the River Kilmarnock by agreement. The Lord Chancellor considered that:

> *…The authorities cited in the argument at the bar support the principle, and establish a satisfactory distinction. The proprietors on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark,* ripæ muniendæ causâ [for the sake of fortifying the river bank]*, but even in this necessary defence of themselves, they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite of the river…*

19. The right to erect works of protection on the one hand, and the requirement that it be balanced, on other hand, against not "doing" or "occasioning" injury to another party's property by doing so is most directly apparent in the decision of *Menzies v Breadalbane* (1828) 3 BLi NS 414, where Lord Lyndhurst said:

> *A proprietor on the banks of a river has no right to build a mound which…would, if completed, in times of ordinary flood water throw the water of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them. It is clear beyond the possibility of a doubt that by the law of England such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course by a sort of new water way, to the prejudice of proprietors on the other side. The ordinary course of the river is that which it takes at ordinary times; there is also a flood channel. I am not talking of that which it takes in extraordinary or accidental flood; but the ordinary course of the river at different seasons of the year must, I apprehend, be subject to the same principles.*

20. Lord Lyndhurst's distinction between "ordinary flood" and "extraordinary flood" is interesting. If a riparian owner on one section of the river carried out works to protect his property from flooding then he will be responsible if those works cause an "ordinary flood" to be diverted on to another person's land. That would suggest the kind of water flow one might expect in the case of raised water levels in an average winter, or allowing a predictable difference between spring and neap tides. But responsibility appears to be diminished in the case of an "extraordinary flood", even if

the works carried out divert the flooding elsewhere. What is the basis for this distinction?

21. Separately, one might also ask why it was necessary for the court to decide what could be considered to be a point of common sense. After all, why should a person not be able to carry out works on his land if it caused no harm to others?

22. Taking the latter question first, that can be addressed by referring to two other aspects of flooding that I have so far not clarified. First, it must be noted that these cases relate to works that are done in advance of a flood – works which anticipate the event. By way of contrast, in the event of an actual extraordinary flood a riparian owner may enclose land and divert water away from his property without regard to the consequences of his actions upon others.

23. Secondly, these matters relate to rivers – there is a separate approach which relates to flood defences on coastal land, and authority for the proposition that an owner of coastal land is entitled to erect works in a *bona fide* manner without regard to damage that might be caused to neighbours.

24. The Privy Council gathered these strands together in its decision in *Gerrard v Crowe* [1921] 1 AC 395. That case concerned river works on the River Oreti in New Zealand[2]. Delivering the judgment of the court Viscount Cave explained the right to make defence against action of the sea without regard to consequences upon neighbours as per the House of Lords in *R v Pagham Sewers Commissioners* (1828) 8 B&C355 on the basis that the sea is "*the common enemy to all proprietors on that part of the coast….*". In the same vein, by reference to other cases[3] themselves referring to *Menzies*, he said that "*if an extraordinary flood is seen to be coming upon land the owner of such land may fence off and protect his land from it, and so turn it away, without being responsible for the consequences, although his neighbour may be injured by it*".

[2] Which, for those interested in recondite and redundant Lord of Rings trivia, is not too distant from the river system that drains into the Mavora Lakes – film location for Nen Hithoel, Fangorn, Silverlode River and River Anduin in Peter Jackson's trilogy.

[3] *Nield v. L&N. W. Ry. Co* (1874) LR 10 Ex. 4; *Whalley v. L. & Y. Ry. Co* 13 QBD. 131

25. Thus throwing up sand bags, getting in the army, and raising barriers across the street and around houses in times of extraordinary flood is not the kind of activity that the law is concerned with. The sea, and extraordinary "act of God" flooding is the enemy of all, and the courts are not inclined to adjudicate upon what is done to protect property in an emergency.

26. However, the court is concerned with activity that interferes with the regular flow of the river, and that includes the natural course of the river both in its ordinary course and in advance of what might be its "ordinary" flooding. Even in *Trafford* Tindal CJ was concerned with what could be any *"ancient and rightful course*" for flood waters.

27. This leads back to the first question – why the distinction between "ordinary" and "extraordinary". With the benefit of the modern law of torts and damages, and Lord Atkins' formulation of the neighbour principle in *Donoghue v Stephenson*, we are familiar with the concept of "reasonable foreseeability". But that concept, in express terms in the 19th century, lay in the future. Nevertheless, that must be (I suggest) a sound basis for the distinction.

28. In addressing the particular issue of flooding the law had developed the notion that a person ought to be responsible for the consequences of his activities where those consequences arose in unusual but ordinary circumstances. In genuinely unusual "out of the ordinary" circumstances, he or she is excused. It follows that in the context of the wider law of nuisance these cases anticipate, and fit in very well with, the leading case of *Leakey v National Trust* [1980] QB 485.

29. *Leakey* was famously concerned with the event of a landslip from an unusual hill owned by the National Trust on to neighbouring property. Whereas it had previously been considered that a landowner was not responsible for natural hazards arising on his land (c.f. the rule in *Rylands v Fletcher*) the Court of Appeal ruled that where a landowner knows or ought to know of the potential danger to neighbours caused by natural deterioration of his property he is liable in nuisance if he fails to take reasonable steps to avert such a danger. In fact, even though that case did not

concern flooding, and even though in its judgment the court did not refer to the cases I have mentioned above, Megaw LJ said:

> *Take, by way of example, the hypothetical instance which I gave earlier: the landowner through whose land a stream flows. In rainy weather, it is known, the stream may flood and the flood may spread to the land of neighbours. If the risk is one which can readily be overcome or lessened - for example by reasonable steps on the part of the landowner to keep the stream free from blockage by flotsam or silt carried down, he will be in breach of duty if he does nothing or does too little. But if the only remedy is substantial and expensive works, then it might well be that the landowner would have discharged his duty by saying to his neighbours, who also know of the risk and who have asked him to do something about it, "You have my permission to come on to my land and to do agreed works at your expense"; or, it may be, "on the basis of a fair sharing of expense." In deciding whether the landowner had discharged his duty of care - if the question were thereafter to come before the courts - I do not think that, except perhaps in a most unusual case, there would be any question of discovery as to means of the plaintiff or the defendant, or evidence as to their respective resources. The question of reasonableness of what had been done or offered would fall to be decided on a broad basis…*

30. This carries the reasonableness analysis further along. The older authorities relate to what a person might be *entitled* to do in order to protect his or her own land; *Leakey* relates to what a person might be *obliged to* do in order to protect his or her neighbour's land.

Discussion point

31. An interesting point that may bear further consideration is how one might treat extraordinary flooding predictable in an age of global warming. Are events like this more predictable now? After all, there were six high profile flooding events within the Severn catchment area between 1998 and 2007 – that is seven in nine years. There were general major flooding events in the south west in 2000, 2007 and 2014. To that we can add the most recent events in the north and north west of the country, On the other hand, not all of these occurred in the same season, and, in 2014, the cause was primarily attributed to a prolonged depression with a steady rainfall, as opposed to torrential rain and flash flooding. These are likely to be difficult questions, but perhaps worth bearing in mind over the coming years.

Part 2: Abstraction

32. From water overground, to water underground. And from natural phenomena, to human activity. How does the law treat deliberate works by a landowner, on his own land, to extract or pump water flowing over or underneath his land, that cause damage to another landowner? These issues have an extensive history of treatment at common law, a more recent innovation in statutory law that is shortly due for its first ever judicial consideration at first instance, and which in modern law may also be affected by the decision in *Leakey*.

Abstraction at common law

33. It is useful to start with a statement of a basic right common to all riparian owners, specifically their right to have and receive the flow of water to and from, or over and along their land. That right is shared with upstream and downstream owners, and so it is implicit that there is likely to be an inherent difficulty with using that flow in such a way with a downstream owner's own right to also receive that flow of water. In a basic example, there is, in principle, no objection to an upstream owner using the flow of water to power a mill or turbine, as long as that use does not diminish or interfere with the onward flow of that water downstream. More complicated questions as to easements that can arise on the basis of long use are not questions that I am going to address in this talk.

34. With that basic structure in mind, it has long been established that the common law distinguished between interference with the flow of water in a known and defined channel, whether underground or overground, and water percolating underground in unknown and undefined channels. The logic of that distinction can be quite easily recognised. Where one owner can easily see or ascertain the direction of a flow of water, the law places a higher degree of responsibility upon him or her to ensure that other riparian owners' parallel rights are respected. Where such flow of water is difficult or impossible for a reasonable man to ascertain, the law refuses to burden him with unpredictable or unforeseeable consequences.

35. There are more subtle points that underpin the distinction, and the details have been worked through in a number of decisions dating back to the 19th century.

36. In *Acton v Blundell* (1843) 152 ER 1223 the claimant owned a substantial number of mills and factories in connection with his business spinning cotton. The machinery relied upon the flow of water from upstream land. A neighbouring land excavated a number of pits and wells into underlying porous rock that extracted and diverted water from underground, which affected the operation of Acton's mill. Acton claimed to have rights in the underground springs and streams, and argued that the works had been carried out less than 20 years before the action was brought so the defendant could have no claim to a prescriptive right. In dismissing claim, and on appeal, it was said:

37. Tindal CJ, giving the judgment of the court:

> *...we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but rather that it falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that, if in the exercise of such right he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of damnum ubsque injuria* [loss without injury]*, which cannot become the ground of an action.*

38. The House of Lords had an opportunity to address the matter in 1859, and in circumstances where the claimant had been making use of water percolating underground for more than 60 years, in the case of *Chasemore v Richards* (1859) 11 ER 140. In that case the claimant mill owner, in Croydon, had enjoyed the use of a stream that was chiefly supplied by percolating underground water. The defendant neighbour dug an extensive well for the purpose of supplying water to the residents of the district.

39. Wightman J, delivering the opinion of the Judges at 365, said:

> *...the law...is inapplicable in the case of subterranean water not flowing in any definite channel, nor indeed at all, in the ordinary sense, but percolating or oozing through the soil, more or less, according to the quantity of rain that may chance to fall. The inapplicability of the general law, respecting rights to water, to such a case, has been recognised and observed upon by many judges whose opinions are of great weight and authority...*

40. And then, Lord Chelmsford at 374, said:

Before...the Plaintiff can question the act of the Defendant, or discuss with him the reasonableness of the claim to appropriate this underground water for these purposes (whatever they may be), he must first establish his own right to have pass freely to his mill, subject only to the qualified and restricted use of it, to which each owner may be entitled through whose land it may make its way. It seems to me that both principle and authority are opposed to such a right...But it appears to me that the principles which apply to flowing water in streams or rivers, the right to the flow of which in its natural state is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates.

41. That is certainly clear enough in terms of the principle. In terms of the reasoning it is also of interest to note some further comments as to the policy considerations that Wightman J had in mind. In the course of his judgment he said as follows:

Suppose, as it was put at the Bar in argument, a man sank a well upon his own land, and the amount of percolating water which found a way into it, had no sensible effect upon the quantity of water in the river which ran to the Plaintiff's mill, no action would be maintainable; but if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water, by the united effect of all the wells, as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone would have that effect, could an action be maintained against any one of them, and if any, which, for it is clear that no action could be maintained against them jointly.

In the course of the argument one of your Lordships (Lord Brougham) adverted to the French Artesian well at the Abattoir de Grenelle, which was said to draw part of its supplies from a distance of forty miles, but underground, and, as far as is known, from percolating water. In the present case the water which finds its way into the Defendant's well is drained from, and percolates through, an extensive district, but it is impossible to say how much from any p a r t If the rain which has fallen may not be [372] intercepted whilst it is merely percolating through the soil, no man could safely collect the rain water as it fell into a pond; nor would he have a right to intercept its fall, before it reached the ground, by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of water which had, before the erection of such impediments, reached the ground, and flowed to the Plaintiff's mill. In the present case the Defendant's well is only a quarter of a mile from the River "Wandle; but the question would have been the same if the distance had been ten or twenty or more miles distant, provided the effect had been to prevent underground percolating water from finding its way into the river, and increasing its quantity, to the detriment of the Plaintiff's mill. Such a right as that claimed by the Plaintiff is so indefinite and unlimited that, unsupported as it is by any weight of authority, we do not think that it can be well founded, or that the present action is maintainable; and we therefore answer your Lordships' question in the negative.

I will return to the force of these observations, when I consider the effect of s.48A of the Water Resources Act 1991.

42. I won't overburden this talk with many more extracts from cases. So as to trace the evolution of the law I will just summarise the cases as follows:

a. In *Black v Ballymena Township Comrs* 17 LR Ir 459 (1886), applying *Chasemore v Richards*, the Irish court explained what is meant by "known" and "defined" – it defined the terms, as it were[4].

b. In *Ewart v Belfast Poor Law Guardians* 9 LR Ir 172 provides a gloss that if a channel is known and defined, even if underground, that is sufficient for a cause of action to arise

c. In *Bradford Corporation v Ferrand* [1902] 2 Ch 655 the court dealt with a defined but unknown channel and applied *Chasemore v Richards*.

43. Bringing the law up to date, the modern application of these principles has led to some uncompromising statements from the Court of Appeal on at least two occasions. In *Langbrook Properties v Surrey CC* [1970] 1 WLR 161 it was held that:

> *The authorities cited on behalf of the defendants in my judgment establish that a man may abstract the water under his land which percolates in undefined channels to whatever extent he pleases, notwithstanding that this may result in the abstraction of water percolating under the land of his neighbour and, thereby, cause him injury. In such circumstances the principle of sic utere tuo ut alienum non laedas does not operate and the damage is damnum sine injuria.*
>
> *Is there then any room for the law of nuisance or negligence to operate? In my judgment there is not.*
>
> *In the first place, if there were, it seems to me highly probable that the courts would already have said so, and yet I have not been referred to any case in which that was done. In Chasemore v. Richards (1859) 7 H.L.Cas. 349 the opportunity was there, since the water authority concerned was found to have had reasonable means of knowing the natural and probable consequences of*

[4] Chatteron VC at 474 – 475, re "known": *"known"....cannot mean that a channel should be visible throughout its course, which would be an impossibility from the very fact of its being subterranean. In considering this question, the knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel but must be a knowledge, by reasonable inference, from existing and observed facts in the natural, or rather the pre-existing, condition of the surface of the ground. The onus of proof lies of course on the plaintiff claiming the right, and it lies upon him to show that without opening the ground by excavation, or having recourse to abstruse speculations of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain that the stream, when it emerges into light, comes from and has flowed through a defined subterranean channel...*

And at 478, re "defined": *...in a definite, that is, as he explained the word, a contracted and bounded channel and stream, but that its course was unknown, invisible and undefined by human knowledge, which he considered to be the only sense in which the words "defined channel" can be used in deciding upon rights..."*

their excavations, but there was no suggestion in the House of Lords that this was a relevant matter.
Moreover, since it is not actionable to cause damage by the abstraction of underground water, even where this is done maliciously, it would seem illogical that it should be actionable if it were done carelessly. Where there is no duty not to injure for the sake of inflicting injury, there cannot, in my judgment, be a duty to take care not to inflict the same injury.

A claim in nuisance can fare no better, since nuisance involves an unlawful interference with a man's use or enjoyment of land (see Winfield on Tort, 8th ed., at p. 353 and cases there cited). But here the interference was not unlawful, as the authorities referred to show.

44. Then, in *Stephens v Anglian Water Authority* [1987] 1 WLR 1382 the logical conclusion, that even deliberate harm can be caused, was fully explicated:

> *The action in substance raises a short but not unimportant question of law, which can be sufficiently stated as follows: Can a person whose land has subsided as a result of the abstraction by his neighbour of water percolating under the neighbour's land in any circumstances maintain an action in negligence against the neighbour for consequential damage?* [at 1383]
>
> *....*
>
> *If a landowner has the right to abstract water from beneath his land, whatever be his motive or intention (even with the intention of causing his neighbour injury) it cannot, in our judgment, be said that he owes a duty to his neighbour to take care in doing it.*
> *...*
>
> *In the light of the authorities binding this court, we regard the answer to the question of law stated at the beginning of this judgment as being in the negative and consider that the plaintiff's claim that the defendants owed her a duty of care is unarguable. If there is no duty of care, the defendants cannot have committed the tort of negligence in doing what they did.* [at 1387]

45. I take a sideways step here to point out that the decision in *Leakey*, came between these two modern judgments, in 1980, and did not affect the court's approach in *Stephens,* seven years later. That suggests that *Leakey,* despite what has to say about an expanded duty of care in respect of neighbours and damage to property, does not affect this line of authority. However, if you are either studious or curious enough to read this case in the weekly Law Reports you will discover that *Leakey* was not cited to the court in argument or referred to in the judgment.

46. This might arguably leave *Stephens* open to debate. It is not *"per incuriam*" in the strict sense that it was not referred to an authority that would have been

binding upon it, but might it be that *Leakey* begins a new and separate approach to the law of nuisance, one which is more generous to the claimant. If it is true, per *Leakey,* that where a landowner knows or ought to know of the potential danger to neighbours caused by natural deterioration of his property that he is under a positive duty to prevent that, then it must be true, *a fortior*i, that he cannot cause damage by positive action on his own land?

47. However, it seems to me that the better argument is that the *Stephens* approach stands. The real point in *Leakey* is foreseeability, and the extension of Lord Atkins' neighbour principle. The difficulty with unknown and undefined channels is just that – they are unknown. The ordinary person cannot properly or reasonably foresee what damage his activity will cause a neighbour, even if he secretly hopes it will cause him harm. Remember Wightman J's extended comments in *Chasemore v Richards*.

48. Would matters be different (post *Leakey*) if, with sufficient expertise, a person could reasonably anticipate what effect percolating underground water has on neighbouring land? Perhaps. And that could be the subject of further interesting debate – but at this point one is overtaken by statutory intervention in the form of s.48A of the Water Resources Act 1991.

Water Resources Act 1991: s.48A

49. Under the provision of this Act the abstraction (as defined) of water, whether from overground or underground sources, is regulated and licensed by the Environment Agency. A licence is required for an abstraction of more than 20 cubic metres a day, from defined sources. This regulatory capacity can be described as a function of a policy need to control the distribution and provision of a scarce resource and the public interest.

50. S.48A was inserted into the 1991 Act by the Water Act 2003. It states:

> *[(1) Subject to subsection (7) below and to section 79 (including that section as applied by section 79A(9)) below, a person who abstracts water from any inland waters or underground strata (an "abstractor") shall not by that abstraction cause loss or damage to another person.*

(2) A person who suffers such loss or damage (a "relevant person") may bring a claim against the abstractor.

(3) Such a claim shall be treated as one in tort for breach of statutory duty.

(4) In proceedings in respect of a claim under this section, the court may not grant an injunction against the abstractor if that would risk interrupting the supply of water to the public, or would put public health or safety at risk.

(5) Except as provided in this section, no claim may be made in civil proceedings by a person (whether or not a relevant person) against an abstractor in respect of loss or damage caused by his abstraction of water.

(6) Nothing in this section prevents or affects a claim for negligence or breach of contract.

(7) This section does not apply, and no claim may be brought under this section, where the loss or damage is caused by an abstractor acting in pursuance of a licence under this Chapter and is loss or damage—

(a) in respect of which a person is entitled to bring a claim under section 60 below (or would be so entitled if there were a breach of the duty referred to in that section);

(b) in respect of which a person would have been entitled to bring a claim under section 60 below but for an express provision (including, for example, section 39(1A) above and section 59C(6) below) disapplying that duty; or

(c) constituting grounds on which a person is entitled to apply to the Secretary of State under section 55 below (or would be so entitled but for subsection (2) of that section) for the revocation or variation of that licence,

but without prejudice to the application of section 48 above.]

51. I may be running out of time to analyse all the detail that is contained in this section. Let me concentrate, then, on some key points. The first is that the point of this section appears to be that it imposes a statutory duty on any person not to cause harm to another by the abstraction of water. This

abstraction is not defined by reference to what may be licensed – so it applies even if the abstraction is legitimately not licensed because it is less than 20 cubic metres a day. It also does not differentiate between inland waters and underground strata – there is equal statutory liability. It also does not distinguish between water in underground strata in known channels versus unknown channel. For percolating, oozing, underground water, this is a radical change.

52. It is, however, an oddly worded form of duty. It does not declare what the duty *is.* Instead, it baldly states what a person shall *not* do – i.e. cause loss or damage, and then says that if they do, they can be sued – and that the claim shall be *treated* as one in tort for breach of statutory duty. Unscrambling leads one to say that there is now a statutory duty not to cause loss or damage to another by the abstraction of water, and even if that water is abstracted from underground strata.

53. What, if any, are the limits of this new statutory liability? On the face of it, the liability is strict. The negative duty is cast in absolute unqualified terms, and all a claimant has to do is prove the causative nexus between the activity abstraction and his loss or damage. One can also argue that there is a reasonable policy reason behind this approach – if a person wishes to abstract water from beneath his land, Parliament has placed the onus upon him or her to be sure that doing so will not cause harm to another. So a person can no longer rely on the fact that he could not easily or reasonably ascertain what is going on beneath the ground in terms of invisible water flow.

54. On the other hand, can that shifting of the onus really be fair? If it is a matter of scientific expertise and judgment, and even then a matter of hydro-geological modelling and analysis, how much can a person be expected to predict? Strict liability means that even if a conscientious owner obtains expert hydrology reports in advance, which tell him that on balance there will be no impact on surrounding land, and then it transpires that damage is caused, he will still be liable. There is also no limitation in terms of time, or

distance. What if the impact is felt after many years, or many miles away? Such difficulties were identified long ago by Wightman J in *Chasemore*.

55. One could argue further, that if the purpose of Parliament was to grant claimants a cause of action where they had not had a tortious one previously, then perhaps that gift of a cause of action should go no further than a claim in nuisance or negligence would have, if such a claim had been permitted by the common law. Any claim for damages in negligence or nuisance would have generally been limited to reasonably foreseeable damage, and so too, it could be said, should this statutory liability.

56. And yet the simple meaning of the statute does favour a strict liability interpretation. If this is the case, then it is a difficult position to square with what has been the long standing position at common law, and some of the logical and practical difficulties those decisions identified in imposing such liability. I have undertaken a review of the Hansard record on debates relating to this section, and the content of the debate on this topic can be said to leave something to be desired.

57. The reason for the imposition such liability was discussed very barely, the long history of the common law treatment of such issues was mentioned *not at all*, and the only point was, in essence "Oh well, an abstractor has to get a licence from the Environment Agency, and the Agency won't give a licence if they think it will cause damage"! This ignores the less than 20 cubic metre per day abstractions which require no licence and could still cause damage, and also ignores the fact that a licence from the EA is not always a guarantee that no damage will be caused or (subject to the limited exceptions in s.48A(7) an indemnity or defence against any claim.

Answers to these questions?

58. When I suggested this topic to the organisers of this seminar I had hoped that at this point in my speech I would be able to give you answers that the High Court, for the first time, may have offered to some of these difficult questions.

At present I can only say that a first instance judgment is expected in the near future which may clarify these matters one way or another.

59. Nevertheless it can at least be said that in any claims under s.48A the issue of causation is going to be a critical – and that in turn can throw up very complicated questions relating to “but for” causation, “material cause” causation, and multiple causes versus cumulative causes. Such questions, however, would need to be the subject of a lecture or seminar all of their own.