 Liability for nuisance:

Recent developments in the measured duty of care between occupiers

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Introduction

1. By definition a building (the dominant tenement) will actually be supported by adjoining land (the servient tenement) before a right to support has been acquired by prescription. This would be the case during the first 20 years after construction of a building. It would also be the case following an alteration in the mode of user which imposes an additional restrictional burden. Excessive use of the easement, beyond that which was granted or acquired, can extinguish such an easement with the result that time will start to run for the acquisition of a right to that further use.

2. From the point of view of property law it is clear that an easement of support is a negative right; the owner of the servient tenement may not take positive steps to interfere with the right but he is under no obligation and owes no duty of care to maintain support to the dominant tenement. Putting that another way, there is no positive duty on the owner of the servient supporting land who is entitled to neglect his land even if the foreseeable consequence is that it will cause the collapse of the land or building of the dominant tenement.

3. However, the law of nuisance has developed differently. The effect of the law of nuisance can be the imposition of responsibility and duties between neighbouring landowners. In this context the duty has sometimes been described as a measured duty of care. The scope of this duty differs from the duty of care in negligence which focuses on the requirements of a reasonable man in the circumstances of the case.

4. Property law has developed a strong resistance to any obligation arising where an easement of support exists. No positive duty is owed to the dominant supported land under the law of easements. The contrasting approach of the law of nuisance gives rise to a question: Can a landowner obtain greater benefit under the law of nuisance? Can a measured duty of care which may impose a positive duty arise where there is an easement of support and where one is being acquired by use? Could a landowner benefit more from the imposition of a positive duty of care, even a measured one, than from the law of property? The Court of Appeal in Coope v Ward considered whether the owners of the dominant tenement could obtain a greater right than the beneficiaries of an easement would have
enjoyed. It considered whether it would render the law incoherent if tortious principles led to a liability when principles of property law would not.

**Coope v Ward**

5. The Wards are the freehold owners of No 41 Orchard. They acquired that property in 2001 and moved in then. Mrs Ward’s parents had owned No 41 Orchard since it was built in 1973. The Coopes have been the freehold owners of No.62 Armstead since 1988.

6. The rear gardens of the properties back onto one another. The Armstead wall is near to the boundary between the properties and has been treated as a boundary feature owned by the owners of the Armstead properties. The ground level of No 41 Orchard is about 2.74m higher than the Armstead properties. The rear boundary of No 41 Orchard corresponds with about 1/3 of the rear of No 62 Armstead, the whole of No 60 Armstead and part of No 58. When the Armstead wall collapsed it fell into both No 60 and 62 Armstead. The Wards and the Stanilands (of number 58) settled during the trial.

7. The Armstead wall was constructed in or before 1953. It was a retaining wall giving support to the waste land on the other side of it, the Herbs. In 1973 the Orchard Lane houses, including No 41 Orchard, were constructed on the Herbs. At that time the ground level in No 41 Orchard was raised further increasing the burden on the Armstead wall.

8. In 1973 Mrs Ward’s parents, formerly owners of No 62 Armstead, purchased No 41 Orchard.

9. The trial judge found that the final building up of No 41 occurred in 1990 or 1991. At that time a single skin wall was added to the Orchard Wall. The court found that increased the burden on the Armstead wall. Twenty years from the date of that work expired in 2010 or 2011. The Armstead wall collapsed in January 2010. Accordingly the claim for an easement of support was rejected because the trial judge found any easement was extinguished by the last increase in pressure on the Armstead wall by changes to No 41 Orchard which occurred less than 20 years before the collapse of the Armstead wall.

10. The trial Judge also found that:

   (i) An easement of support was performed by the Armstead wall for 20 years from 1953 for land about 4 feet deep;

   (ii) There was no visible sign of the Armstead wall being in distress prior to the collapse

   (iii) Additional loading on the Armstead wall was a very significant feature of the wall’s collapse in 2010 and it was the loading by snowfall that triggered the collapse.

   (iv) The wall did not collapse as a result of action by the Coopes.

   (v) Mr Ward denied assisting his father-in-law to build the second single-skin wall in 1990;

   (vi) There was no evidence the Wards were responsible for the additional loading.

   (vii) Neither the Wards nor the Coopes had any liability to the other for the collapse in 2010.

11. The trial Judge concluded that following the collapse there was an obvious danger that more of No 41 Orchard would collapse into No 62 Armstead if nothing was done or if either landowner took steps to remove what was on his land. He found that given the existence of that danger to both landowners which neither had created, both had a concurrent, mutually enforceable duty to do what was fair, just and reasonable to prevent or minimize the known risk of further collapse.
12. The Coopes appealed the finding of a measured duty of care, arguing the trial Judge should have found that they owed no duty to the Wards and had no liability for a retaining wall. They argued that the trial judge was wrong to find a measured duty of care where:

a. There was no right of support;

b. A previous right of support had been lost by excessive use;

c. The excessive loading by the Wards and their predecessors caused the collapse;

d. there was no finding that the Wards owed any such duty in relation to the wall or their land before or after the collapse;

e. There was a confidential settlement between the Wards and another neighbour (the Stanilands) and it was not known whether the Stanilands had accepted they owed a measured duty.

13. The Wards submitted on appeal that on a proper appreciation of the basis and the standard of care required to comply with the measured duty of care, the challenges to the conclusions on the measured duty of care and the limited contribution required of the Coopes were flawed. The basis of the duty is knowledge of the hazard, the ability to foresee the consequences of not checking or removing the hazard and the ability to abate it. That duty properly arose once the Armstead wall had collapsed.

14. Further that the cause of action in the pleaded case was not changed by the fact that the Wards sought a more limited, but not different remedy in their closing submissions. It is not justifiable to criticize the judge effectively for not adjourning the matter once he had decided there was a mutual measured duty of care, when no such request was made.

15. Given the findings made by the trial judge in relation to the absence of the Wards’ knowledge of any hazard relating to the Armstead wall prior to its collapse, the Coopes’ counterclaims for negligence and nuisance were fundamentally flawed. The claim in trespass was not dealt with by the Coopes’ skeleton argument and in any event, an involuntary entry onto another’s land, without intention or negligence, is not trespass.

Development of the measured duty of care

16. The Privy Council in Goldman v Hargrave [1967] AC 645 at 659B-F, 661G-662A and the House of Lords in Delaware Mansions Limited v Westminster [2001] UKHL 55 at paragraphs 30-31 recognized a general duty of care in relation to hazards occurring on an occupier’s land (whether natural or man-made) to remove or reduce the same. That duty was characterized as a “measured duty of care” to remove and reduce hazards to an occupier’s neighbour. See Goldman at 662G.

17. The existence of the measured duty of care as described in Goldman and its application in the context of support existing between parcels of land, in particular the risk of an occupier’s land falling onto the land of another due to its instability, was recognized by the Court of Appeal in Leakey v National Trust [1980] QB 485 at 514A-D. The Court has made it clear that it is not necessary to apply the labels “nuisance” or “negligence” to the duty. The common law duty is simply concerned with reasonableness and foreseeability to arrive at “the fair and just incidents of a neighbour’s duty” to prevent or minimize risk. See Delaware at paragraphs 29-31.

18. The basis of the duty is (i) knowledge of the hazard, (ii) ability to foresee the consequences of not checking or removing the hazard and (iii) the ability to abate it. See Goldman at 660F and 663C-D. When confirming the existence of such a duty of care in Leaky the Court identified it as a duty that underpinned the long established right to abate a nuisance. See Leakey at 523F-524D.
19. The hazard in *Goldman* and many of the earlier cases was fire. There was no easement which existed or could have existed in respect of the same subject matter. It follows the existence of the measured duty of care being considered was not related to or dependent upon the existence of an easement or indeed its absence. *Leakey* involved natural movement of soil from higher land to lower land and knowledge of the risk for at least 8 years. The existence of any easement between the two parcels of land was not considered, although the properties and the geographical relationship between them had been in place for much longer than 20 years. See *Leakey* 509C-E. The only overlap between the matters that are necessary to give rise to an easement of support and a measured duty of care in connection with the hazard of unstable land is the land. The easement of support arises from the passing of time with a particular arrangement in place. By way of contrast the duty of care depends on knowledge, foreseeability and ability to address a particular hazard. It follows the duty of care is not dependent on the existence of an easement or any particular element that could amount to an easement.

20. The operation of the measured duty of care where an easement of support exists was considered by the Court of Appeal in *Holbeck Hall Hotel Ltd v Scarborough* [2002] 2 All ER 705. The Court of Appeal acknowledged that the right of support did not impose any positive duty on the owner of the servient tenement; the only duty that arose from the easement was a duty not to withdraw support. See *Holbeck* at 715C-H. The court concluded there was no difference in principle between a hazard arising from a lack of support and one arising from the escape/encroachment of a noxious thing. See *Holbeck* at 719E. In those circumstances the Court rejected the idea that the measured duty of care could not give rise to duty on the servient owner which did not arise by reason of the easement of support and concluded that the servient owner was subject to a measured duty notwithstanding the easement.

21. It is clear the presence of an easement, even when it fails to provide a remedy, is no bar to a measured duty of care. See also *Abbahall v Smees* [2003] 1 WLR 1472 at paragraph 10. There is no logical or principled reason why the measured duty of care would not arise in the absence of an easement of support. There is nothing unusual or objectionable about a situation giving rise to more than one legal relation or cause of action between two parties. No distinction is to be drawn between different hazards which means that whilst in some case there is no relevant easement known to law in others there will be the possibility of one. The existence of the measured duty of care depends on what is reasonable, fair and just given knowledge of the hazard, its foreseeability and ability to remove or minimise it and not the existence, absence or loss of an easement. It does not depend on a particular topographical arrangement existing for a specified period.

22. In *Holbeck* it was recognised that the measured duty of care represented a departure from the original principle that only the person who created a nuisance on his land would be liable. The extension to that principle results in the imposition of a duty only when the current (or in this case new) occupier continued the nuisance by failing to take reasonable steps to end it when he had knowledge and ample time to do so. See *Holbeck* at 715-6 paragraphs 29, 30 and 719 at 39. In each of the measured duty cases the hazard arose either naturally or man-made by another. The person upon whom the duty was imposed did not create the hazard and the justification for their liability was founded on their own knowledge, proximity and the need for a fair and just remedy.

23. The measured duty of care cannot arise without knowledge of a hazard. If all the other ingredients exist save knowledge, the duty will not arise until there is knowledge and a reasonable time to act on it. It follows logically there will be occasions where the hazard and other ingredients exist but the neighbours affected have no duty until an event results in them having the necessary knowledge. The absence of a duty prior to an event that leads to knowledge is plainly not a bar to a duty arising once there is knowledge. That is what happened in the *Coope v Ward* case.
24. The standard of care required to comply with the duty in each instance was to do what it was reasonable to expect of the occupier in his individual circumstances i.e. the personal capacities and circumstances of a particular defendant. See Goldman at 663E and Leaky at 526E. The limits upon the scope of the duty of care operate to “ameliorate any injustice” that might otherwise arise. In particular the extent of the risk, the chances of damage being caused, the practicality of preventing or minimizing damage, which includes the cost, time and extent of any necessary works. This would involve a broad assessment, which might involve an element of obvious discrepancy in financial resources but not a detailed investigation or evaluation of the same. See Leaky at 524E-H, 526F-G, 527B-C. In Abbahal at 36 to 42 the court recognised that apportioning liability between landowners may be an appropriate way to achieve the necessary justice and reasonableness.

25. In Coope v Ward at paragraph 37, Clarke LJ held that Duke of Westminster v Guild was not authority for the proposition that no duty of care relating to support could arise. The Court rejected the argument that the danger of damage due to lack of support was different from danger due to the escape or encroachment of a noxious thing. Further, the Court considered that given there was a contractual relationship between the parties (landlord and tenant) in Duke of Westminster it could be said that even if the contractual relationship may limit the existence or scope of a duty of care between the parties (at paragraph 38) that was a very different proposition from suggesting the proprietary relation would inhibit the occurrence of a measured duty of care.

26. The Court accepted the argument that any danger due to lack of support must be a danger to the property needing support arising from the state of the property from which support was necessary. Accordingly, there is no difference in principle between damage due to lack of support and danger due to the escape or encroachment of a noxious thing. The Court further held that whether a measured duty of care exists is to be determined by the law of negligence/nuisance and not the law of property because such a duty can exist where there is no question of an easement arising.

27. The Court rejected the Appellant’s argument that a failure of support cannot be a relevant hazard for the purpose of the measure duty of care. At paragraphs 48 to 53 the Court of Appeal held that the condition of the land after a collapse gave rise to a measured duty of care. “The risk of further collapse of number 41 arising from the post collapse state of number 62 seems to me no different in kind to more tangible risks such as fire, overhanging trees, or mobile land.” Clarke LJ held that the trial judge was right to hold that there was a measured duty of care on both sides.

28. The Court at paragraph 65 held that the Wards were in principle entitled to pursue their claim to damages (based on the measured duty of care that had always been pleaded) on a more limited basis than their original claim.

29. At paragraph 75 however, the court held that it was not just and reasonable to impose on the Coopes a liability to contribute to the cost of some as yet unspecified engineering solution. This was on the basis of three points:

   f. First, the cause of the collapse was the overloading of number 41 Orchard Road over the years with earth which, as we now know, was highly likely to lead in the end to this result (at paragraphs 76 to 77)

   g. Second, that it was unreasonable to require a contribution to a “solution” which is entirely unspecified (at paragraphs 78 to 79)

   h. Third, that circumstances had changed since number 41 was built and it was not appropriate to base the Coopes’ liability on the footing that 4 feet was the depth of the earth on the Orchard Lane side when number 41 was built (at paragraph 83).
30. A measured duty of care can therefore exist between neighbouring landowners in respect of the consequences attendant upon the collapse of a wall between their proprieties. It did not render the law incoherent that tortuous principles can lead to liability where property law would not (at paragraph 37). The measured duty of care did not however extend to the Coopes having to contribute financially to the costs of rebuilding the adjoining wall between the properties.

31. One of the questions arising in this case was whether a measured duty of care can exist where there is an easement of support. In *Holbeck*, the answer given by the court was that the duty could exist. The answer in *Duke of Westminster*, was in the negative. The Court of Appeal did not explicitly answer this question. It however considered that a measured duty of care could exist in the law of nuisance where an easement of support has been extinguished, as it had on the facts of *Coope v Ward*.

**Conclusion**

32. In conclusion, it is possible for the law of nuisance to give rise to a measured duty of care which results in the owners of a dominant tenement being owed a duty of care by the owners of a servient tenement. It follows the position under common law nuisance may well be more beneficial to a landlord as it may confer on him the benefit of a positive duty owed by the neighbouring owner to protect his land from hazards even if there is no easement of support and regardless of the fact that if there was it would not give rise to any positive duty.

33. However, the measured duty of care is just that, measured. For some, as with the Wards, although a measured duty of care may exist the scope of the duty may be very limited. It may not extend to the making of financial contributions or the doing of any work. At the very lowest, the measured duty of care will usually give rise to an obligation to warn if a hazard is known about and to allow access to their land to enable the neighbour to carry out any work that might be necessary to shore up their land or protect it from further falling.

34. In *Ward* it was not considered fair, just and reasonable to impose on the servient tenement a liability to contribute to the unspecified cost of a replacement wall, where no breach of the measured duty of care had been established, responsibility for the collapse of the wall lay the other side of the fence and it arose from the actions of the occupiers of that land in adding more earth. The case has however confirmed that the failure of support can find a claim on measured duty of care and the circumstances in which it is fair, just and reasonable to impose a measured duty of care on both landowners.

April 2015

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