Liability of local authorities for naturally occurring nuisances.

Falling trees, tree roots and flooding

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1. **Responsibilities of LAs**

(i) trees growing on LAs land – highway verges, parks and other land;

(ii) flooding – highway drainage, watercourse, culverts, trash screens etc.

Trees

2. Trees present two risks:

(i) falling trees / branches causing injury and / or damage to property;

(ii) encroachment of tree roots causing subsidence in shrinkable clay soils.

Falling trees

3. The duty of care owed by a person responsible for a tree can be stated in general terms as being a duty to *"take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour"* (*Donoghue v Stevenson*[1]). Such a statement tells us little

[1] [1932] AC 562

about the practical obligations owed by tree owners to those who come within the immediate vicinity of their trees. Immediately questions arise as to the degree of knowledge expected of a tree owner and as to the resources to be committed by the tree owner to the assessment of the condition of his trees.

4. The House of Lords considered the issue in 1950 in the case of *Caminer v Northern & London Investment Trust Limited*[2] and approved the test as being that of *"the conduct to be expected from a reasonable and prudent landowner"*. However, Lord Norman recognised that: *"the test of the conduct to be expected from a reasonable and prudent landlord sounds more simple than it really is. For it postulates some degree of knowledge on the part of landlords which must necessarily fall short of the knowledge possessed by scientific arboriculturalists but which must surely be greater than the knowledge possessed by the ordinary urban observer of trees or even of the countryman not practically concerned with their care …. If a landlord is aware of his ignorance about elms he should obtain the advice of someone better instructed, not a scientific expert in the ordinary case, but another landlord with greater experience, or a practical forester, for example"*.

5. *Caminer* was decided in 1950. Since that time various cases have been reported[3], the arboricultural industry has changed and many publications have appeared dealing with the issues of tree safety and tree management. However, the definition of the general duty of care has not changed (see *Micklewright v Surrey CC*[4]; *Stagecoach v Hind*[5]). It remains that of the *"reasonable and prudent landowner"*.

6. The extent to which the reasonable and prudent landowner should inspect the trees on his land has been clarified by *Micklewright* and *Stagecoach*. In *Micklewright* a member of the public was killed when a branch fell from a highway tree. There was extensive internal decay but

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2 [1951] AC 88

3 *Quinn v* Scott [1965] 1 WLR 1004; Knight *v Hext* (1979) 253 EG 1227; *Lane v Trustees of the Tredegar Estate* [1954] EGD 216; *Chapman v Barking and Dagenham LBC* (1998) CA unreported; *Maclellan v The Forestry Commission* (15.10.04) Nigel Wilkinson QC, unreported; *Poll v Viscount Asquith of Morley* (11.5.06) HHJ Macduff, unreported; *Atkins v Sir James Scott* (14.8.08) HHJ Iain Hughes QC unreported.

4 [2011] EWCA Civ 922

5 [2014] EWHC 1891 (TCC)

no outward sign of that decay. The tree was not the subject of a proper system of inspection, but the judge at first instance found that if a proper system had been in place, the extent of the decay and the danger it posed would not have been revealed. The Council was found not to be liable. The Court of Appeal upheld the judgment and focused on the two stages underpinning the judge's decision. First, whether a routine inspection would have led on to a detailed inspection by a qualified arboriculturalist. Second, if so, would the arboriculturalist's inspection have led to the removal of the branch. It was accepted that, if an arboriculturalist had inspected the tree, the decay would have been discovered and the tree felled. The Court of Appeal upheld the judge's decision that no expert inspection had been warranted because a preliminary inspection would not have given cause for concern.

7. *Micklewright* concerned a highway tree, the responsibility of the Highway Authority. *Stagecoach* concerned a tree standing on a private householder's land. A branch fell onto a railway track. A train collided with the branch. Coulson J. stated the principles relating to a landowner's duty as being:

(a) "The owner of a tree owes a duty to act as a reasonable and prudent landowner (***Caminer***);

(b) Such a duty must not amount to an unreasonable burden (***Lambourn***) or force the landowner to act as the insurer of nature (***Noble***). But he has a duty to act where there is a danger which is apparent to him and which he can see with his own eyes (***Brown***);

(c) A reasonable and prudent landowner should carry out preliminary/informal inspections or observations on a regular basis (***Micklewright*** and the first instance cases noted in paragraph 66 above);

(d) In certain circumstances, the landowner should arrange for fuller inspections by arboriculturalists (***Caminer***, ***Quinn***). This will usually be because preliminary/informal inspections or observations have revealed a potential problem (***Micklewright***, ***Charlesworth and Percy***), although it could also arise because of a lack of knowledge or capacity on the part of the landowner to carry out preliminary/informal inspections (***Caminer***). A general approach that requires a close/formal inspection only if there is some form of

'trigger' is also in accordance with the published guidance referred to in paragraphs 53-55 above.

(e) The resources available to the householder may have a relevance (***Leakey***) to the way in which the duty is discharged."

8. Coulson J.'s recognition of the principle that a landowner's resources may have a relevance to the way in which a duty is discharged (per *Leakey v National Trust*) highlights the possibility of a greater burden being placed on a local authority / landed estate when such entities have greater human and financial resources. But the reality is that those who are carrying out informal inspections for such entities are usually going to have greater knowledge of trees than most ordinary householders in any event. The HSE SIM 01/2007/05 "Management of the risk from falling trees" (2007), and the NTSG "Common sense risk management of trees" (2011), both advocate the two stages of inspection, the second stage only being triggered where there is an observable defect which should be recognised by the first stage inspector. The HSE SIM recognises that: *"For trees in a frequently visited zone, a system for periodic, proactive checks is appropriate. This should involve a quick visual check for obvious signs that a tree is likely to be unstable and be carried out by a person with a working knowledge of trees and their defects, but who need not be an arboricultural specialist. Informing staff who work in parks or highways as to what to look for would normally suffice."*[6]

9. *Bowen v National Trust*[7] proceeded as a claim under the Occupiers' Liability Act 1957 and focused on whether the Trust's inspectors failed to exercise reasonable care in their task as professional (per *Bolam*). The case is a good example of the court's recognition that a tree with defects may be maintained where the risks to visitors are limited and properly assessed. To require the defendant to do more than it did *"would also be requiring the defendant to do more than was reasonable to see that the children enjoying the use of this wood were reasonably safe to do so"*. This passage reflects the wording of s. 2(2) of the Occupiers' Liability Act 1957 and is similar to the duty set out in *Leakey*. *"to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property*" (per Megaw LJ in *Leakey* at page

6 Paragraph 10(ii)
7 [2011] EWHC 1992 (QB)

524). *Leakey* postdates *Caminer* and has already been held by the House of Lords in *Delaware Mansions* to be the touch stone for liability in respect of tree root claims. There is, therefore, no reason why the overarching duty imposed by *Leakey* is not equally applicable to the nuisance of falling trees. The *Leakey* duty may not provide any material departure from the general duty of care identified in *Caminer* but it does allow a court to consider the parties' resources and the balance of benefit against risk (s. 1 of the Compensation Act 2006; *Tomlinson v Congleton BC*[8]).

Tree root encroachment / subsidence

10. *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321 – 25.10.01

Lord Cooke – *"the answer to the issue falls to be found by applying the concepts of reasonableness between neighbours (real or figurative) and reasonable foreseeability which underlie much modern tort law and, more particularly, the law of nuisance"*.

"If reasonableness between neighbours is the key to the solution of problems in this field, it cannot be right to visit the authority or owner responsible for a tree with a large bill for underpinning without giving them notice of the damage and the opportunity of avoiding further damage by removal of the tree. Should they elect to preserve the tree for environmental reasons, they may fairly be expected to bear the cost of underpinning or other reasonable necessary remedial works …. As a general proposition, I think that the Defendant is entitled to notice and a reasonable opportunity of abatement before liability for remedial expenditure can arise."

"The law can be summed up in the proposition that, where there is a continuing nuisance of which the Defendant knew or ought to have known, reasonable remedial expenditure may be recovered by the owner who has had to incur it."

11. *LE Jones (Insurance Brokers) Ltd v Portsmouth City Council* [2003] BLR 67 – 7.11.02

Having been given notice of the intention to underpin the Council did not suggest an alternative remedy and did not ask for time to consider an

[8] [2004] 1 AC 46

alternative remedy (question of fact as to whether defendant had been given a reasonable opportunity to abate the nuisance). Burden is on the defendant to show that, if given sufficient time, it would have abated the nuisance, and to show that the claimant failed to mitigate his loss. In the absence of assured tree management it was reasonable for the claimant to underpin the property.

12. *Loftus-Brigham v London Borough of Ealing* [2003] EWCA 1490 – 28.10.03

Causation - did desiccation materially contribute to the damage (see also *Eiles v Southwark London Borough Council* [2006] EWHC 1411 (TCC))

13. *Kirk v Brent London Borough Council* [2005] EWCA Civ 1701– 8.12.05 – strike out application.

Delaware is not authority for the proposition that there must be notice given to a defendant of the need for remedial works before such works are undertaken before any damages can be recovered. Accepted that reasonable foreseeability of the risk of damage does not simply arise from the fact that a mature Plane tree on London clay, with a height greater than its distance from the property, stands outside a property (but see *Eiles v Southwark London Borough Council* [2006] EWHC 1411 (TCC); *Greenwood v Portwood* (1985) CLY 2500; *Osborne v State of Spain* (1998)). Constructive knowledge may arise if damage had already occurred to neighbouring property from the roots of the same tree. Notice may also be irrelevant if underpinning would have been the only realistic option. See also *Younger v Molesworth* [2006] EWHC 3088 in respect of lack of knowledge of cause of damage.

14. *Hilda's Montessori Nursery Ltd v Tesco Stores Ltd* [2006] EWHC 1054 – 31.1.06

Causation – Defendant sought to invoke *Rhesa Shipping* (court not compelled to chose between two competing and improbable theories) – In spite of atypical timing of damage, lack of evidence of cyclical movement or desiccation, claimant succeeded because trees were close to damaged extension and had the potential to cause shrinkage of high plasticity clay soil, there were roots found under the foundations and

there was some limited desiccation near to the part of the building which was damaged.

15. *Perrin v Northampton Borough Council* [2007] EWCA Civ 1353 – 19.12.07

S.198(6) Town and Country Planning Act 1990

"Without prejudice to any other exemption for which provisions may be made by a tree preservation order, no such order shall apply –

(a) to the cutting down, uprooting, topping or lopping of trees which are dying or dead or have become dangerous, or

(b) to the cutting down, uprooting, topping or lopping of any trees in compliance with any obligations imposed by or under an Act of Parliament or so far as may be necessary for the prevention or abatement of a nuisance."

The words "so far as may be necessary for the prevention or abatement of a nuisance" mean "<u>if and</u> so far as may be necessary …….". It follows that possible remedies to abate the nuisance are relevant (underpinning, root barriers etc) other than just works to the tree itself in order to see whether the cutting down / lopping of a tree is necessary.

16. In deciding whether an alternative scheme is relevant, account will need to be taken of the cost of the scheme and the ability of D to pay (most probably insured and so not a real issue).

17. The extent of the nuisance is relevant to a consideration of the works that are necessary to prevent or abate the nuisance.

18. The extent of the amenity provided by the tree may also be a consideration in whether felling is necessary.

19. A property owner cannot rely upon s.198(6)(b) where the tree damages or threatens his own property. There is no nuisance in that instance.

20. If a tree on D's land damages the property on C's land, both parties can rely upon s. 198(6)(b) in cutting down or lopping the tree. However, the section does not assist C to go on to D's land to abate the nuisance. He can only cut the roots on his own land. He can either (i) seek an injunction (which may not be granted because of a TPO); (ii) seek an order for damages including prospective remedial works; or (iii) carry out preventative / remedial works and then seek damages. Section 198 does not alter C's rights to the remedies at (ii) and (iii).

21. The existence of a TPO does not limit the obligation of D not to commit a nuisance against C, and does not restrict C's right to recover damages from D. D can seek compensation from the Local Authority and is, in any event, probably insured against the damages payable to C.

22. Ultimately, it is not for C, but for D, to decide whether to pay damages for remedial / prevention works, or to seek to fell the tree.

23. Both Sir John Chadwick and Blackburne J. doubted that there was a difference between "actionable nuisance" (damage caused or imminently threatened) and the encroachment of roots into the adjoining land. In *Delaware* Lord Cooke stated that it was the impairment of the load bearing qualities of the soil which created the nuisance (see also *Masters v Brent LBC* [1978] QB 841).

24. *Berent v Family Mosaic Housing* [2012] EWCA Civ 961

The Court of Appeal upheld the trial judge's decision that liability did not attach to the Defendants in that there was no basis to infer that the defendants knew or should have known that there was a real risk that the trees would cause damage. The outcome was fact specific. However, the Court of Appeal did emphasise that reasonable foreseeability of a risk meant reasonable foreseeability of a "real risk" (per Lord Reid in *The Wagon Mound No.2*); and that the enquiry as to reasonable foreseeability of damage could not be separated from the related enquiry as to what is reasonable in the light of the reasonably foreseeable risk. This reflects the principles set out in *Leakey v National Trust* and the subsequent dictum of

Dunn LJ in *Solloway v Hampshire CC*: *"In considering whether there is a breach of duty, the extent of the risk and the foreseeable consequences of it have to be balanced against the practicable measures to be taken to minimise the damage and its consequences"*. The Claimant's expert did not advocate pruning as being an effective management tool. The Court did not think that felling was reasonable before there was any evidence of damage, given that the risk of damage was not "real" until some damage had occurred (see also *Park v Swindon BC* December 2010 unreported).

25. *Robbins v Bexley London Borough Council* [2013] EWCA Civ 1233

The case addressed the issue of causation and concluded that where the defendant had not done anything, in the light of its knowledge that there was a real risk of damage being caused, a judge must then go on to ask what would have happened if the defendant had done something to satisfy its duty to take such steps as were reasonably required to prevent damage being caused by the tree roots. The court left open the question of whether the burden of proof passed to the defendant in showing that, if it had acted with reasonable care, the damage would still have occurred (*Phethean-Hubble v Coles* [2012] EWCA Civ 349; but see *Vernon Knight Associates v Cornwall Council* [2013] EWCA Civ 950).

26. *Khan v Harrow Council* [2013] EWHC 2687 (TCC)

The court distinguished between the reasonable foreseeability of damage by the roots of a hedge in close proximity to the house as opposed to the roots of a tree at a further distance from the house. The damages were reduced by 15% to reflect the claimant's contributory negligence in failing to inform the defendant of damage to the property, and the risks of further damage, in a timely manner. On the issue of foreseeability, the judge highlighted the need, in the absence of actual knowledge, to ascertain what would have been reasonably foreseeable to the reasonably prudent landowner who had trees on their property. Based on the limited media evidence, the judge concluded that prior to 2006 such an owner should have been aware that there is a risk of subsidence damage caused by tree roots, particularly on clay sub-soils, but not of the risk in particular trees. He said: "*the general risk that trees pose in terms of settlement damage is not sufficient without more to impose liability in nuisance for subsidence damage caused by tree roots. There has to be more ..... obviously, the general risk forms the background to consideration of the particular risk. ..... With knowledge of the general risk, the location,*

size and condition of those trees would mean that a reasonably prudent landowner would be put on notice of the particular risk which that tree posed to the neighbouring property. It would cause the reasonably prudent landowner to appreciate that there was a real risk, not just a mere possibility, of subsidence damage caused by this tree ".

27. Ramsey J. also commented upon the relevance of notice being given of damage. If the risk of damage is not reasonably foreseeable then there is no liability, but once notice of damage is given the defendant is liable for any continuing nuisance based on that actual knowledge. Furthermore, a claimant must give notice of proposed remedial work so that the defendant can take any necessary steps to abate the nuisance, otherwise remedial works may not be recoverable.

28. *Browne v Swindon BC* (2015) – the judge at first instance found that the council could not rely upon the assumption that the foundations of the property complied with building regulations or NHBC Guidance when built, in arguing that it was not reasonably foreseeable that the tree constituted a risk of damage to the house.

29. The cases highlight that the consideration of liability in tree root subsidence cases is underpinned by the principle established in *Leakey* that: "*The duty is a duty to that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property. The considerations with which the law is familiar are all to be taken into account in deciding whether there has been a breach of duty, and, if so, what that breach is, and whether it is causative of the damage in respect of which the claim is made. Thus, there will fall to be considered the extent of the risk; what, so far as reasonably can be foreseen, are the chances that anything untoward will happen or that any damage will be caused? What is to be foreseen as to the possible extent of the damage if the risk becomes a reality? Is it practicable to prevent, or to minimise, the happening of any damage? If it is practicable, how simple or how difficult are the measures which could be taken, how much and how lengthy work do they involve, and what is the probable cost of such works? Was there sufficient time for preventive action to have been taken, by persons acting reasonably in relation to the known risk, between the time when it became known to, or should have*

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

30. The assessment of liability, apart from the issue of causation, involves a balancing exercise involving both reasonable forseeability and reasonable steps. That consideration is played out from the position of the reasonable and prudent landowner - be that landowner a local authority, large estate or ordinary householder.

Flooding

31. Flooding can occur in numerous ways but, for LAs, the most significant sources of flooding are from watercourses and highways.

Watercourses

32. If water is deliberately drained from the higher land to the lower land then liability will follow (*Thomas v Gower RDC* [1922] 2 KB 76). Similarly, if water is caused to flow in a more concentrated manner than naturally occurred so that flooding occurs, liability will follow.

Culverts / trash screens

33. *Bybrook Barn Garden Centre v Kent CC* [2001] BLR 55 - Court of Appeal, applying *Leakey*, held that an increased water flow in a stream, due to changes in the landscape upstream, meant that an originally unobjectionable structure, a culvert, had become a nuisance when it hindered the flow of the stream and caused adjoining land to flood. The council knew of the problem and were able to carry out works which were not extensive or excessive in terms of cost and were, therefore, liable.

34. In addition to the possible need to improve / update infrastructure to prevent flooding, a landowner responsible for a stream is also required to maintain / clear any entrance to a culvert to prevent blockage. The culvert

may require a screen as the only means of preventing blockage. Furthermore, the screen is likely to need cleansing to prevent blockage (see *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 - a screen was placed over the top of the pipe where it was useless, rather than being a few feet in front of the pipe opening; *Pemberton v Bright* [1960] 1 All ER 792 - the highway authority was liable for failing to provide a screen at the mouth of a culvert when it constructed the culvert under the highway).

Flooding from the highway

35. The primary focus of a highway authority is upon maintenance of the highway in accordance with the duty imposed by s. 41 Highways Act 1980. That duty includes the provision and maintenance of an adequate system of road drainage for the purposes of draining the road surface (*Dept of Transport v Mott Macdonald* [2006] 1 WLR 2256; *Burnside v Emerson* [1968] 1 WLR 1490; *Thoburn v Northumberland CC* (1999) I LGLR 819 CA; T*arrant v Rowlands* [1979] RTR 144). The obligations under s. 41 are only owed to highway users and not to adjoining landowners.

36. The highway authority also owes the normal duty of care owed by a landowner to an adjoining owner to take reasonable care to avoid acts or omissions which cause floodwater to flow onto adjoining land so as to cause damage. The principles of *Leakey v National Trust* apply.

37. A number of specific issues arise in ascertaining whether there has been a breach of duty:

- is compliance with the highway inspection regime sufficient?
- are the resources and demands of highway authorities relevant?
- are the resources, and opportunities to limit the risk of flooding, of the adjoining landowner relevant?
- is the availability of insurance to the adjoining owner relevant?

38. *Vernon Knight Associates v Cornwall Council* [2013] EWCA Civ 950 concerned a stretch of minor road in Cornwall which bordered a donkey park to the north and a holiday park to the south. The land sloped from north to south. In periods of heavy rain water ran off the donkey park land onto the highway. The water accumulated on the highway and then

overtopped a bank / wall and flowed into the holiday park causing damage to buildings on the site.

39. The stretch of road was heavily wooded on either side and the water run off from the north carried with it leaves and other debris. The drainage gullies (which were oversized) were prone to fleecing over which blocked the gullies and caused flooding of the highway to occur.

40. The highway authority carried out regular cyclical maintenance in accordance with its s. 41 duty. In addition the Charge Hand responsible for the area made it his business to check the gullies at times of heavy rainfall during the course of the working day. On two occasions of heavy rain he did not do so. On those occasions flooding of the holiday park occurred.

41. The judge at first instance found that the highway authority had a system in place which they failed to carry out on the two occasions when flooding occurred. There was no reasonable explanation for those failures. Accordingly they were liable.

42. The Court of Appeal stated the duty in respect of non-feasance in natural nuisance to be:

(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.
(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.

43. The Council argued that the following matters were to be taken into account in determining the extent of the Council's duty (CA response in italics):

(i) Most of the floodwater came from the Donkey Park, which was owned by a third party. The council did not exacerbate the flow of flood water, but took steps to reduce its effect. *To be taken into account - the Council failed to take the measures it usually carried out to prevent the flooding which occurred.*

(ii) The council was only an adjoining owner by reason of its position as a highway authority. Bearing in mind the many demands upon the council's resources, the court should not impose unduly onerous requirements. *To be taken into account - an important consideration but the same measures were needed to protect motorists and adjoining owners, to check and clear the drains - "even after making due allowance for the pressures on local authorities, the measured duty on the council did require it to take reasonable steps to keep that drainage installation functioning properly"*.

(iii) The council had an adequate system in place, as found by the judge. Honicombe Road was a secondary road on which there had only been two floods in the eight year period since the drains were installed. *If there was some good reason for the failure of the system on the two occasions (such as lack of resources or other more urgent work) that would probably have absolved the council from liability. There was no such good reason.*

(iv) The Claimant was able to and did insure against the damage suffered. *Not of relevance - the gang could and should have prevented the floods by following normal practices.*

(v) The Claimant caused or contributed to the flood damage as a result of

a) having filled in an old ditch and having altered the topography of the land; *This was historic and the duties of landowners must be determined by reference to the current arrangements.*

b) not clearing gratings over the gullies on 24 November 2006 and 4 September 2008. "*There is some scope for criticising the claimants. It would have been sensible if Mr Morris had sent one of his staff up to check on the drains in Honicombe Road during the heavy rainfall on the two critical dates. On the other hand, that cannot consitute a complete defence to the claim. The drains along Honicombe Road were the property of the council and were the principal responsibility of the council. The allegations of contributory negligence which may possibly have been viable, were not pursued*".

44. Jackson LJ: *"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 circumstances. Although he was carrying out a multifactorial assessment, he properly highlighted those factors which were particularly significant."*

45. The burden lay on the council to prove that there was good reason for their non-attendance at the scene on the two flood events.

46. The judge at first instance had provided a postscript in which he said that, given the present state of knowledge, the claimant may be less likely to succeed in a future flooding claim. Court of Appeal attached "no significance" to this postscript: *"I am not prepared to speculate about the outcome of future litigation, given what both parties have learned during the present proceedings."*

47. The legal principles in *Vernon Knight* were applied in *Potgieter v Bristol City Council* (17.8.16) where highway water was alleged to be entering into an adjoining owner's basement.

photographs and plans in the trial bundle is that, prior to July 2012, there was in fact no functioning gully pot on the claimant's side of Pembroke Road between the junction with Pembroke Avenue and the junction with Station Road. This may explain why the claimant described rainwater as "*cascading*" down Pembroke Road after a downpour. The question is what effect this would be likely to have had on the ingress of water into the claimant's basement.

117. There is no evidence that rainwater used to pool in the roadside around gully pot 1, which is the gully pot which would have had to take all the rainwater from the claimant's side of Pembroke Road before gully pot 2 was installed. Mr Oram's assumption in June 2012 that water used to collect on the road surface by the claimant's front door and near the front basement is not supported by any of the other evidence. So if gully pot 1 was occasionally overloaded, it seemed able to cope. Nevertheless the absence of effective drainage on the claimant's side of Pembroke Road would have meant that gully pot 1 handled a greater volume of run-off prior to July 2012 than afterwards and this might have exacerbated or magnified any escape of water through the seal defect and Defects B and C.

118. It is virtually impossible to form any quantitative view of the contribution which was made to the flooding of the claimant's basement by Defects B and C and the seal defect in gully pot 1 between June 2008 and March 2015 (in respect of Defects B and C) and between June 2008 and July 2015 (in respect of the seal defect). I am satisfied that overall it would have been more than negligible, but to put any figure or percentage on it would be pure speculation. It must be remembered that until August 2014, the sewer defects were a contributor as well.

119. Identifying the defects and their likely causative effect is only one part of the inquiry. When considering whether BCC may have been in breach of its duty to the claimant in the past, regard must be had to what it would be reasonable to expect a highway authority in the position of BCC to do and to whether BCC has met that standard in the way it has responded to the claimant's complaints. Mr Stead addressed those questions in paragraphs 20 to 21 of his skeleton argument. I accept his analysis. In considering what is fair just and reasonable between an urban highway authority and the owner of a neighbouring property such as the claimant's property, the following considerations are relevant: (1) The highway authority is not obliged to maintain a road surface or pavement that is impermeable to rainwater nor a system of drainage that is watertight. Most highway drains contain some defects and leak to a minor extent because the ground shifts with the passing of traffic. (2) The priority for a highway authority is to maintain the safety of the highway for road users. Highway drainage is designed to avoid surface flooding which is dangerous for road users and hazardous for adjacent properties. The priority therefore is to keep highway drains unblocked. (3) Where a highway authority is notified of a possible defect in its drainage system it is reasonable to expect it to investigate that defect and to carry out necessary repairs within a timescale and at a cost that is commensurate with the potential hazard or risk of damage being caused. (4) The owner of a property which borders the highway who wishes to use a basement within the property for habitable accommodation can be expected to install a waterproofing system to

the standards of current Building Regulations. (5) It is not reasonable to expect that minor leaks from highway drainage will penetrate such a waterproofing system.

120. I have recounted in considerable detail the steps which BCC has taken since the summer of 2008 to respond to the claimant's problem. With the exception of the first complaint about a defect in the road surface, the claimant's complaints about defective drainage have not suggested what the defect is or identified where, from outside her property, the water may be coming from. BCC has been presented with a problem by the claimant and with demands that it find the cause. In my judgment BCC has responded to those complaints appropriately and in a way commensurate with its duty to the claimant, for most of the time in the face of considerable hostility. BCC was under no obligation to investigate and discover where the water entering the claimant's basement was coming from. BCC was obliged only to take reasonable steps to ensure that its system of highway drainage in the vicinity of the claimant's property was adequate to drain the highway and in good working order.

121. Mr Stead referred to the decision of the Court of Appeal in *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR 291. That was a tripping case concerned with pavement defects. In allowing Barnsley Council's appeal against the trial judge's finding of liability, Steyn LJ (with whom Dillon LJ agreed) said this:

> "*Finally, I add that, in drawing the inference of dangerousness in this case, the judge impliedly set a standard which, if generally used in the thousands of tripping cases which come before the courts every year, would impose an unreasonable burden upon highway authorities in respect of minor depressions and holes in streets which in a less than perfect world the public must simply regard as a fact of life. It is important that our tort law should not impose unreasonably high standards, otherwise scarce resources would be diverted from situations where maintenance and repair of the highways is more urgently needed. This branch of the law of tort ought to represent a sensible balance or compromise between private and public interest. The judge's ruling in this case, if allowed to stand, would tilt the balance too far in favour of the woman who was unfortunately injured in this case. The risk of a low order and the cost of remedying such minor defects all over the country would be enormous. In my judgment the plaintiff's claim fails on this first point.*"

122. Although the facts in that case were very different, like the present case it concerned the measured duty on a highway authority to maintain part of the highway. Mr Stead submits that what was said by Steyn LJ is as relevant to drainage defects as it is to pavement defects. I agree with him. I would not be prepared to hold BCC in breach of duty to the claimant for the defects in the highway drainage which have been discovered since 2008 unless, having regard to the whole history of the matter, I was satisfied that BCC had failed to act reasonably to remedy those defects and to ensure that its drainage system was in good order. I am not so satisfied. I hold that BCC is not liable to the claimant for historic nuisance.

123. If I am wrong in that conclusion and it is later held that BCC is liable, I would simply add that the evidence shows that the claimant would have suffered a serious problem of water

Conclusion

48. Nuisance claims raise the primary issues of reasonable foreseeability of the risk of injury/damage, and the reasonableness of steps taken by the LA to counter the risk. The identification of the risk and the taking of all reasonable steps bring into play the extent to which resources are available to the LA.

49. Steps can be taken at planning stage / planting stage to identify appropriate planting locations and appropriate species to prevent tree root encroachment.

50. Policy / standards should not create unattainable aspirations and should be based upon what is realistic and practicable.

51. Following notification of possible tree root subsidence, early investigation and decision making can save significant sums in damages and legal costs.

52. A reactive response policy may well be reasonable, but when notice is given of a defect / damage there must be an adequate and appropriate response.

53. If a lack of resources has impacted upon the steps taken, then detailed evidence identifying the problem and the consequences of the reduced resources should be put before the court. One cannot rely upon the general comment that LAs are hard pressed and lack the necessary resources.

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