St John's CHAMBERS

Water Rights and Wrongs

John Sharples, Barrister, St John's Chambers

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Watercourses can be classified in 3 different ways:
- natural vs artificial
- surface vs underground
- defined vs undefined channels

The rights and responsibilities of neighbouring landowners in relation to a particular body of water depends on these classifications. The following is a (necessarily circumscribed) summary of landowners' rights.

1. Water Rights

Water rights can be either natural or acquired (by grant/reservation or prescription) as an easement. In broad terms
- you cannot (with one exception) have natural rights over artificial bodies of water.
- both natural and artificial rights can exist in relation to natural bodies.

I will look at five different types of water sources:
- surface waters in defined natural channels
- surface water in artificial channels
- surface waters in undefined channels
- underground waters in defined channels
- underground waters in undefined channels

The first and second are most frequently the subject of disputes.

I Surface waters: defined natural channels

Natural rights

Natural rights may exist in relation to natural watercourses. A "watercourse" is one where the water:
- usually flows in a certain direction. The flow need not be continuous. So a stream that occasionally dries up or even flows only occasionally may be a watercourse.
- by a regular channel with banks or sides. It must be reasonably well-defined.

In reality if one of these requirements is satisfied the other will be too.

Only riparian owners enjoy natural rights to water in a watercourse. A "riparian" owner is one whose land is either (a) intersected or (b) bounded by a natural watercourse. It can adjoin the stream either horizontally or vertically. So ownership of the bed is a sufficient requirement, but not a necessary one.

How far "back" from the bank do these rights extend? Not every piece of land in the same ownership which includes a portion of the bank enjoys riparian rights. There must be either

- contact with the stream or
- or reasonable proximity to it and no separately-owned intervening land. So if an owner sells off part of his land and the portion sold separates his remaining land (or part of it) from the stream, it will cease to enjoy riparian rights.

The three riparian rights are:

(1) Use of the water for purposes connected with the riparian land. Traditionally this is said to consist of two categories:
- use for "ordinary" purpose e.g. domestic/watering livestock The lower riparian owners cannot complain if by doing so he exhausts the water.
- "extraordinary"/secondary purposes as long as (a) the use is reasonable (b) it is connected with/incident to his land and (c) he returns it to the stream substantially unaltered in volume or character[1]. This includes ordinary (vs excessive) spray irrigation[2]. It does not matter that there is sufficient left for the lower owners own purposes[3].
  But what falls within each category can vary from place to place and time to time.

(2) Flow: to have the water come to and go from him without interruption by the upstream- or downstream owners

(3) Purity: to have the water come to him unpolluted.

These rights are of course now highly circumscribed by statute, principally the Water Resources Act 1991 and the Land Drainage Act 1991 – see below for a partial consideration of the WRA's effect.

Artificial rights

A landowner who has no riparian rights can acquire (by grant, reservation or prescription) an easement conferring water rights. And a landowner who has riparian rights can also acquire by easement greater rights to water. For example to (a) divert water for extraordinary reasons which are not limited in the way described above (b) dam/artificially raise the water levels in the stream (c) regulate the flow of water by means of a hatch or (d) divert the course of the stream.

These (additional) rights can allow him to interfere with what would otherwise be the natural, riparian rights of upstream- and downstream owners if – but only if – they affect their use of the stream.

[1] McCartney v Londonderry & Lough Swilly Ry Co. [1904] AC 301.
[2] Rugby Joint Water Board v Walters [1967] Ch 397: 60,000 gal per day clearly fell on the wrong side of the line.
[3] Attwood v Llay Main Collieries Ltd [1926] Ch 444.

They must however comply with the general requirements for acquiring rights by grant/prescription i.e. they must be for the benefit of some dominant tenement (vs in gross) and exercised "as of right" (without force, stealth or permission).

The scope of the rights depends on the wording of the grant/reservation or the nature of the use giving rise to a prescriptive right. Similarly whether a particular use is "excessive" e.g. due to the development of the dominant tenement is also to be measured in the same way as for easements generally.

II Surface water: artificial channels

The rules are quite different in relation to artificial channels, typically a mill race/leat or water pumped from a mine.

Natural or artificial?

Even so a once-natural stream which has been culverted does not lose its status as such[4]. But it is a question of degree e.g. if the course of the natural stream has been radically altered so as to flow in a different direction/through different lands it may be regarded as artificial. The distinction can sometimes be difficult to draw in practice

Sources of rights over artificial watercourses

Strictly speaking, rights in relation to artificial watercourses (e.g. mill leats) can only exist as easements or by custom i.e. there can be no natural rights[5]. As easements they must be created either by express or implied grant or reservation or arise through prescription (at common law, under the doctrine of lost modern grant or under the Prescription Act 1832)

However it is sometimes possible to infer an artificial watercourse was built on condition the adjoining owners would have the same rights as if it were natural[6]. Whether that is the proper inference is a question of fact and inference. So e.g. it is less easy to infer such an intention in relation to entirely artificial streams e.g. run-off from a mine[7].

Express rights

Care must be taken as to the construction of express grants/reservations of a "watercourse". Depending on the context this can mean either (a) the right to running water (b) the artificial structure which contains it e.g. a pipe or (c) the land through which it runs. The prima facie construction is (a)[8].

[4] Nuttall v Bracewell (1866-1867) LR 2 Ex 1
[5] Halsbury's Laws Vol.87 @ para 999.
[6] See the recent survey in Pearson v Foster [2017] EWHC 107 (Ch) @ [64] et seq.
[7] Nuttall v Bracewell, above
[8] See for a useful summary of the various cases Gale on Easements 20th ed. 2017 @ 6-35 et sseq.

Prescriptive rights

A prescriptive right can arise over a permanent watercourse. This is typically one penned up by embankments, etc.

Prescriptive rights cannot be acquired in relation to temporary artificial watercourses (typically, mill races and leats to drain mines) if the correct inference is that the enjoyment depended on temporary circumstances (the continued operation of the mill or mine). For in that case the proper inference is that such use was with the mill/mine owner's permission and for only so long as the operation continued/subject to his unfettered right to cease.

"Temporary" for these purposes means "a purpose that happens to last in fact for a few years only [or] which is time-limited in the sense that it may within the reasonable contemplation of the parties come to an end"[9] and so precarious.

In these cases the persons using the stream do not acquire a prescriptive right to insist on its continuation. The mine/mill owners are under no obligation to continue supplying water to the persons who have hitherto enjoyed it, even if that use has continued for 20+ years.

III Surface water: no defined channel

If there is no channel (i.e. the water simply dissipates over- or underground) there are no riparian rights and the owner of the land on which it emanates can interrupt its natural undefined flow. Artificial rights are unlikely to exist, simply because of the nature of the flow.

So it is conventionally thought that a lower landowner who would otherwise have received it has no right to complain if the higher owner either diverts it or abstracts it for his own purposes. The right to abstract need not be exercised reasonably or in good faith. And as the landowner cannot be liable for acting maliciously a fortiori he is not liable when acting negligently.

But this view is unlikely to survive recent developments (see below) e.g. the imposition of
- a duty of care for natural nuisances[10]
- a sometimes-positive duty of care in relation to loss of support, where liability (traditionally limited to instances of positive withdrawal of support) can now arise from a failure to take action[11].

In *Ward v Coope*[12] it was said that whether a duty of care was owed in such cases is now to be determined by the laws of negligence, not property. That is almost certainly the case and the old law is probably no longer good.

Even so a landowner has no right to drain the water he has taken in this way by
- increasing the volume or rate of flow onto the receiving land or
- diverting its course so it now drains onto land it did not used to naturally drain onto.

[9] Burrows v Lang [1908] 2 Ch 508.
[10] E.g. Leakey v National Trust [1980] QB 484.
[11] Holbeck Hall Hotel v Scarborough BC [2000] QB 836
[12] [2015] 1 WLR 4051 @ [37].

In relation to surface springs it is not clear whether the relevant rules are those for defined- or undefined channels. If the underground route is uncertain but there is a defined spring-head, the position seems to be that the stream begins at that point and so the landowner's rights to take water from it are subject to the limits on riparian rights (above)[13].

IV Underground waters: defined channels

The same rights exist in relation to a defined, known subterranean stream as exist in relation to defined natural channels on the surface: the owner of the land through which it runs has the equivalent riparian rights, as do the owners of the land adjoining it[14].

V Underground waters: undefined channels

Traditionally it is said that a landowner can do as he pleases with water percolating under his land through undefined channels: he may divert or abstract it completely, even if this has the effect of lowering the surface of his neighbours' land[15]. So no action lies in negligence or nuisance[16].

But (again) it is doubtful whether this still remains the case today given recent developments in relation to the law of nuisance/negligence.

2. Statutory limitations/liabilities

Both natural rights and easements in relation to water are now subject to:

- the Water Resources Act 1991
- the Land Drainage Act 1991 ss.23-4 which concern obstructions in ordinary watercourses i.e. not part of a main river

Abstractions

In (necessarily brief) terms:

1. subject to exceptions a licence is required to abstract water from a source of supply i.e. any "inland waters" except "discrete waters" (ponds etc. which do not discharge into other watercourses or underground strata)[17].
2. a person may only apply for an abstraction licence if he has a right of access to land contiguous to the relevant inland water (surface waters) or consisting of or comprising the relevant underground strata (subterranean waters) from which he is to abstract and will continue to do so for at least 1yr.
3. of course a licensee must comply with the conditions set out in the licence which limit/regulate its exercise.
4. there are three types of abstraction licences: full (28 days or more); temporary (less than 28 days); and transfer licences (transferring water to another source of supply or to the

[13] Rugby Joint Water Board v Walters [1967] Ch 397, 424
[14] Dickinson v Grand Junction Canal Co (1852) 7 Exch 282, 301.
[15] Rugby Joint Water Board v Walters, above.
[16] Stephens v Anglia Water Authority [1987] 1 WLR 1381.
[17] S.221(1) WRA 1991.

same source but at a different point in the course of dewatering activities in connecting with mining/quarrying, etc.)

5. the main exceptions, where no abstraction licence is required[18], are (1) abstractions of less than 20 cu m in any 24hr period which does not consist of continuous operations involving the abstraction of more than that amount and (2) abstractions in the course of/resulting from land drainage works or emergency abstractions to prevent immediate danger to/interference with (i.a.) mining/quarrying operations

The effect of the grant of a licence is to prevent anyone affected by its exercise bringing a claim against the licensee in nuisance, but not negligence[19]. This immunity does not apply to activities which amount to a breach of statutory duty under s.48A WRA 1991. It is now subject to that section (below).

Statutory duty

Subject to certain exceptions, under s.48A a person who abstracts water from any inland water or underground strata must not, by doing so, cause loss or damage to another person. A breach of this statutory duty sounds in damages and is enforceable by the victim. The abstractor is liable for all resulting losses, whether/not they were reasonably foreseeable. However the victim must show that he would not have suffered the loss but for the abstraction.

This new duty replaces common law nuisance liability, but not negligence.

A short word on flood risk management

The recent case of Robert Lindley Ltd. v East Riding of Yorkshire Council[20] clarified certain issues regarding a landowner's right to compensation in relation to the exercise of powers/responsibilities for flood risk management under s.14-14A Land Drainage Act 1991.

This has become relevant in light of the recent (and seemingly increasing) instances of general flooding. It is often the case during temporary emergency pumping operations agricultural land is used to temporarily store floodwaters that were inundating (or would have done so) more "sensitive" (usually residential) areas. The result is often severe crop damage. S.14(5) imposes a statutory liability on the drainage board or local authority for resulting damage.

The tribunal in Robert Lindley held that:

- s.149A) refers to "anything done". These wide words are not confined to permanent works but include temporary emergency pumping operations during even a once-in-a-lifetime flood events
- but given the field would have flooded anyway, compensation is limited to the extra damage if any which it suffered as a result of pumping. This is likely to create difficulties in calculating compensation.
- it had been settled under previous legislation[21] that the actions only gave rise to statutory compensation if they would have been actionable at common law, but for

[18] S.27 WRA 1991.
[19] S.48(2) WRA 1991.
[20] [2016] UKUT 6 (LC).
[21] S.34(3) Land Drainage Act 1930

statutory authorisation. In this case the deliberate diversion of excess water would be an actionable nuisance by encroachment. The court left open whether the statutory compensation scheme ousts the common law remedy.

- the local council was the "lead local flood authority" for the purpose of the Flood and Water Management Act 2010. This prescribes an array of flood risk management functions and establishes which agencies are responsible for them. It followed the Council was liable irrespective of the fact the pumping equipment were supplied by the Fire Service and Environment Agency.

3. Water Wrongs

At common law, liability for escape of water can arise

1 under Rylands v Fletcher[22];
2 in nuisance and/or
3 in negligence.

1. Rylands v Fletcher

Historically, Rylands v Fletcher imposed strict liability where there was a non-natural use of land and an escape of the material from it which caused damage to a neighbour. Liability could arise where the escape was from a large body of water contained in an artificial structure (artificial lake, reservoir, canal, man-made watercourse etc.)[23]

Liability arises where there is knowledge, or foreseeability, of a risk. The owner is strictly liable in the sense that it is no defence that he exercised reasonable care to prevent the escape.

However Rylands v Fletcher is now most unlikely to apply to the sort of escapes with which we are concerned, in light of Transco v Stockport MBC[24]. It held that:

- the accumulation of water in a service pipe did not amount to a non-natural, or "out of the ordinary use" of land. So too channels for land drainage in the countryside. However stored water might in certain circumstances constitute such a danger, as could a high-pressure water main laid under a city street
- there must be an exceptionally high risk of danger or mischief in the event of an escape, however unlikely such an escape may be.
- there must be a use which is quite out of the ordinary for that place and time or a non-natural use of land;
- there must also be a foreseeable risk of damage of the type suffered in the event of escape.

2. Nuisance/Negligence

Although it is true to say that nuisance and negligence have become largely assimilated there are still differences that are relevant here:

[22] (1868) L.R. 3 HL 330.
[23] RH Buckley & Sons Ltd v N Buckley & Sons [1989] 2 QB 608
[24] [2003] UKHL 61

Liability for nuisance arises when:

(1) there is a foreseeable risk of the type of damage that occurred; and

(2) either the user of land is not reasonable / the interference is unreasonable or the landowner fails to take reasonable care (in effect, negligence)[25].

Whereas liability in negligence cannot be established on proof of an unreasonable interference: it requires proof of a foreseeable risk of damage and a failure to take reasonable care.

In reality however most cases of flooding in this context involves uses which are per se reasonable. It follows that liability in nuisance/negligence is likely to be co-extensive. That is, liability for flooding (particularly naturally-occurring flooding) requires proof of negligence.

Non-naturally occurring nuisances

A landowner may be liable in nuisance for interfering with the natural flow of water across/adjacent to his land if the effect of doing so is to

- cause it to flow in greater volume/a more concentrated flow onto his neighbour's lower land
- divert it so that it flows onto different land from which it would naturally pass over[26] or
- dam his land so as to prevent water passing onto it through a defined natural channel or an artificial one over which there are easements and so causing it to accumulate on his neighbour's higher/upstream land. But if the water *otherwise* come naturally onto his land his only duty is likely to be the Leakey one[27].

Naturally occurring nuisances

Furthermore for the most part liability here will concern naturally-arising nuisances. These give rise to a "measured duty of care" under the principles in Leakey v National Trust[28]. That duty is to do what is reasonable in all the circumstances to prevent or minimise the known risk of damage or injury to one's neighbour or his property.

The extent of the duty and the question of breach (or otherwise) is highly fact-sensitive. It may be sufficient (e.g.) merely to warn of the risk of flooding depending on whether the risk was natural or man-made (and if so by whom), the parties' relative resources and their respective (means) of knowledge of the risk/its occurrence. In Lambert v Barratt Homes Ltd[29] it was said the court must regard to "what is fair just and reasonable".

It follows that old cases may no longer be reliable as a guide to liability. They established:

- that one landowner has no liability to his neighbour to prevent the natural flow of surface flood water in a downhill direction (Home Brewery v Davis[30]). However following Green v Lord Somerleyton[31] it is thought Leakey principles apply in such cases.

[25] Cambridge Water v Eastern Counties Leather [1994] 1 All ER 53.
[26] Thomas v Gower RDC [1922] 2 KB 76
[27] Green v Lord Somerleyton [2003] EWCA Civ 198
[28] See fn.10 above.
[29] [2010] EWCA Civ. 681 @ [17].
[30] [1987] 1 QB 339 @ 349.
[31] Above fn.26.

- a riparian owner may heighten his banks to prevent water flooding from the channel onto his land even though this diverts it onto his neighbour's land (Gerrard v Crowe[32]) [1921] 1 AC 395). These cases are now likely to be decided according to the measured duty of care. Hence a riparian owner owes such a duty to keep the bed of his stream clear by cutting weeds or removing accumulated silt/stones which create a risk of flooding to adjoining land[33] . However in Arscott v The Coal Authority[34] the court considered the "common enemy" rule (stated as being: "You are entitled to protect yourself against the common enemy's incursions; but if the incursion upon your land has already happened or is about to happen, you may not export it to your neighbour"). It held the Coal Authority not liable in nuisance for raising its banks as (a) the risk of damage to a neighbour through flooding was not reasonably foreseeable and (b) the common enemy rule (which it regarded as reflecting what amounted to reasonable user) applied.

However it probably remains the case that the higher landowner is not required to take steps to prevent underground water percolating downhill onto his neighbour's land.

Artificial structures which interfere with the flow of water

If a landowner creates an artificial structure on his land (e.g. a culvert) which interferes with the natural flow of the water, he is liable

- to design/build it in such a way that it does not interfere with the flow of water so as to foreseeably increase the risk of flooding to neighbouring land[35]; and
- under the Leakey measured duty of care, to improve/update it as is reasonable/ necessary from time to time to ensure it does not cause flooding due to increased water flow e.g caused by changes in the landscape upstream[36].
- to take reasonable steps to maintain/clear that structure to prevent it blocking e.g. with detritus[37]. This requires proof of at least a regular scheme of inspection/maintenance to ensure the structure remains unclogged.

John Sharples
St John's Chambers

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[32] [1921] 1 AC 395
[33] Leakey fn.10 above.
[34] [2004] EWCA Civ 892.
[35] Bybrook Barn Garden Centre v Kent CC [2001] BLR 55 (placing screen over the end of the pipe where it was useless rather than a few feet from its mouth); Pemberton v Bright [1960] 1 All ER 792 (failing to provide a screen at the mouth of a culvert making it liable to blockage by detritus)
[36] Ibid.
[37] Vernon Knight Associates v Cornwall Council [2013] EWCA Civ. 950.