MEANS TEST LIABILITY: THE SUBJECTIVE STANDARD OF CARE IN NUISANCE

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To those who have viewed the merging of nuisance with negligence with alarm, the decision in *Leakey* v *National Trust for Places of Historic Interest or Natural Beauty*[1] must have represented yet another nail in the coffin of that failing if not actually moribund patient, nuisance. The confusion between negligence and nuisance is historical and its origins have been canvassed before in the context of recovery of damages for physical injury in nuisance.[2] Not only does nuisance continue to be haunted by that particular phantom despite Professor Newark's plea for a conclusive interment, but yet another has been resurrected in the shape of the imposition of the negligence concept of a positive duty of care resting upon an occupier in respect of hazards on his land.

Could it be that Lord Macmillan's observation in *Donoghue* v *Stevenson*[3] that "the categories of negligence are never closed" constituted a tacit warning as early as 1932 that negligence was no respecter of doctrinal boundaries? Certainly Megaw LJ in *Leakey* seized upon the neighbour principle as having a valuably literal application in the context of occupier's liability, although the problems implicit in translating a negligence duty of care into the confined ambit of nuisance do not appear to have been considered. It is the writer's contention that the marriage of convenience between nuisance and negligence, presided over by *Wagon Mound (No 2)*[4] and attended by *Sedleigh-Denfield* v *O'Callaghan*[5] and *Goldman* v *Hargrave*[6] has resulted in the emergence of a highly idiosyncratic offspring in the shape of *Leakey* and that the product of this *mésalliance* may present some uncomfortable cross-doctrinal problems.

The facts of *Leakey* were simple. The National Trust were owners and occupiers of land, which included a large mound known as "Burrow Mump", the geological composition of which rendered it susceptible to subsidence at intervals. Due to an unexpected climatic extreme, a very dry summer followed by a wet autumn, the mound cracked and earth fell on to the plaintiffs' land. The plaintiffs drew the defendants' attention to this hazard, whereupon the defendants, with full confidence in the protection afforded by nuisance to occupiers innocent of creating, or

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1 [1980] QB 485.
2 Newark, "The Boundaries of Nuisance" (1949) 65 LQR 480.
3 [1932] AC 562, 619.
4 *Overseas Tankship (UK) Ltd* v *Miller Steamship Co Pty* [1967] AC 617.
5 [1940] AC 880.
6 [1967] AC 645.

actively adopting or continuing a nuisance, invited the plaintiffs to abate the nuisance themselves. In an action in nuisance for damages, the Court of Appeal found no difficulty in uncovering a positive duty of care, owed by the defendants to the plaintiffs in respect of the hazard on their land.

In view of the fact that the duty of care so found undermines the classical function of nuisance in balancing and resolving the diverse interests of occupiers in land, by imposing an antecedent and positive liability in negligence on the defendant, it is worth examining the origins, nature and significance of this duty of care in order to determine its true function. Nuisance has traditionally supplied remedies to occupiers disturbed by hazards on the defendant's property — despite the fact that the defendant may not have actively brought about the nuisance. This liability extended to nuisances created after the defendant became the occupier but in respect of which he had actual or constructive knowledge.

In to this category of liability fell the acts of contractors[7] and trespassers[8] on the defendant's land for which the defendant/occupier became responsible once he knew or ought to have known of the commission of such acts. The emergence of a positive duty to abate did not go unchallenged. In the line of cases illustrating this debate, which may be called conveniently, if not comprehensively, the "fire, flood, thistles and trees" cases, the vexed issue of the occupier's liability for hazards on his land, whether such hazards had occurred naturally or artificially, centred on the distinction between nonfeasance and misfeasance.

The law has been reluctant to impose negligence liability upon the individual for a total failure to act. Omissions are generally understood as failed or careless acts; any higher degree of responsibility for nonfeasance apparently imposing an onerous burden on a defendant which would be difficult to justify in the absence of any recognisable preexisting relationship. In nuisance however, protection against the consequences of nonfeasance has been justified on the basis of reasonable or natural uses of land and the consequent desirability of limiting an occupier's responsibility for his land to situations where there has been a positive intervention or contribution to the state of affairs bringing about the nuisance.

The distinction between misfeasance and nonfeasance has received scathing criticism from the late Professor A L Goodhart[9] who viewed as casuistry any attempted juristic distinctions attaching to the origins of the hazard on the defendant's land. Whether the hazard was created by the defendant himself, by a third party, or by the forces of nature should not affect a defendant's responsibility providing he had actual or constructive knowledge of the existence of the hazard. How then does Professor Goodhart express this liability? Not in terms of a duty of care appropriate to negligence, although this was the interpretation of Goodhart's analysis favoured by the Privy Council in *Goldman* v *Hargrave*

7 *Tarry* v *Ashton* [1876] QBD 314.
8 *Sedleigh-Denfield* supra n 5.
9 Goodhart, "Liability for Things Naturally on the Land" (1930) 4 CLJ 13.

and in *Leakey,* but simply as an obligation resting upon the occupier to take reasonable steps to abate.

In view of the popular tendency to subsume nuisance within negligence, it may be considered that the distinction between a duty of care which is limited by a subjective scope and an occupier's obligation to abate is minimal. It is submitted firstly, that if the distinction is minimal, the imposition of a duty of care within nuisance, is superfluous; and secondly, if the distinction is significant, then the most recent attempts at judicial engrafting are misconceived.

The obligation on the occupier to abate a nuisance on his own land originated in the tort of public nuisance,[10] but was extended by the House of Lords in *Sedleigh-Denfield*[11] to cases of private nuisance, on the basis that the object in both classes of nuisance, namely, the protection of the plaintiff from a hazard on the defendant's land, was the same. This approach was followed in New Zealand in *Boatswain* v *Crawford*[12] where an occupier was found to be liable in nuisance for the escape of fire from his land to that of the plaintiff. On the facts, the defendant had constructive knowledge of the fire but took no steps to abate it. Negligence was not alleged.

In *Landon* v *Rutherford,*[13] which involved facts almost identical to *Boatswain* v *Crawford,* the defendant who declined to participate in efforts to curb the fire on his property, was found to be liable in nuisance. Fell J expressly rejected the suggestion that failure to act in the face of danger would, as a general principle, constitute negligence. A general obligation on an occupier to guard against a nuisance emanating from his property was upheld in *Morgan* v *Khyatt,*[14] a case dealing with the escape of roots of pohutukawa trees on the defendant's property to that of the plaintiff. The Privy Council there approved the principle established in *Davey* v *Harrow Corporation*[15] imposing liability for encroachment irrespective of whether the growth of the trees came about by human or natural intervention.

In the prolonged battle against an occupier's liability for nonfeasance, support for the innocent occupier, which had earlier protected him against liability for nuisances caused by such diverse but natural dangers as rocks,[16] thistledown,[17] prickly pear,[18] twigs[19] and fire,[20] had almost entirely disappeared by 1964, although final capitulation was not achieved until the decisive siege undertaken in *Goldman* v *Hargrave*[21]

10 *Att-Gen* v *Tod Heatley* [1897] 1 Ch 560.
11 Supra n 5.
12 [1943] NZLR 109.
13 [1951] NZLR 975.
14 [1964] NZLR 660.
15 [1958] 1 QB 60.
16 *Pontardawe Rural District Council* v *Moore-Gwyn* [1929] 1 Ch 656.
17 *Giles* v *Walker* (1890) 24 QBD 656.
18 *Sparke* v *Osborne* (1908) 7 CLR 51.
19 *Molloy* v *Drummond* [1939] NZLR 499.
20 *Job Edwards Ltd* v *Co of Proprietors of the Birmingham Navigations* [1924] 1 KB 341; the dissenting judgment of Scrutton LJ is now accepted as the better view.
21 Supra n 6.

in 1967. There, a tree on the defendant's property, hit by lightning, was felled by the defendant who took no further steps to extinguish the fire. When a wind sprang up, the fire was ultimately carried to the plaintiff's land, where it caused considerable damage.

Three major points must be considered in the context of this case. Firstly, the Privy Council was greatly influenced by the severity of fire as a hazard, particularly in Australia where the devastation caused by bush fires is notorious. Reference was made to the Bush Fires Act 1954-1958 (WA), and the Fires Prevention (Metropolis) Act 1774 (UK), which was accepted law in Western Australia. This statute exempted from liability an occupier upon whose land a fire started accidentally and in respect of which there was no intervening act of negligence by the occupier. On the facts of the case, the only question to be decided *was* that of negligence. Since the material part of that statute is still extant in New Zealand, the logical conclusion must be that it is the severity of fire as a hazard which attracts liability, whether this liability is grounded in nuisance or negligence. The greater the hazard, the more acute the need to find an attitudinal complicity on the part of the defendant.

Secondly, the Privy Council placed great reliance on the dissenting judgment of Scrutton LJ in *Job Edwards Ltd* v *Co of Proprietors of the Birmingham Navigations,*[22] which expressly raised the possibility of imposing on an occupier a general duty of care in respect of hazards on the occupier's land. The Privy Council seem to have assumed that that dictum was approved by the House of Lords in *Sedleigh-Denfield*,[23] but nowhere in that case is there to be found any support for such a general duty of care. Lord Wright was the only judge to specifically commend the judgment of Scrutton LJ[24] although his Lordship studiously ignored the suggestion of a duty of care in negligence. Viscount Maugham and Lords Atkin, Romer and Porter either stated the majority view, or acknowledged the dissenting judgment without further comment. It is submitted that *Sedleigh-Denfield* is authority only for the principle that an occupier's obligation to abate a hazard continued on his land exists irrespective of whether such an action is brought in public or private nuisance. It neither expressly nor impliedly raises the issue of whether the obligation to abate is co-extensive with or replaceable by a general duty of care in negligence.

Thirdly, in *Wagon Mound (No 2)*[25] the Privy Council had recently established fault as the parameter of foreseeability in nuisance. This is immediately problematic, for however subtle the pejorative incline, the concept of fault generally operates to place a presumptive emphasis on blameworthy conduct or state of mind. This is at variance with the traditional analysis favoured by nuisance, which takes as its starting point the balance of interest in enjoyment and use of land as between adjoining occupiers, and focuses on the state of affairs constituted by that balance or imbalance of interests. The consideration of events giving

22 Supra n 20.
23 Supra n 5.
24 Ibid at 910.
25 Supra n 4.

rise to interference is assessed in terms of the reasonableness[26] or otherwise of the invasion of interests, but the difficulty posed by introducing the conduct-orientated concept of fault and foreseeability lies in shifting the emphasis from the state of affairs or invasion of interest analysis to a behavioural model of liability. The assumption appears to be that what is unreasonable will be, prima facie, wrongful, but this view does not provide for any analysis of whether a particular event is, under the circumstances, reasonable or unreasonable. Further, in weighing the reasonableness or otherwise of an invasion of interests the inference of blameworthiness attaches to the result of that deliberation rather than to the process of deciding, thus side-stepping the real issues under consideration. The proposition that foreseeability is relevant in nuisance[27] whether or not negligence is in issue, has encouraged the recent judicial tendency, illustrated by *Goldman* v *Hargrave, French* v *Auckland City Corporation*[28] and *Leakey*, to overlook the distinctive functions of both nuisance and negligence in sublimating the balance of interests approach in to that of behavioural liability.

Where negligence is found to be the principal element in nuisance, as in *Goldman* v *Hargrave,* or at least causative of the nuisance, as in *French* v *Auckland City Corporation,* there may be some argument for neglecting to draw doctrinal distinctions. But there is no authority for the proposition that it is no longer necessary to make the distinction as a general rule. In *Leakey*, a case of nuisance without negligence, Megaw LJ relied on *Goldman* v *Hargrave* as establishing the proposition that, there being no difference contingent upon whether liability rested in misfeasance or nonfeasance, it was immaterial whether the cause of action originated in negligence or nuisance. But this is to infer that the only distinction between negligence and nuisance is establishing liability in misfeasance or nonfeasance, which obscures the functional differences between the two fields of tort liability.

Further, it has been suggested that *Goldman* v *Hargrave* was a case raising rather special issues. The severity of damage by fire has been treated historically as imposing a lighter liability on a defendant in the absence of negligence and the Privy Council may have been influenced by a rather generous and selective interpretation of *Sedleigh-Denfield* as well as by their own recent deliberations on the relevance of foreseeability in nuisance.

Despite what appears to be the rather narrow factual ambit of *Goldman* v *Hargrave,* the case gave rise to a principle of a general duty of care, expressed in the widest terms, in respect of hazards on an occupier's land. In transposing this duty of care with its foundations firmly rooted in negligence, in to the confined ambit of nuisance, certain considerations must be borne in mind.

26 In considering the reasonableness of an invasion of an occupier's interests in land, the character of the locality may be taken into account: *St Helen's Smelting Co* v *Tipping* (1865) 11 HLC 642.

27 This dilemma is canvassed by Dias, "Trouble on Oiled Waters: Problems of *The Wagon Mound (No 2)* [1967] CLJ 62.

28 [1974] NZLR 340.

If negligence can be described as attitudinal or behavioural, and nuisance as reflecting a state of affairs within a set of previously circumscribed relationships, then the scope of negligence is clearly seen to be far broader and more general than that of nuisance. While negligence does not yet recognise a general liability for nonfeasance, it is a liability which is, in fact and in nature, conceptually more appropriate to nuisance in respect of hazards on the defendant's land, as constituting an unreasonable invasion of the plaintiff's interests in his land. Translating this duty of care in to nuisance however, is only achieved by limiting its function, contorting its scope, and obliterating the valuable function of nuisance in protecting a balance of interests in the enjoyment of land.

How then is this duty of care applied and how, if at all, does it differ from an occupier's duty to abate, which it is submitted, is the true heritage of *Sedleigh-Denfield*? The burden of imposing a duty of care on a defendant/occupier is considered to be both justified and ameliorated by reducing the scope of the duty of care from an objective to a subjective standard. This means, in practice, the exile of the ubiquitous "reasonable man", and his replacement by the individual occupier complete with his bank accounts, credit cards and particular proclivities, mental and physical. The difficulties of applying a subjective standard of care are dismissed by Megaw LJ in *Leakey* as likely to be theoretical. Whether the Courts will view the task of computation of resources in a complex case with an equivalent equanimity remains to be seen. Theoretical or not, the test is one which is likely to give rise to an anomalous burden being placed on occupiers who are corporations, boards and public bodies who concern themselves with maintaining public amenities, reserves, parks and the like. If the duty of care envisaged by *Goldman* v *Hargrave* and enthusiastically endorsed by *Leakey* is infinitely expandable according to the larger means of such landowners, it might be considered that the effect of this elastic duty of care will be to discourage such occupiers from providing or preserving such amenities for the public.

Further anomalies arise under the means test liability. If the traditional balance of interests approach to nuisance is replaced by a duty of care, the scope of which is subjective, it appears to make no difference in some circumstances whether the nuisance was brought about by an act of gross negligence, or by no negligence at all. If, as *Leakey* suggests, liability is now incurred for inaction in the face of a hazard, it seems that the only relevance the degree of negligence has is in relation to the defendant's resources, economic and physical.

A defendant who is extremely negligent in respect of a hazard on his land but whose resources are poor may be treated more leniently than someone with greater resources, but who exercised a high degree of care. Difficulties may also arise in determining the point at which the duty of care arises. Since it exists by virtue of the presence of a hazard on the defendant's land, breach of the duty of care must arise on the defendant's failure to act appropriately. Megaw LJ however, viewed the duty of care as arising when the hazard progressed from latency to patency, "whether the causative agent of the defect is man or nature". His Lordship continued by stating that "the mere fact that there is a duty

does not necessarily mean that inaction constitutes a breach of the duty".[29] With respect to the learned Lord Justice, it is submitted that the difference between latency and patency in this context is semantic rather than substantive. The duty of care arises in respect of a condition on the defendant/occupier's land which constitutes a hazard, a risk, through its very existence. The essence of the duty of care concept is its quality of antecedence. It is a presumptive relationship or condition predicated on the need to guard against the materialisation of certain risks whether these are latent or patent. To assume otherwise in the context of an occupier's liability would be tantamount to questioning the need for a duty of care at all.

Since the basis of liability in *Sedleigh-Denfield*, relied on by the Privy Council in *Goldman* v *Hargrave,* was the occupier's obligation to abate a hazard on his land, the same remedy sought by the plaintiffs in *Leakey,* it may be questioned whether this generalised duty of care offers anything, beyond a complex of jurisdictional problems, not already provided within nuisance itself. The obligation to abate and the duty of care are related conceptually, but not by consanguinity. The obligation to abate implicitly recognises a responsibility to a neighbouring occupier in respect of a hazard on the defendant's land. The liability for failure to meet that responsibility arises when the risk has materialised to the point at which it constitutes an unreasonable interference with the plaintiff's land. This postpones the duty to abate until that time, although the line of authority represented by *Sedleigh-Denfield* appears to recognise that that obligation may arise before damage is actually caused.

Nuisance provides for a balance and reciprocity of interests and use of land, and the occupier's responsibility to abate reflects that concern. It is implicitly assumed that in abating a nuisance an occupier will be guided by his resources, with the parameter of liability resting on the obligation not to overstep the bounds of reasonable interference with the neighbouring occupier's enjoyment of land. Where the defendant's resources fall short, the mutuality inherent in the function of nuisance is provided by the plaintiff's right to abate the nuisance himself. It may be that the existence of this right presupposes a duty of care on the part of the defendant in conceptual terms, but there is still a substantial difference between acknowledging a responsibility in nuisance, which allows for a flexible weighing of interests, and a duty of care in negligence, which places the entire burden of responsibility on a defendant at an earlier point in time, namely, whenever the hazard (however this is defined in negligence) manifests itself.

No one would seriously dispute the importance of requiring an occupier to exercise responsibility in respect of a hazard on land under his control. Whether this is most equitably achieved by a means test liability in negligence rather than the balance of interests approach appropriate to nuisance is debatable. At the very least, such a blanket

29 Supra n 1 at 518.

liability fails to differentiate between rural and urban uses of land[30] and overlooks such factors as consideration of the character of the neighbourhood. If these factors *are* encompassed within the subjective scope of the standard of care (although no such references can be gleaned from either *Goldman* v *Hargrave* or *Leakey*), it may be questioned how conflicting interests within a neighbourhood, or subjective assessments of the character of the neighbourhood itself, can be evaluated and reconciled without reference to the overriding objective principle provided by the balance of interests or state of affairs approach characteristic of nuisance. It may well be that the strength of nuisance lies precisely in the balance of interests test as the ultimate, and objective, arbiter of competing subjective interests.

The fact that "coming to a nuisance" has not traditionally been regarded as a good defence to nuisance, while *volenti non fit injuria* has always protected a defendant in negligence, amply illustrates the more flexible approach taken by nuisance in respecting and attempting to resolve conflicting interests in land. But which of these defences will be available to occupiers under the test for liability as laid down in *Leakey*? The defence of *volenti non fit injuria* is more burdensome to a plaintiff than the notionally equivalent defence in nuisance, and in terms of the occupation and use of land, appears to be rigid and inappropriate.

Perhaps the greatest difficulty arising from this latest incursion of negligence concepts in to nuisance is the difficulty in defining the hazard itself. Because of the antecedent nature of a duty of care, the occupier's responsibility for the hazard on his land always arises at an earlier point in time than it generally would under nuisance. While the law has been prepared to recognise the immediacy and severity of certain types of hazards, such as fire, flood, or damage caused by the encroaching roots of trees, the effect of *Leakey* may well be to throw open the meaning of hazard to subjective and variable interpretation. Will an occupier be liable for the escape of autumn leaves on to his neighbour's property? Will he be liable for the escape of sunflower seeds, if his neighbour exhibits an acute allergy to the said seeds? The difficulty in determining the anatomy of the hazard, once outside the ambit of a cataclysm, is obvious. The decision in *French* v *Auckland City Corporation,*[31] concerning the escape of thistles, may have opened the way for liability for the escape of natural organisms of greater aesthetic value but which are objected to by a particular occupier. This is at least one instance where it may be necessary to distinguish between liability in negligence or nuisance for nonfeasance, as the tests for establishing damage to the plaintiff are not necessarily the same.

What then does *Leakey* represent in the law of torts? It appears to be little more than a modern judicial Frankenstein, a creature of composite

30 The distinction between urban and rural uses of land is considered very important by American courts as the old rule protecting an occupier from the consequences of nonfeasance in respect of a natural condition on his land still applies. In urban areas however, liability in negligence for hazards on the land is increasing, but there is no suggestion that the standard of care be limited in any way: see Prosser, *Handbook of the Law of Torts* (4th ed, 1971) at 355.

31 Supra n 28.

and ill-assorted parts contrived from, and modelled on, a set of obligations already existing in nuisance. The concept of a subjective standard of care in negligence is anomalous in extent and direction, limiting the field of negligence liability within nuisance, while obscuring the more flexible and socially appropriate function of nuisance in protecting the interests of adjoining occupiers. In this latest skirmish upon the borders of nuisance it may be wondered whether *Leakey* has gained anything more than a Pyrrhic victory in substituting for the balance of interests test favoured by nuisance, a subjectively means tested duty of care, which may prove to be unworkable, inequitable and anomalous.