



[\[Home\]](#) [\[Databases\]](#) [\[World Law\]](#) [\[Multidatabase Search\]](#) [\[Help\]](#) [\[Feedback\]](#)

United Kingdom House of Lords Decisions

You are here: [BAILII](#) >> [Databases](#) >> [United Kingdom House of Lords Decisions](#) >> Delaware Mansions Limited and Others v. Lord Mayor and Citizens of The City of Westminster [2001] UKHL 55 (25th October, 2001)

URL: <http://www.bailii.org/uk/cases/UKHL/2001/55.html>

Cite as: (2001) 151 NLJ 1611, 79 Con LR 39, [2001] 3 WLR 1007, [2001] 4 All ER 737, [2002] BLR 25, [2002] 1 AC 321, [2001] NPC 151, [2001] UKHL 55, [2002] TCLR 8, [2001] 44 EGCS 150, [2002] BLGR 1

[\[New search\]](#) [\[Help\]](#)

Delaware Mansions Limited and Others v. Lord Mayor and Citizens of The City of Westminster [2001] UKHL 55 (25th October, 2001)

HOUSE OF LORDS

Lord Steyn Lord Browne-Wilkinson Lord Cooke of Thorndon Lord Clyde Lord Hutton

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

DELAWARE MANSIONS LIMITED AND OTHERS

(RESPONDENTS)

v

LORD MAYOR AND CITIZENS OF THE CITY OF WESTMINSTER

(APPELLANTS)

ON 25 OCTOBER 2001

[2001] UKHL 55

LORD STEYN

My Lords,

1. Since the opinion of Lord Cooke of Thorndon in this case is the last which he will deliver in the House of Lords, it is appropriate to pay tribute to his massive contribution to the coherent and rational development of the law in New Zealand, in England and throughout the common law world. His opinion in the case before the House is characteristically lucid and compelling. For the reasons he has given I would also dismiss the appeal.

LORD BROWNE-WILKINSON

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Cooke of Thorndon. I agree with it and for the reasons which he has given I, too, would dismiss this appeal.

LORD COOKE OF THORNDON

My Lords,

3. This case raises an issue, on which there is surprisingly little authority in English law, about the recoverability of remedial expenditure incurred after encroachment by tree roots. By writ and statement of claim issued in the Queen's Bench Division, Official Referees' Business, on 7 June 1995, two plaintiffs claimed damages and interest from the Westminster City Council ("Westminster") as highways authority for the area including the property affected and as owner of a London plane tree growing in the footpath of the highway, Delaware Road in Maida Vale, some four metres from the front boundary of the property. The first plaintiff was Delaware Mansions Ltd ("Delaware"), a management company owned by the tenants of Delaware Mansions, which consist of 19 blocks divided into 167 flats, occupying the whole of the north-eastern side of the road. The second plaintiff was Flecksun Ltd ("Flecksun"), a wholly-owned subsidiary of Delaware. Flecksun had in 1990 acquired the freehold of Delaware Mansions from the original owners and developers, the Church Commissioners.

4. The case came before Mr Recorder Derek Wood QC, sitting as an Official Referee. He dismissed the claims of both plaintiffs, while making a number of findings of fact favourable to them: (1998) 88 BLR 99. They appealed to the Court of Appeal, but Delaware did not pursue its appeal, nor has it taken any part in the hearing in your Lordships' House, so the House is not required to consider whether it had standing to sue. The appeal of Flecksun came before a Court of Appeal consisting of Beldam, Pill and Thorpe LJJ [2000] BLR 1. For reasons given by Pill LJ in a judgment delivered on 21 July 1999 the court allowed Flecksun's appeal, with the effect that Flecksun was to recover judgment for £835,430.92 (being the expenditure claimed, £570,734.98, including removal costs of the leaseholders, plus interest). By leave granted by an Appellate Committee, Westminster appeals to this House.

The history and the issue

5. The flats are held by the individual tenants under long leases granted by the Church Commissioners. On 5 April 1990 the Church Commissioners agreed to sell their freehold reversion to Flecksun for £1. The sale was completed by registered transfer on 25 June 1990. There was no express assignment of any right of action against Westminster respecting the plane tree, and it has not been argued that there was an implied one. It is common ground that the nominal consideration was not influenced by the effect of the plane tree on the property.

6. The plane tree was probably planted at the time when the Maida Vale estate, including Delaware Mansions, was developed by the Church Commissioners in the early years of the 20th century. It is now almost as high as the 5-storey brick Delaware Mansions. It stands, somewhat isolated from other smaller trees, approximately between flats numbers 73 to 82 and 83 to 92. As found by the trial judge, damage by cracking came to be caused by the roots of the tree, through causing desiccation and shrinkage of the London clay soil, to blocks 9, 10, 11 and 12. The dates of the cracking have assumed importance, I think disproportionate, in the argument of the case. It is not disputed that Westminster owns and controls the tree, one of no less than 7000 street trees (half of them London planes) within its jurisdiction. The trees are regularly inspected by an officer of the

council, and tree-pruning is carried out by contractors. Westminster's records show that in 1983 the contractors were told to trim the crown of this tree by 50% and in 1986 by 25%. From the mid 1970s the tree had been allowed to develop a large crown. About that time severe tree-pruning went out of fashion; people liked to see a more bushy effect; with lighter pruning the demand of the foliage for water increased and roots grew more extensively.

7. During 1989, a year of drought, Delaware's then managing agents (Chestertons) began to receive reports from residents in blocks 9 to 12 that cracks were appearing in the structure. In December 1989 the agents instructed structural engineers, the Cairns Smith Partnership ("CSP"), to make a report on the cracking. In a report delivered to the Church Commissioners on 5 March 1990 CSP concluded that the cracking had been caused by the roots of the tree, and recommended that it be removed. If removal was not possible, they recommended underpinning. It will be noted that this was before the transfer agreement between the Church Commissioners and Flecksun, but it was a brief rather than a detailed report. It was evidently not seen by Westminster at that stage.

8. After the transfer of the freehold to Flecksun, another firm of managing agents took over. They requested Mr F G Finch, a qualified architect specialising in the refurbishment of London properties, to look into the damage in more detail and collaborate with CSP. In December 1990 and January 1991 CSP conducted a more detailed survey of the cracking and concurrently Finch Associates presented a comprehensive report. Mr Finch endorsed the view that the worst cracking had resulted from foundation damage, that remedial steps were urgently required, and that underpinning was necessary. After considering much expert and other evidence the judge made a finding, which again has become prominent in the case, that :

"... all or almost all of the structural damage which is the subject-matter of the plaintiffs' claim had occurred as a result of the 1989 drought not later than March 1990. If, which is not certain, some further cracking took place in the superstructure after that date, that cracking in my judgment was the further consequence of the 1989 to early 1990 damage to the foundations."

9. The attention of Westminster appears first to have been drawn to the problem when on 14 August 1990 (that is to say, a month and three weeks after the transfer) Chestertons sent to Westminster CSP's March report. No reply or immediate action resulted, but eventually, to quote the judge, it was agreed shortly after 3 January 1991 at a site meeting that root pruning would be carried out:

"... by cutting a trench approximately 300mm wide and 1 metre deep along the back edge of the pavement, and then back-filling the trench with a PVC liner to reduce re-growth. It was also made clear by the plaintiffs at this meeting that the underpinning works proposed by CSP would nevertheless have to proceed and, as part of those works, a further trench would be cut at basement level. It was not and never has been admitted by Westminster that the structural damage described by CSP had in fact been caused by tree roots."

10. Subsequently soil consultants were engaged by CSP and their representative (Mr Quarrell) gave evidence, as did an arboriculturist (Dr Biddle) and a consulting engineer (Mr Butcher) engaged by Westminster. There was a strong conflict of expert evidence at the trial. In the end the judge found on the balance of probabilities that the ground beneath blocks 10 and 11, and to a lesser extent blocks 9 and 12, had become desiccated as a result of the activities of roots belonging to the plane tree in front of block 11. He also made the following findings, which are of undoubted importance :

"In October 1991 root pruning was carried out and a pavement-level root barrier inserted as previously agreed by Westminster. But the plaintiffs adhered to the advice of CSP, and occupiers of some of the basement flats began to move out to enable CSP's programme of underpinning works to be carried out. This work started in January 1992. On 6 March 1992 and again on 9 April 1992 the contractors found tree roots beneath the foundations to blocks 10

and 11. These findings powerfully corroborate the evidence of tree roots and desiccation put forward by Mr Quarrell, and they necessitated the insertion of piles instead of underpinning in the locations affected. The work was completed in July 1992 at a total cost to the plaintiffs (including the removal costs of the leaseholders) of £570,734.98.

Westminster agree that this sum was in fact incurred, and that it was a fair and reasonable sum for the works which were actually carried out and for the other heads of expenditure which were in fact incurred. Mr Butcher however stated that in his opinion the scope and extent of the works was excessive if and insofar as they were brought about by the roots of this tree. He could accept that structural works to the stairwells to blocks 10 and 11 were justified. He challenged the need to extend those works beyond those areas, suggesting that the additional work which he was unable to accept was carried out for the sake of protecting the building against possible future damage rather than repairing the damage which had occurred up to that date. Mr Cairns explained to me that this was a matter of professional judgement. He agreed that a line had to be drawn somewhere, and in cross-examination Mr Butcher accepted that Mr Cairns' scheme was a reasonable one, even though he did not agree with it. In my judgment the costs incurred by the plaintiffs were properly and reasonably incurred and, if a legal cause of action can be established, would be recoverable from Westminster."

11. It is common ground, as recorded in the joint statement of facts and issues before your Lordships, that this amounts to a finding that the claimants acted reasonably in executing the extent of works undertaken. It has not been contended for Westminster that the work done for the council in October 1991 was sufficient both to remedy the existing damage from the roots and to safeguard against future damage from the same source. Instead the argument has been that all the existing damage had occurred before Flecksun acquired the freehold and that only the Church Commissioners could sue for that damage (subject to any limitation defence); and that Flecksun could only sue for fresh damage if and when it occurred. That argument was accepted by the trial judge. The Court of Appeal held, however, that Flecksun could recover on the basis that there was a continuing nuisance. Their reasoning is encapsulated in the following passage in the judgment of Pill LJ [2000] BLR 1, 4-5, paras 22-23, the reference to *Hunter* being to *Hunter v Canary Wharf Ltd* [1997] AC 655, 695:

"22. Thus where there is a continuing nuisance, the owner is entitled to a declaration, to abate the nuisance, to damages for physical injury and to an injunction. He is in my judgment, and on the same principle, entitled to the reasonable cost of eliminating the nuisance if it is reasonable to eliminate it. This does not offend against Lord Lloyd's formulation in *Hunter* which was not intended to define the remedies of an owner subject to a nuisance by encroachment.

23. A nuisance is present during the second appellants' ownership; acceptance of the need for remedial work establishes that. The actual and relevant damage is the cost of the necessary and reasonable remedial work. Underpinning has been held to be a reasonable way of eliminating the nuisance and the owner can recover the cost of doing it. There is no need to prove further physical damage resulting from the nuisance."

English cases on encroaching roots

12. There are dicta in the reports to the effect that, in the law of nuisance, root encroachment into a neighbouring property is similar to bough encroachment over the property. For instance in *Lemmon v Webb* [1894] 3 Ch 1, affirmed [1895] AC 1, where it was held that a neighbour could lop boughs overhanging his property without notice to the owner of the tree, provided that he could do so without entering the owner's land, Lindley, Lopes and Kay LJ all said that a similar right of abatement by cutting applied to encroaching roots (see [1894] 3 Ch 1, 14, 16 and 24). That, though, is of no help on damages. Evidently there are only a handful of reported cases decided in England on

damages for root encroachment. Counsel had found only seven before the present case. I shall refer briefly to each of them.

13. The first such case is as late as 1939: *Butler v Standard Telephones and Cables Ltd* [1940] 1 KB 399, a judgment of Lewis J. The plaintiffs' houses were damaged by the roots of trees on the defendant's adjoining land burrowing under the walls of the houses and causing the soil to shrink through abstraction of moisture. Underpinning of one of the affected houses had not prevented later settlement. The damages were agreed subject to the determination of the issue of liability, so the decision provides no help on damages. On liability the judge found for the plaintiffs, following dicta in *Lemmon v Webb* and an Irish decision (*Middleton v Humphries* (1912) 47 IrLT 160).

14. The next case was *McCombe v Read* [1955] 2 QB 429, a judgment of Harman J. The main point decided was that an injunction will lie to restrain a continuing nuisance to property caused by encroachment of tree roots. Damages were also claimed, including the cost of a not wholly successful underpinning. The judge said that the latter cost was accepted, and that as regards later damage the plaintiff could only recover if he could prove continuing damage from the same nuisance, in which event he could claim the damage accruing up to the date of judgment. An inquiry as to damage was ordered.

15. *Davey v Harrow Corporation* [1958] 1 QB 60 reached the Court of Appeal (Lord Goddard CJ, Jenkins and Morris LJ). The judgment of the court was delivered by Lord Goddard. It was a standard case of cracking of walls due to root penetration, except that at first instance it had been found that the plaintiff had not proved that the offending trees, since cut down, were on the defendant's land rather than his own. The judge assessed damages, if they had been recoverable, at £1,000, and no question of quantum was argued on appeal. Further evidence established, however, that in fact the trees were on the land of the defendant, so the appeal was allowed. Lord Goddard regarded it as established that encroachment by roots was a nuisance and that, if damage was caused, an action on the case would lie. For the defendant an argument was that the plaintiff had to show that the trees were planted and not self-sown, and that no action could be maintained where the damage was caused by natural growth or natural causes. Lord Goddard rejected that distinction. "The nuisance consists in allowing the trees to encroach from the land of their owner into that of his neighbour. The owner must keep his trees in, just as he may not allow filth to escape from his premises onto that of his neighbour ...": p 71.

16. *Morgan v Khyatt* [1964] 1 WLR 475 was an appeal to the Privy Council from the New Zealand Court of Appeal. Roots from thirsty pohutukawa trees on the defendant's property had damaged a concrete wall and drains therein leading from the plaintiff's house. The trial judge had awarded the plaintiff damages for repair costs, and an injunction. This was upheld by the Court of Appeal and again by the Judicial Committee, subject to a minor modification in the terms of the injunction. Viscount Simonds, who presided, is reported (at p 476) to have said during the argument that the Court of Appeal were right in following *Davey v Harrow Corporation*, which the Board thought rightly decided. But the judgment of the Board, delivered by Lord Evershed, is consistent (at p 477) with a requirement of knowledge on the part of the defendant:

"As regards the law applicable in such a case as the present, their Lordships can feel no doubt that it was correctly applied by both courts in New Zealand. It is sufficient, therefore, for present purposes to say that it has in their Lordships' opinion long been established as a general proposition that an owner of land may make any natural use of it; but also (and by way of qualification of the general rule) that if an owner of land grows or permits the growth on his land in the natural way of trees whose roots penetrate into adjoining property and thereby cause and continue to cause damage to buildings upon that property, he is liable for the tort of nuisance to the owner of that adjoining property. It was found both by Leicester J and by the Court of Appeal in New Zealand that such were the facts in the present case; that is to say, that the roots of Morgan's four pohutukawa trees had penetrated into the adjoining property now

owned by the respondent and to his knowledge had long been damaging the wall and drains therein and would (unless somehow prevented) inevitably and increasingly continue so to do.

17. *Masters v Brent London Borough Council* [1978] 1 QB 841, a decision of Talbot J, is the English case closest to the present on the facts. The plaintiff's father had a leasehold interest in a house in which he lived with the plaintiff and the plaintiff's wife. The roots of a lime tree planted in the pavement in front of the house encroached on the land and caused subsidence undermining the foundations of the house by extracting moisture from the subsoil. The defendant local authority accepted that this was an actionable nuisance; the question of the date at which the authority knew or should have known this is not discussed in the judgment. The plaintiff and his father took the advice of a building company as to the necessary works (described at one point in the judgment as repairs) but at that stage could not afford the cost. The father transferred the leasehold to the plaintiff to enable the plaintiff to raise a mortgage to pay for the remedial work. He did so and sued the local authority for the cost of the work. He was met by the same argument as is advanced for Westminster in the present case: that the damage had occurred before he acquired the proprietary interest. But Talbot J. accepted that there was a continuing actionable nuisance affecting the land both during the father's ownership and during the plaintiff's ownership. He said, at p 848, that there was in fact, not in theory, continuing damage:

"Where there is a continuing nuisance inflicting damage upon premises those who are in possession of the interest may recover losses which they have borne whether the loss began before the acquisition of the interest, or whether it began after the acquisition of the interest. The test is: what is the loss which the owner of the land has to meet in respect of the continuing nuisance affecting his land?"

18. In the present case the trial judge declined to follow *Masters* and criticised Talbot J's reasoning in principle, although accepting that the case might have been correctly decided on its own special facts. The argument for Westminster is that it was wrong. The argument for Flecksun is that it was right but that it is not necessary for the House to uphold it in order for the respondent to succeed. The Court of Appeal thought it unnecessary to hear submissions on *Masters*.

19. Whether the defendant's liability is strict had not been expressly examined in the cases up to this point. It did arise in *Solloway v Hampshire County Council* (1981) 79 LGR 449, another Court of Appeal decision (Stephenson and Dunn LJJ. and Sir David Cairns). This decision was much influenced by the circumstance that in the meantime a differently constituted Court of Appeal had held in *Leakey v National Trust for Places of Historic Interest or National Beauty* [1980] QB 485 (a case relating to falls of earth from a mound that had built up on the defendant's land) that the duty arising from a nuisance which is not brought about by human agency does not arise unless and until the defendant has, or ought to have had, knowledge of the existence of the defect and the danger thereby created. In turn *Leakey* had been influenced by the well-known authorities *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 and *Goldman v Hargrave* [1967] 1 AC 645, to which I will return a little later.

20. *Solloway* I see as a significant case for present purposes. In 1967 the plaintiff bought a house built in 1922. About eight metres from the front there was growing in the pavement a horse chestnut tree owned by the defendant highway authority. In 1966, a year of a second successive very hot summer with drought conditions, cracks appeared in the walls. The cause was root dehydration. The damage had to be rectified by underpinning costing £5,656. Although the subsoil in the area was almost entirely plateau gravel with clay underneath, the subsoil of the plaintiff's house had outcrops of clay which were of such a nature that, even without the drought, the roots would have reached them and caused damage by dehydration. The plaintiff recovered the rectification cost at first instance before Stocker J. The council's appeal was allowed, however, on grounds relating to unforeseeability and the scope of the responsible authority or owner's duty. Each member of the Court of Appeal gave a separate judgment, albeit on broadly similar lines, Dunn and Stephenson LJJ

expressing regret at having so to decide.

21. The starting point in the *Solloway* judgments was acceptance that since *Leakey v National Trust* a reasonably foreseeable risk of damage by encroachment had to be established. On that point Dunn LJ (who gave the first judgment) thought that there was no more than a vague possibility. Sir David Cairns was of the same mind. Stephenson LJ was willing to assume that there was a real risk, reasonably apparent to the defendant's engineers if they had thought about it. But all three appellate judges thought that the cost and inconvenience to the local authority of taking any effective steps to remove or reduce it would have been quite out of proportion to the risk. As Dunn LJ put it, at p 458:

"In my view there is no reason to suppose that many of the houses in Shirley Avenue could be eliminated from this risk. We were told that there is an avenue of trees all along that road and the evidence was that pockets of clay might exist anywhere in Shirley Avenue. All the householders, it seems to me, would have to be approached, not only in Shirley Avenue but in any other street in Hampshire where there are trees adjacent to houses."

It was said also that it would all have been of great inconvenience to householders, and that the widespread examination of subsoils by the sinking of boreholes would have caused alarm affecting market values.

22. The last case in the line of English decisions cited is *Hurst v Hampshire County Council* (1997) 96 LGR 27. This is of no present assistance as it turned on whether a highway authority had a sufficient interest in trees growing on the verge of the highway to be liable in nuisance for root damage, a point not in dispute in the present case.

Other nuisance cases

23. None of the roots cases in the line just reviewed was concerned with the argument that remedial expenditure is not recoverable by the current owner for pre-transfer damage, except *Masters v Brent London Borough Council* [1978] 1 QB 841, which is against the argument. On behalf of Westminster, however, counsel relied on other cases of nuisance, notably *Whitehouse v Fellowes* (1861) 10 CB (NS) 765 (negligently constructed drain causing flooding of adjoining land); *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 (successive subsidences from working of coal by lessees of seams under plaintiff's land); and *West Leigh Colliery Co Ltd v Tunnicliffe & Hampson Ltd.* [1908] AC 27 (also a case of subsidence through working of minerals). While these are cases of longstanding authority, care is needed in identifying precisely what was decided in each.

24. In *Whitehouse* the issue was one of time limitation. A statute prescribed a limit of three months. Did time run from the negligent work or the resultant flooding? The decision was for the latter alternative, on the ground that there was a continuing nuisance giving rise to a fresh cause of action on each occasion of damage. No question of remedial expenditure arose.

25. In the *Darley Main* case the issue was again limitation. In 1868 the working of the coal had caused a subsidence of the plaintiff's cottages for which the defendants had accepted liability and made satisfaction by repairing the cottages. In 1882 further subsidence and further injury to the cottages occurred. It was brought about when the owner of adjoining land worked coal there, but the defendants admitted that if they had left sufficient support under the plaintiff's land that working would have done no harm. By a majority, Lord Blackburn dissenting, the House of Lords held that the original excavating lessees were responsible for permitting a continuing nuisance, for each incident of damage from which a fresh cause of action arose. Again the measure of damages was not discussed; they were to be assessed by an arbitrator.

26. In the *West Leigh* case the issue was somewhat different. It was whether depreciation in the value of the surface owner's property brought about by the apprehension of future damage could be

recovered. The House of Lords held not, Lord James of Hereford dubitante. Lord Loreburn LC said [1908] AC 27, 34 that to allow recovery once and for all of the entire diminution in the value of the property would be inconvenient and capricious in its results. The plaintiff was held entitled to recover the cost of repairs to his wall, plus nevertheless an allowance for the depreciation of its value as a damaged and repaired structure (see pp 32-33 *per* Lord Ashbourne).

27. Thus none of the authorities chiefly relied upon for Westminster has focussed on the content of remedial expenses, whether by distinguishing between pre- and post- proprietorship damage or between making good existing damage and safeguarding against future damage. The same is true of two authorities on which Mr Recorder Wood relied, namely *Thompson v Gibson* (1841) 7 M & W 456 and *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858, 867-868 *per* Lord Denning MR

Reasonableness as a criterion

28. It seems to me therefore that any decision which your Lordships may give in this case must to some extent break new ground in English law. One point at least is clear. Double recovery could not be permitted. But there is no question of that in the present case, nor was there in *Masters v Brent London Borough Council*. The Church Commissioners here had not incurred the remedial expenditure; and on the authority of the *West Leigh Colliery* case, on which Westminster rely, they could apparently not have recovered depreciation in the market value of their property resulting from apprehension of future damage.

29. Beyond that I think that 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. The great cases in nuisance decided in our time have these concepts at their heart. In *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, the House of Lords held that an occupier of land "continues" a nuisance if, with knowledge or presumed knowledge of its existence (in that case a defective grating giving rise to flood damage), he fails to take reasonable means to bring it to an end when he has reasonable time to do so. In *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617, the second *Wagon Mound* case, the Privy Council, approaching the case under the rubrics of both nuisance and negligence, said, at p 644 *per* Lord Reid:

"If it is clear that the reasonable man would have realised or foreseen and prevented the risk, then it must follow that the appellant is liable in damages".

30. Once more, in *Goldman v Hargrave* [1967] 1 AC 645, the Privy Council *per* Lord Wilberforce, as to an occupier's duty to take reasonable steps to prevent the spreading of a fire caused by lightning striking a tree, said, at p 663, and likewise not discriminating between nuisance and negligence (see at 656-657):

"So far it has been possible to consider the existence of a duty, in general terms. But the matter cannot be left there without some definition of the scope of his duty. How far does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be 'reasonable', since what is reasonable to one man may be very unreasonable, and indeed ruinous, to another: the law must take account of the fact that the occupier on whom the duty is cast has, *ex hypothesi*, had this hazard thrust upon him through no seeking or fault of his own. His interest, and his resources, whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard, or as compared with those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust. One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability

to foresee the consequences of not checking or removing it, and the ability to abate it. And in many cases, as, for example, in Scrutton LJ's hypothetical case of stamping out a fire, or the present case, where the hazard could have been removed with little effort and no expenditure, no problem arises. But other cases may not be so simple. In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able-bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more. This approach to a difficult matter is in fact that which the courts in their more recent decisions have taken".

31. In both the second *Wagon Mound* case and *Goldman v Hargrave* the judgments, which repay full rereading, are directed to what a reasonable person in the shoes of the defendant would have done. The label nuisance or negligence is treated as of no real significance. In this field, I think, the concern of the common law lies in working out the fair and just content and incidents of a neighbour's duty rather than affixing a label and inferring the extent of the duty from it.

32. Even in the field of *Rylands v Fletcher* strict liability ((1868) LR 3 HL 330) the House of Lords in *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 has stressed the principles of reasonable user and reasonable foreseeability: see the speech of Lord Goff of Chieveley, at pp 299-301. It was the absence of reasonable foreseeability of harm of the relevant type that excluded liability in that case.

33. Approaching the present case in the light of those governing concepts and the judge's findings, I think that there was a continuing nuisance during Flecksun's ownership until at least the completion of the underpinning and the piling in July 1992. It matters not that further cracking of the superstructure may not have occurred after March 1990. The encroachment of the roots was causing continuing damage to the land by dehydrating the soil and inhibiting rehydration. Damage consisting of impairment of the load-bearing qualities of residential land is, in my view, itself a nuisance. This is consistent with the opinions of Talbot J in the *Masters* case [1978] 1 QB 841 and the Court of Appeal in the instant case, although neither Talbot J nor Pill LJ analysed specifically what they regarded as a continuing nuisance. Cracking in the building was consequential. Having regard to the proximity of the plane tree to Delaware Mansions, a real risk of damage to the land and the foundations was foreseeable on the part of Westminster, as in effect the judge found. It is arguable that the cost of repairs to the cracking could have been recovered as soon as it became manifest. That point need not be decided, although I am disposed to think that a reasonable landowner would notify the controlling local authority or neighbour as soon as tree root damage was suspected. It is agreed that if the plane tree had been removed, the need to underpin would have been avoided and the total cost of repair to the building would have been only £14,000 (joint statement of facts and issues, paragraph 23). On the other hand the judge has found that, once the council declined to remove the tree, the underpinning and piling costs were reasonably incurred, despite the council's trench.

34. It is at this point that I see *Solloway v Hampshire County Council*, 79 LGR 449 as important as a salutary warning against imposing unreasonable and unacceptable burdens on local authorities or other tree owners. 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 reasonably necessary remedial works; and the party on whom the cost has fallen may recover it, even though there may be elements of hitherto unsatisfied pre-proprietorship damage or protection for the future. But, 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. In this case Westminster had ample notice and time before the underpinning and piling, and is in my opinion liable.

"A world elsewhere"

35. Although counsel evidently preferred a more insular approach, it can be useful to remember that there is a common law world elsewhere which may provide some help, particularly on issues where English law is not yet settled. Without undertaking extensive research, it is not difficult to find some support for the views already expressed in Australasian and United States jurisprudence.

36. In *Fleming, The Law of Torts* 9th ed (1998), p 498 there is the following passage:

"Abatement is a privilege, not a duty. An ancient ruling has it that it 'destroys any right of action in respect of the nuisance'. But as now interpreted, it means no more than that the act of abatement has the effect of removing the nuisance so that the claimant is not entitled to future damages. He may, however, recover damages for past injury. And although some dicta assume that the cost of removing the nuisance is also irrecoverable, it has been held that this does not preclude reimbursement for the cost of mitigating future damage".

For the last sentence three decisions are cited in a footnote, two of them in roots cases, namely *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478; and *City of Richmond v Scantelbury* [1991] 2 VR 38, 48. It is of interest that in the *Cowell* case in the Supreme Court of New South Wales, Hodgson J said, at p 488:

"In a case such as this, as a general rule, I think it is highly desirable that persons in the position of the defendants be given notice of this kind, and thus have a fair opportunity to abate the nuisance themselves before large sums of money are spent on such works as building barrier walls."

The judge went on to excuse the failure to give notice in that particular case, on the ground that it would have made no difference to the inactivity of the defendant. He also found that the defendant was not liable until it (knowingly) adopted a continuing nuisance which had not been reasonably foreseeable. On the particular facts he disallowed the cost of underpinning but allowed the cost of other remedial works.

37. In *Prosser and Keeton on Torts* 5th ed (1984), p 640 there is this:

"Also, in addition to the depreciation measure of damages, the plaintiff in a nuisance case may recover the reasonable cost of his own efforts to abate the nuisance or prevent future injury. For example, where a sewer line backed up and overflowed into the plaintiff's theater, the plaintiff hired a contractor to re-lay lateral sewer lines to avoid the problem in the future, and the contractor's charges being reasonable, the plaintiff was allowed to recover them. Such decisions seem correct, though it should also be noted that to the extent the plaintiff is in fact able to abate the nuisance by his own efforts, or to the extent it is abatable by injunction, permanent damages are not assessed."

The sewer case cited is *Stratford Theater v Town of Stratford* 140 Conn 422 (1953). Two other cases are cited.

38. In the end, in my opinion, 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. In the present case this was Flecksun. Accordingly I would dismiss the appeal with costs.

LORD CLYDE

My Lords,

39. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Cooke of Thorndon. I agree with it and for the reasons which he has given I, too, would dismiss this appeal.

LORD HUTTON

My Lords,

40. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Cooke of Thorndon. I agree with it and for the reasons which he has given I, too, would dismiss this appeal.

© 2001 Crown Copyright

BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)
URL: <http://www.bailii.org/uk/cases/UKHL/2001/55.html>