one. Of course, there are arguments for saying that the contributory fault of others should reduce the extent of the defendant's liability; but, those arguments having been so firmly thrust out of the front door, we should not be so willing to accept them round the back. The new rule certainly seems to involve the courts in rather arbitrary estimates of the amount to be deducted—in effect it requires a hearing on apportionment, but without the benefit of evidence and argument from the other party whose contributing fault is said to justify the apportionment. And the simple fact is that neither the trial judge nor the Court of Appeal felt able to apply their new doctrine to the facts, somehow feeling in their bones that a 50% reduction in damages would be too much. If the very court which articulates a new doctrine seems to feel that it is too harsh, then very probably it is, and we are better off without it.

STEVE HEDLEY

SLIPPING INTO UNCERTAINTY

HOLBECK Hall Hotel stood on the cliffs at Scarborough with views over a lawn and rose garden to the North Sea. The undercliff below the hotel was owned by Scarborough Borough Council. Over the years, natural erosion of the coastline led to relatively minor landslips in the area. The Council engaged engineers to investigate them and remedial works were carried out in 1989, but in 1993 there was a massive landslip. The lawn and rose garden fell into the sea, and the ground under the seaward wing of the hotel collapsed so badly that the whole building had to be demolished. Its owner claimed damages from the Council, and Judge John Hicks Q.C., applying *Leakey* v. *National Trust* [1980] Q.B. 485, held the Council liable for breach of a "measured duty of care". The Court of Appeal agreed that an occupier could be under such a duty to prevent danger to a neighbour's land from lack of support due to natural causes, but held the Council not liable because it owed no duty in relation to latent defects which could only have been discovered by extensive geological investigation: *Holbeck Hall Hotel Ltd.* v. *Scarborough Borough Council* [2000] 2 W.L.R. 1396.

Like *Leakey*, where Burrow Mump shifted from natural causes and shed detritus on the plaintiffs' house, *Holbeck Hall* involved failure to carry out remedial works, but the defendant argued that the *Leakey* duty arose only where there was an encroachment from the defendant's land to the plaintiff's; in *Holbeck Hall* the

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movement was in the opposite direction. However, Stuart-Smith L.J., who gave the only reasoned judgment, stated that encroachment was simply one form of nuisance; another occurred where activities on the defendant's land caused physical damage through loss of support to his neighbour's land and buildings. Disapproving Sir Wilfrid Greene M.R.'s dictum in *Bond* v. *Nottingham Corporation* [1940] Ch. 429, 438–439, that the right of support does not require the owner of the servient tenement to repair a building which provides support for his neighbour, but allows him to "let it fall into decay", he said that the same principles should apply, whether the defendant had himself created the nuisance or had merely adopted or continued it. In *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880 the House of Lords had held the defendant liable for failure to abate a nuisance caused by the act of a trespasser, and this principle could be extended to failure to deal with the hazards of nature, whether they caused encroachment or loss of support, but "in each case, liability only arises if there is negligence".

Stuart-Smith L.J. held that for a measured duty of care to arise, "the defendant must know or be presumed to know of the defect or condition giving rise to the hazard and must, as a reasonable man, foresee that the defect or condition will, if not remedied, cause damage to the plaintiff's land"; further, the defect must be patent, not latent. The plaintiff argued that the risk of landslips in the area was patent; the defendant was therefore liable for damage of this type and, on the principle of *Hughes* v. *Lord Advocate* [1963] A.C. 837, should be liable for the full extent of the damage, whether that extent was foreseeable or not. But Stuart-Smith L.J. distinguished *Hughes* on the ground that it involved damage as the result of the defendant's operations, whereas "the present is a case of non-feasance" (a distinction between acts and omissions which sits oddly with his refusal to distinguish them earlier). Megaw L.J. in *Leakey*, discussing the factors to be considered in deciding whether there was a breach of duty, had listed ease and expense of abatement and the ability of the defendant to achieve it, but had also asked: "What is to be foreseen as to the possible extent of the damage if the risk becomes a reality?" In Stuart-Smith L.J.'s view, the major landslip was so different in extent from any landslip which the defendant could have foreseen that (by analogy with the pervasive *Caparo* test for duty of care in negligence) it would not be just and reasonable to hold the defendant liable for it.

The outcome of the case is to be welcomed: it would surely have been unreasonable to expect the taxpayers of Scarborough to pay for their Council's failure to shore up a commercial enterprise,

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the owner of which had had as much opportunity as the Council to detect the possibility of aqueous incursions. Yet the decision shows the difficulties (dismissed by Megaw L.J. in *Leakey* as "more theoretical than practical") of predicting the outcome of litigation where it is argued that there is a "measured duty of care", tailored to the defendant's particular circumstances. Although it is a relief to find that major and minor landslips are not to be regarded as different types of damage (and the House of Lords in *Jolley* v. *Sutton London Borough Council* [2000] 1 W.L.R. 1082 has recently advocated a broad approach to identification of a "type", albeit in the context of personal injury), it is difficult to see why the *Hughes* principle of liability for the full extent of a foreseeable type of damage should apply to negligence and to nuisances of human origin (*The Wagon Mound No. 2* [1967] 1 A.C. 617) but not to natural hazards. What about the related but distinct "take your plaintiff as you find him" rule? *Leakey* allows for consideration of the relative skills and resources of the parties, but it gives no guidance on cases where the plaintiff suffers property damage of a foreseeable type which, owing to the peculiarly valuable or sensitive nature of his property, is greater than the defendant could have foreseen. In *Leakey* Shaw L.J. said that he "must confess to substantial misgivings" about the development of the law relating to natural nuisances, and concurred "with diffident reluctance" with the other members of the Court of Appeal in holding that failure to abate them could give rise to liability. The uncertainties revealed by *Holbeck Hall* show that his reluctance was justified.

C.A. Hopkins

TRUST PROPERTY AND UNJUST ENRICHMENT: TRACING INTO THE PROCEEDS OF LIFE INSURANCE POLICIES

Foskett v. *McKeown* [2000] 2 W.L.R. 1299 concerned the aftermath of a property development scheme in the Algarve marketed by one Mr. Murphy. 220 customers ("the purchasers") entered into contracts which provided that after two years they would each be conveyed a specified plot of land or their money would be repaid with interest. Unless and until the purchasers' money was used for the stated purposes it was to be held on trust. However, at the expiration of the specified period, it was discovered that the trust money had been misappropriated. While much of the trust money was untraceable, Murphy had applied around £20,000 of it to pay the fourth and fifth premiums of a life insurance policy that was

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