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A2 GCE LAW

G158/01/RM Law of Torts Special Study

PRE-RELEASE SPECIAL STUDY MATERIAL

JUNE 2019

7641233019

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- This document consists of **8** pages. Any blank pages are indicated.

SOURCE 1

HOUSE OF LORDS

ST HELEN'S SMELTING Co v TIPPING (1865) 11 HLC 642,650

[Facts: The claimant owned a large country manor house and many acres of land. The land was close to a copper smelting works which had been in operation for some time. Trees on the claimant's land were damaged by poisonous fumes caused by the normal operation of the smelting works. The claimant sued in nuisance. Issue: The argument was whether the smelting works had acquired a right to carry on their activities through acquisition and long-term use and whether the claimant had 'come to the nuisance'. Held: The claimant won as 'coming to the nuisance' is not a defence and the smelting works could not have acquired a right to continually pollute through prescription.]

LORD WESTBURY:

My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs.

If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop.

But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply in circumstances the immediate result of which is sensible injury to the value of the property.

SOURCE 2

Cocking v Eacott [2016] EWCA Civ 140

The judge held that the second defendant, W, was liable in nuisance to the claimant owners of the next door property, even though she did not occupy the property from which the nuisance emanated. It was her daughter, the first defendant, E, who actually lived at the property under a bare licence granted by W. E was held to have created two types of nuisance, namely, excessive barking from her dog and intentional abusive shouting. W was not held liable for the shouting. However, she was held liable for the barking nuisance from July 2011 onwards, of which she was found to have had knowledge and which she did nothing to abate, notwithstanding that the judge found her to be in complete control of the property. W appealed.

The main issue was whether the judge had been right in law to hold that W was liable for the barking nuisance when she had been the licensor of the property, but had not actually been residing there. The court also considered whether W should have been held liable as to costs.

The appeal would be dismissed.
To be liable for nuisance, a landlord either had to participate directly in the commission of the nuisance by himself or his agent, or had to be taken to have authorised the nuisance by having let the property. The fact that a landlord did nothing to stop a tenant from causing the nuisance could not amount to participating in it. However, an occupier would normally be responsible for a nuisance, even if he had not directly caused it, because he was in control and possession of the property […].

A licensor in W's position had been correctly regarded as an 'occupier' of the property. The judge had held that W had been in control of the property, notwithstanding that she had not lived there, and she had known of the nuisance. On the judge's findings, E had never had more than a bare licence. W had been, in the requisite sense, both in possession and control of the property throughout her daughter's residence there and the judge had decided that W had been able to abate the nuisance, but had chosen to do nothing.

SOURCE 3

Tort Law, 6th Edition, Routledge, p.81

Nature of the locality

This is an important determinant of what constitutes nuisance in the case of amenity damage. As was said in *St Helens Smelting Co v Tipping* [1865], 'one should not expect the clean air of the Lake District in an industrial town such as St Helens'.

[…]

In *Laws v Florinplace Ltd* [1981], the defendants opened a sex centre and cinema club which showed explicit sex acts. Local residents sought an injunction. It was held that the use constituted a private nuisance.

Similarly, in *Thompson-Schwab v Costaki* [1956], the plaintiff lived in a respectable residential street in the West End of London. The defendant used a house in the same street for the purposes of prostitution. It was held that, having regard to the character of the neighbourhood, the defendant's use of the property constituted a nuisance.

However, the character of a neighbourhood can change over the years, and a more modern approach is for the court to ask whether the acts complained of are more than can be tolerated in modern living conditions. […]

In the public nuisance case of *Gillingham BC v Medway (Chatham) Dock Co* [1992], it was held that the nature of a locality can be changed through planning permission.

In *Wheeler v Saunders* [1995], it was held that a local authority had no jurisdiction to authorise a nuisance, save in so far as it had the power to permit a change in the character of the neighbourhood and the nuisance resulted inevitably from the change of use.

SOURCE 4

Winfield & Jolowicz Tort, 18th Edition, WVH Rogers, Sweet & Maxwell, p.712

Private nuisance may be described as unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it. It has been said that the tort takes three forms: encroachment on a neighbour's land; direct physical injury to the land; or interference with the enjoyment of the land. The varieties of the third form are almost infinite but it is still a tort against rights of property and therefore lies only at the suit of a person with a sufficient interest in the land. Generally, the essence of a nuisance is a state of affairs that is either continuous or recurrent, a condition or activity which unduly interferes with the use or enjoyment of land. It is not necessary that there be any *physical* emanation from the defendant's premises. Noises and smells can be nuisances, but so, it seems can be otherwise offensive businesses. The mere presence of a building is not, however, a nuisance. Not every slight annoyance is actionable. Stenches, smoke, the escape of effluent and a multitude of different things may amount to a nuisance in fact but whether they constitute an actionable nuisance will depend on a variety of considerations, especially the character of the defendant's conduct, and a balancing of conflicting interests. In fact the whole of the law of private nuisance represents an attempt to preserve a balance between two conflicting interests, that of one occupier in using his land as he thinks fit, and that of his neighbour in the quiet enjoyment of his land. Everyone must endure some degree of noise, smell, etc. from his neighbour, otherwise modern life would be impossible and such a privilege of interfering with the comfort of a neighbour is reciprocal. It is repeatedly said in nuisance cases that the rule is *sic utere tuo ut alienum non laedas* [use your own property in such a way as not to harm that of others], but the maxim is unhelpful and misleading. If it means that no person is ever allowed to use his property so as to injure another, it is palpably false. If it means that a person in using his property may injure his neighbour, but not if he does so unlawfully, it is not worth stating, as it leaves unanswered the critical question of when the interference becomes unlawful. In fact, the law repeatedly recognises that a person may use his own land so as to injure another without committing a nuisance. It is only if such use is unreasonable that it becomes unlawful.

SOURCE 5

Nuisance – keep it simple stupid

Barr and others v Biffa Waste Services Limited (No 3) [2012] EWCA Civ 312
2 April 2012

On 19 March 2012 the Court of Appeal upheld an appeal in this long running litigation, which concerned a claim for private nuisance relating to odour complaints made by neighbours to a landfill site in Ware, Hertfordshire operated by Biffa Waste Services Ltd (Biffa). Last year, Mr Justice Coulson in the Technology and Construction Court (TCC) delivered a judgment dismissing the local residents' case holding that Biffa had not acted negligently or in breach of its waste permit in its operation of the site and therefore the action in nuisance was bound to fail. […]

The Court of Appeal judgment

The Court of Appeal wholly rejected the approach taken in the TCC at first instance to the application of the law. It reaffirmed the well settled principles of the laws of nuisance to be applied to the case as being: 1. For any nuisance there is no absolute standard, it is a question of degree whether the interference is sufficiently serious to constitute a nuisance, which is to be decided by reference to all the circumstances of the case. 2. There must be a real interference with the comfort or convenience of living, according to the standards of the average man. 3. The character of the neighbourhood area must be taken into account. 4. The duration of interference is an element in assessing its actionability, but it is not a decisive factor. A temporary interference which is substantial will be an actionable nuisance. 5. Statutory authority may be a defence to an action in nuisance, but only if statutory authority to commit a nuisance is express or necessarily implied. […] 6. The public utility of the activity in question is not a defence. It was based on a consideration of these factors that the Court of Appeal held that the Claimants' appeal should be allowed.

Carnwarth LJ commented: "To develop a modified set of principles … the judge embarked on an arduous journey through 200 paragraphs of legal analysis … Without disrespect to those efforts, I continue to believe that the applicable law of nuisance is relatively straightforward, and that 19th century principles for the most part remain valid".

Specifically addressing the reasoning of the Judge in the TCC, the Court of Appeal concluded that the "reasonable user" test was merely a reference to the established principles of nuisance as set out above. Furthermore when it came to making out a statutory defence, the common law of nuisance should not be bent to fit with statutory controls like permit schemes […]

Comment

The judgment is significant for both claimants and defendants in private nuisance cases. It reaffirms the relevance of established principles in law many of which date back to the 19th century as remaining relevant today. While some nuisance claims can seem complex in their structure due to multiple claimants and the context of intricate regulatory regimes, the Court of Appeal has affirmed that a simple back to basics approach should be taken to these cases.

SOURCE 6

Fundamental Change to Nuisance Law: Coventry v Lawrence, Michael Barlow, 06 March 2014

[T]he Supreme Court has reviewed the law of nuisance in the case of Coventry v Lawrence [2014] UKSC 13. It has made fundamental changes to long-established principles of the law of nuisance. This case is of significant importance to those carrying out activities that create noise (or other impacts such as odour and other emissions) and those who are affected by such activities, as well as local authorities and developers. The key facts are [that complaints about noise were made by the appellants who had recently purchased a house on land next to a motorcycle speedway stadium located in Suffolk].

Prescription: The court acknowledged that the right to commit a nuisance by noise can be acquired by prescription (i.e. long use). It was held that the noise nuisance through holding motocross events more than 20 times a year for a period of 20 years could give rise to a right to continue such activity by prescription. However, on the facts, the 20 year period had not been satisfied as the first complaints had been lodged only 16 years prior to the case.

Coming to the nuisance: The court held that, provided a claimant in nuisance uses his or her property for essentially the same purpose as his predecessors before the nuisance started, the defendant cannot rely on the defence that the claimant 'came to the nuisance'. However, where a claimant builds on his or her property or changes the use of the property after the defendant had initially commenced the activity then the claimant's claim for nuisance could fail.

The defendant's own activities and the "locality": The court clarified the law in relation to assessing the character of the locality. The court should start from the proposition that the defendant's activities are taken into account when making such assessment. However, such activities should only be considered to the extent to which they would not cause a nuisance to the claimant. Therefore, if the activities cannot be carried out without creating a nuisance, such activities will have to be entirely discounted when assessing the character of the locality. Also, if the activities are in breach of planning permission they will not be taken into account when assessing the character of the locality.

Relevance of planning permission: The Supreme Court considered whether a defendant can rely on the grant, terms or conditions of a planning permission. […] It was held … [t]hat the fact that planning permission has been granted does not mean that the relevant activity is lawful, and is therefore of no assistance to the defendant. The issue of common law nuisance is reserved to the court rather than the relevant planning authority. However, where planning permission stipulates limits as to the frequency and intensity of noise then such conditions within a planning permission may be relevant in assisting the claimant's action.

Injunction or damages?: The Supreme Court recognised that, where a claimant has established a nuisance, the claimant is entitled to an injunction to restrain the defendant from continuing the nuisance in the future (in addition to damages for past nuisance). The legal burden is on the defendant to satisfy the court as to why an injunction should not be granted. However, the court may choose not to award an injunction and award the claimant damages for future damages instead. Such damages are conventionally based on the reduction in value of the claimant's property as a result of the continuation of the nuisance. […]

Conclusion: The Supreme Court has taken an opportunity to clarify some important points in relation to the law of nuisance and, in particular, areas where practitioners and commentators thought that the area of law had not kept pace with industrial development. This is a key moment in the development of the law of nuisance.