There are three identifiable scenarios within the two case studies; Gina's pesticides leaking through a boundary fence, killing Samuel's prize roses; Gina's cockerel crowing, and Samuel's response by playing loud music; and Claire falling down a stairwell sustaining injury, while investigating ShineBright's building undergoing refurbishment. We will look at each of these scenarios in turn, identify the facts, the applicable areas of law, and advise the relevant parties of their rights, if any, they may have in the law of tort.

In the case of Gina's pesticides, Gina had kept several containers of pesticides and chemicals stacked up against the boundary fence between her property and Samuels. This implies the pesticides and chemicals were left open to the elements with no kind of protection. It is reasonable to expect that the containers would degrade and potentially leak the pesticides and chemicals into the surrounding environment. Samuel's prize roses were growing on the other side of the boundary fence to the poorly stored containers. Given the roses are referred to as prize winning, it is reasonable to assume they would potentially have won a prize again at the village fete the next day. The roses died as a result of a pesticide leak through the boundary fence, owing to Gina's loose ideas about storage of potentially harmful chemicals.

The damage caused could potentially fall under the torts of trespass and/or private nuisance. Negligence can be omitted in this instance, as although Gina could be said to have a duty of care to store the chemicals correctly, have breached that duty by an act of omission in her failure to store the chemicals correctly, and could reasonably foresee that her failure to store the chemicals correctly could result in damage to Samuel's property, a claim of negligence can only be brought against a person, not against a person's land. To quote Professor Newark;

"In true cases of nuisance the interest of the plaintiff which is invaded is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner. A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens."[1]

Although this quote in its entirety serves to illustrate how occupation of land rather than ownership is the measure of whether a claim in nuisance can be sought, it does show how a claim in nuisance is directed at enjoyment of land rather than ones health or physical wellbeing, as in cases of negligence.

Trespass by definition is *"…constituted by unjustifiable interference with the possession of land".*[2] This does not have to be committed by an individual, not does it have to be intentional. In the case of *The League Against Cruel Sports v Scott* [1986][3], hounds pursuing a stag were considered to constitute trespass when they entered onto land which was not a public right of way. The judge deemed there had been an act of trespass despite the trespasser being a pack of hounds, using the judgement from *Draper v Hodder* [1972][4] to back up the position; *"The organisers of the hunt are liable for any trespass committed by themselves their hounds or any other persons for whose acts they are responsible."* These cases demonstrate that trespass can be committed by a chattel or person under the care of another, and that the person in a positon of responsibility, in these cases the hunt master, takes ultimate responsibility for the trespass of chattels or persons under their care. In *Basely v Clarkson* [1681][5], in which the defendant accidentally mowed some grass belonging

[1] Newark, F H, (1949), The Boundaries of Nuisance*. Law Quarterly Review,* pp 488-489
[2] Rogers, W V H, (2010), *Winfield and Jolowicz on Tort*, 18th edition, London, Sweet and Maxwell, p685
[3] *League Against Cruel Sports v Scott*, [1986], QB 240
[4] *Draper v Hodder*, [1972], 2 QB 556
[5] *Basely v Clarkson* [1681]

to the plaintiff, thus actively interfering with possession of land without intent. The judge ruled in favour of the plaintiff to the cost of 2 shillings. This shows that trespass does not need to be wilful or intentional to be considered trespass. In a similar manner the damage to Samuel's roses could be considered trespass, as despite it not being Gina herself who trespassed, chemicals and pesticides under her ownership and care did trespass onto the adjacent land without Gina's intent. As per the cases above this could potentially be considered an act of trespass.

In addition to trespass, Gina has caused private nuisance to Samuel in the destruction of his prize roses. As per Professor Newark, *"The essence of nuisance is that it is a tort to land. Or to be more accurate it was a tort directed against the plaintiff's enjoyment of rights over land"*[6]. The growing of prize roses and entering them into the village fete is a presumably enjoyable leisure activity for Samuel, and therefore a case of nuisance could be brought against Gina. There is precedent for this, notably in *Foster v Warblington District Council* [1906][7]. The plaintiff was in sole occupation of oyster beds, which had been artificially constructed with intent to sell the resulting oysters. The defendant council discharged sewage into the oyster beds, rendering his product useless. Although this case was really about claiming nuisance damages without the title to the land, merely being in possession of the land, the facts of the case still apply in that environmental damage is considered nuisance. A more recent and high profile case is that of *Hunter v Canary Wharf Ltd* [1997][8], an unsuccessful claim of private nuisance in respect to lost TV signals during and following the construction of Canary Wharf. To quote Lord Lloyd of Berwick, *"Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land"*[9]. It is clear that the leak and subsequent destruction of Samuel's prize roses satisfies all three of Lord Lloyd's criteria for private nuisance.

Perhaps the most applicable Tort in this instance is the rule of *Rylands v Fletcher* [1868][10]. Fletcher employed contractors to construct a reservoir on his land. During construction the contractors found disused mineshafts, which they haphazardly blocked up. Upon filling the reservoir for the first time, the mineshafts flooded. Unfortunately they led to working mines owned by Rylands. The court held in favour of Rylands, and in doing so created a new principle of tort. To quote Lord Cairns LC;

"…introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, - and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable."[11]

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[6] Newark, F H, (1949), The Boundaries of Nuisance*. Law Quarterly Review,* p482
[7] *Foster v Warblington District Council* [1906], 1 KB 648
[8] *Hunter v Canary Wharf* [1997], UKHL 14
[9] *Hunter v Canary Wharf* [1997], UKHL 14, AC 655, 695
[10] *Rylands v Fletcher* [1868], HL
[11] *Rylands v Fletcher* [1868], HL 330, 338-339

To apply this to the storage of Gina's pesticides and chemicals, by bringing them onto her land she accepts responsibility for any damage caused by the pesticides and chemicals escaping, by extension any damage incurred to Samuels land.

Moving on to the second element of this scenario; Gina's cockerel is crowing during the day. It is stated in the case study that Samuel's roses are going to a village fete, and that Gina has retired to surrey to start a smallholding. From this we can reasonably assume the area could be described as rural, therefore a cockerel crowing during the day would not be out of place for the character of the area. An example of this can be found in *Miller v Jackson* [1977][12]. A village cricket club, having existed for some time, had a case brought against it by neighbouring residential tenants with regards to cricket balls landing in gardens and damaging property. The judge found that as the club predated the houses built nearby, and the tenants in occupation, there was no reason for the cricket club to shut down. The tenants knew there was a cricket club when moving into the area, and therefore accepted the risk. Likewise in Samuel's case, although Gina's cockerel is a new addition to the area, the area itself is rural in character; such intermittent noises should be expected. Furthermore the cockerel cannot be afforded the capacity to decide whether or not to crow.

Samuel responds to the cockerels crowing by playing loud rock music. In doing so he could be said to consent to the other noise nearby; given his taste in music and willingness to blast out heavy metal at minor provocation, could his usual use and enjoyment of the land be said to be quiet? Furthermore, in the second scenario, it is stated across the road ShineBright Ltd are undertaking refurbishment works of their building. Surely the works going on during the day would be considered more of a nuisance than a cockerel crowing? With this in mind, I do not believe Samuel has a claim in nuisance against Gina. However, Gina may well have a claim against Samuel due to his playing loud music every time the cockerel crows. Depending on the severity of the noise and effect of the music on the cockerel, she could bring a claim in statutory nuisance under the Environmental Protection Act 1990[13], or a claim under the Animal Welfare Act 1996[14] as prevention of unnecessary suffering.

In the case of Claire and ShineBright Ltd, ShineBright's premises are undergoing redevelopment. Claire, an 11 year old girl, crawls through a gap in the boundary fence. There is a small warning notice affixed to the top of the fence that reads "Keep Out!" Claire falls down a staircase to the newly built basement and breaks a leg. As per the Occupiers Liability Act 1957[15], the occupier of a building has a duty to visitors to ensure the building is safe for the business that they are there for. In this instance, as the premises' are under redevelopment, the contractors undertaking the works would be deemed to be the contactor in occupation as per S2 (4) (b)[16] of The Act, and therefore the duty to visitors would rest with them. They have carried out their duty to a degree in erecting a boundary fence around the worksite, with warning signage (albeit small) on the boundary fence. Clearly there had been some failing in site security given there was a gap in the boundary fence, however is it reasonable to assume Claire should have stayed out of the site given the warning sign, fencing, and general state of the building?

[12] *Miller v Jackson* [1977], CA
[13] Environmental Protection Act 1990, S79 (1)
[14] Animal Welfare Act 1996, S4 (1)
[15] Occupiers Liability Act 1957, S2 (2)
[16] Occupiers Liability Act 1957, S2 (4) (b)

Unfortunately not for the contractors, due to a combination of the Occupiers Liability Act 1957 and 1984. As per S2 (3) (a) of the 1957 Act[17], there is a duty of care to children in particular if they are visitors to a premises. Section 1 of the 1984 Act extends a duty of care to non-visitors, or those who have not been invited onto the premises but enter the premises of their own accord.[18] The occupier's duty of care can be discharged by provision of adequate warning notices, and if the person willingly accepts the risks by ignoring such notices. In this instance the warning notice would be deemed inadequate due to its miniscule size, and Claire would not be deemed capable of accepting the risks for entering a building site due to her status as a child. The status of trespassers, especially children, has evolved significantly throughout the 20th Century. In the early 1900's a doctrine persisted of trespassers having to take land as they find it, as in the case of *Devilin v Jeffarays Trustee* [1902][19]. A child fell into a clay pit 25 yards from a public road and drowned; the occupier was held to have no liability as the child accepted the risks by entering private land. By the 20's we see humanisation in the case of trespass. In the case of *Glasgow Corporation v Taylor* [1921][20], a child ate berries from a bush in Glasgow's publicly accessible botanical gardens, which unfortunately proved to be fatal. To quote Lord Shaw of Dunfermline;

"*There is no trespass in the case. The child, having a right to be in these gardens, was, in my opinion, entitled, as were also his parents, to rely upon the gardens being left in a reasonably safe condition. Or, in the language of the Lord Justice-Clerk: "The playground for the children must be taken as being provided as a place reasonably suitable and safe for children, and I think the parents were entitled so to regard it.*"

This highlights how a child cannot be reasonably held accountable for their actions due to the doctrine of allurement; it is reasonable to expect a child will investigate things an adult would steer clear from due to potential danger. To consider a case which is relatively close to Claire's, *British Railway Board v Herrington* [1972][21], a child entered onto the defendant's land through a broken fence. The Railway Board were aware of the broken fence but had failed to mend it. The child suffered severe injuries as a result. The Board held they owed no duty of care to a trespasser. This was dismissed on the grounds that the field the child was playing in was adjacent to the railway, the boundary fence of the railway was in a state of disrepair so as not to impede the child's movement through it, the electrified track was capable of injuring someone who touched it, and the child could not be held to fully recognise the danger of the electrified track. The court held judgement in favour of Herrington, given the small expense to repair the boundary fence could have prevented the injuries sustained. To apply this to the case of Claire, the building site would be considered a dangerous area. It could be said that the building site held a degree of allurement to Claire due to her age and the inquisitive nature of 11 year olds. The signage on the boundary fence was small and at a height, invalidating its purpose as a warning. The boundary fence was in disrepair, allowing Claire unfettered access to the building. The contractor in occupation had a duty of care to ensure the danger was well signposted, and that the boundary fence was intact to prevent such trespasses.

In conclusion, I would advise Samuel has a right to claim against Gina in trespass due to the leak of her property onto his being an encroachment. He also has a right to claim against Gina in nuisance as the leak killed off his roses, interfering with his quiet enjoyment of his land. The strongest claim Samuel has is in the rule of *Rylands v Fletcher*, due to Gina having to accept

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[18] Occupiers Liability Act 1984, S1

[19] *Devlin v Jeffray's Trustees* [1902] 40 ScLR 92

[20] *Glasgow Corporation v Taylor* [1921], UKHL 2

[21] *British Railways Board v Herrington* [1972], UKHL

responsibility for any damage caused by her property being brought onto her land and subsequently leaking. Gina does not have a claim in tort against Samuel, but may claim statutory nuisance under the Environmental Protection Act 1990, or depending on the effect on her cockerel, seek an injunction under the Animal Welfare Act 1996. Claire, or her guardian, has a right to claim negligence against ShineBright Ltd.'s contractors due to their failure to take appropriate and sufficient measures to secure the building site against non-visitors.

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