



An Introduction to Tort Law (2nd edn)

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## 10. Nuisance

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### Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter deals with the tort of nuisance, which is concerned exclusively with land. Nuisance embraces all the multifarious rights and interests appertaining to land — that extremely distinctive form of property whose characteristics include uniqueness, durability, fixity, contiguity, visibility, and short supply. Some such rights are natural, others must be acquired; some are absolute, others qualified; some depend on physical possession, others, such as easements, do not. One of these rights is the right to enjoy one's land. The chapter discusses how the four elements (earth, air, fire, and water) can affect the landowner or occupier; cases where a defendant is held liable for failing to protect his neighbour; the nature of the occupier's duty; disamenity as the characteristic of nuisance law; and whether a landlord is liable for a nuisance committed by a tenant.

**Keywords:** tort law, tort of nuisance, damages, rights, compensation, nuisance law, landlords, tenants

The tort of trespass vindicates rights, as we have seen, and the tort of negligence offers damages as compensation for harm. The tort of nuisance does both: it can be invoked whether you are complaining that a fire from next door destroyed your house or that the noise infringes your right to sleep. This dual role does not make nuisance any easier to understand, given that rights must be protected even if no damage has been

suffered and no fault committed, whereas harm is generally compensable only if due to fault of some kind. Accordingly, the question whether liability 'in nuisance' is strict or not is one which can be endlessly and pointlessly debated.

Trespass and negligence have this in common, however, that they both cover interests in all physical property, land and chattels alike. Nuisance, on the other hand, is concerned exclusively with land, just as the tort of conversion deals only with moveables. But even this does not make nuisance any easier to understand, for whereas negligence protects only the physical integrity of land and buildings, and trespass only the right to undisturbed possession, nuisance embraces all the multifarious rights and interests appertaining to land, that extremely distinctive form of property whose characteristics include uniqueness, durability, fixity, contiguity, visibility, and short supply. Some such rights are natural, others must be acquired; some are absolute, others qualified; some depend on physical possession, others, such as easements, do not. One of these rights is the right to enjoy one's land; indeed, it is commonly said to be of the essence of nuisance. Analysis in terms of such a compendious right is certainly apt enough if your neighbour is making nasty smells or noises, or perhaps when a busy brothel sets up next door, but if your house is burnt down or your garden washed away in a flood it hardly seems apt to say that you are complaining of mere disamenity. However, since actual damage to the fabric of property is of interest to the law of negligence, whereas noises and smells are not, unless they are deafening or poisonous, it may be said that noises and smells are *characteristic* of nuisance law.

## Remedies

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Persons afflicted by recurrent noises and smells generally want them stopped. They seek an injunction rather than damages, welcome though an award of damages always is. Injunctions do not figure much in books on negligence, and arise in the case of trespasses only if they are repeated or continuing. Since you cannot stop an activity or situation unless it is still going on, there is a tendency, assisted by the fact that isolated smells and transient noises are unlikely to be actionable at all, to say that a nuisance (a word which confusingly denotes both the cause and its effect) must be of some duration. This has led the courts to say, absurdly enough but doubtless in response to a foolish argument from counsel, that though the damaging event, such as the escape of fire, happened only once, it nevertheless arose from a continuing state of affairs, that is, an ongoing situation on the defendant's land that was about to result in ignition. A further factor of note is that while even a continuing trespass affects only the particular occupier whose property is invaded, some nuisances may affect the whole environment: we have a category of public nuisances, but not of public trespasses. This helps to explain the very heavy involvement of local authorities in the detection and prevention of nuisances, which will be discussed shortly.

## Parties

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The claimant 'in nuisance' must have a legal right in or over the affected land.<sup>1</sup> The defendant usually has one, too, but this is not a legal requirement; it results from the operation of the inverse square rule, which tells us how rapidly light and sound (and smells, too, one supposes) diminish in intensity as distance increases: put

less pompously, it is generally the people next door who are the real nuisance. We may therefore take it that we are principally concerned with the relationship of neighbours, not in the figurative sense popularized by Lord Atkin in *Donoghue v Stevenson*, but real neighbours, so familiar in our daily life. As every solicitor knows, disputes between neighbours are almost as fractious, irrational, and uncompromising as disputes within the family. The law-and-economics people who say that it is immaterial how the law apportions rights and liabilities in this area since neighbours can always contract around them have obviously never tried to get human neighbours to agree, though what they say may be true of limited liability companies, concerned only with money, which economists take as the model to which, in a world they suppose ideal, human beings should conform.

In order to indicate the scope of nuisance law and the distinctions which are made within it, let us leave aside for the moment the right to enjoy one's property free from intolerable irritation, and consider other matters which may affect a landowner or occupier. We start with the four elements, earth, air, fire, and water.

## Earth

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If a pit is dug close to your boundary, your land may fall into it. If so, you have an automatic action against your neighbour, even if he had the digging done by an expert and it is all a great surprise: your right not to have your land collapse as a result of your neighbour's excavations is absolute.<sup>2</sup> Further distinctions are made: the land itself has a natural right to support, whereas buildings on it have to acquire such a right. If your house, having acquired such a right, collapses because of the defendant's activity, it matters whether he was digging or draining, for if he is draining he is apparently not liable at all, even if it is quite foreseeable that your house will fall down when the wet earth on which it stood dries up and shrinks.<sup>3</sup> It is quite another question if your land collapses without any action on your neighbour's part, but solely as a result of natural forces. Until recently you would have had no claim. A few years ago, however, a hotel in Yorkshire fell into the sea. This would not have happened if the defendant, who had control of the seaward strip of land, had executed its coastal protection plans. Although it did no more than King Canute to keep the sea at bay, the defendant would have been held liable were it not that this novel duty to take positive steps to secure one's neighbour's land from collapse is not absolute but qualified ('measured'), not only in relation to what is objectively reasonable but also what is subjectively appropriate, given the cost of the necessary works and the defendant's resources.<sup>4</sup>

## Air

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Domestic premises no longer depend so much on open fires, so the absence of any right to receive an undisturbed flow of *air* is not so important. One is, however, entitled to relatively (but only relatively) pure air, and the neighbour will be liable if he pollutes it to an unreasonable extent by smoke, fumes, and so on. Light is different. A right to *light* has to be acquired by long enjoyment; indeed, your neighbour is entitled to block the light to your building simply in order to prevent your acquiring a right to continue having it and to maintain his right to build so as to block it.<sup>5</sup> Even when the right has been acquired for one's building (there is no right

at all to light in one's garden),<sup>6</sup> it is not a right to all the light one used to have, but only to a reasonable amount:<sup>7</sup> there has to be an adjustment between your right to see what is going on in your house and the neighbour's right to build on his land. On the other hand, he is perfectly entitled to block your view, however attractive, and, probably, however ugly his building or fence.<sup>8</sup> Thus a distinction is drawn between seeing inside the building and seeing out of it. Even within your house your ability to watch television may be affected by your neighbour's building, as residents of the Isle of Dogs discovered to their dismay when Canary Wharf was built. The House of Lords held that this was not actionable, but indicated that there might be a different outcome if the reception was affected by an activity rather than a building.<sup>9</sup> Television signals, like light, have to come in, cabled or not. We have seen a distinction between seeing inside the house and seeing out of it: might there not be an analogous distinction between what comes into the house and what is kept out of it? Perhaps there is. When householders complained that their supply of gas had been interrupted by negligent excavations it was held that this was not actionable in nuisance (it was clearly not actionable in negligence), since to decide otherwise would significantly increase the scope of the tort.<sup>10</sup>

As to buildings, planning permission is by statute required for any alteration to a building which would raise it to a height of more than four metres if it is within two metres of the boundary and for any boundary wall or fence more than two metres high.<sup>11</sup> (Where planning permission is required, the neighbours may object to its being granted; if it is granted, they cannot sue the authority, unless it has actually caused a danger,<sup>12</sup> but retain their common law rights, if any, against the occupier.)<sup>13</sup> But a hedge is not a wall or a fence and if your neighbour's untrimmed *cypressus Leylandii* hedge reached its 30-metre height and deprived your roses of light and you of your view there was nothing you could do, save cut off protruding limbs and sever intrusive roots, until the Anti-Social Behaviour Act 2003 (Part 8) gave the local authority power to intervene where a hedge (two or more evergreen or semi-evergreen trees or shrubs close together) is over two metres high.

## Fire

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Fire spreads easily. The fabric of a building is easily insured against fire, though special cover is required for contents and consequential 'business interruption', which tort damages will meet. Liability for the escape of fire is not strict, since the occupier 'on whose estate any fire shall... accidentally begin' is immune to liability under an Act of 1774, when fire insurance companies were starting up. Even where the fire is wholly accidental, however, such as one started by lightning, the occupier who is aware of it must take all reasonable steps to bring it under control. Furthermore, he is answerable for a fire started or allowed to spread by the fault of anyone he allows on his premises: thus a hostel-keeper has been held liable to a neighbour for personal injury (?) suffered from a fire started by one of the lodgers smoking in a communal room.<sup>14</sup> Less contestably, a householder was held liable when her plumber caused a fire by mismanaging his blowtorch when trying to thaw out a frozen pipe.<sup>15</sup> The latter decision may, indeed, be an instance of an unacknowledged general principle that a neighbour is always liable for property damage done to his neighbour by the fault of his independent contractors, but this is far from certain: there may be a distinction, in law as in fact, between fire and flood, for in an older case a householder was held not liable for a flood due to his plumber's botched attempt to repair a leaky cistern.<sup>16</sup>

## Water

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There is certainly a distinction between flood and drought, between too much water and too little. As to flooding, a person who interferes with the flow of water in a stream, as by damming it so as to produce a pond for his pleasure or business, may well be strictly liable if it overflows.<sup>17</sup> By contrast, if a flood is due not to deliberate interference but to some natural or trespassory obstruction on his land, the neighbour will be liable only if he should have removed it or done something to make the flooding less likely. If water percolates downhill on to your land, you cannot complain, but you may prevent its entering your land, even if this means sending it back to your uphill neighbour. This very proper act of self-help or self-defence may now perhaps be subject to the condition that it be reasonable to do so in order to protect your own land.<sup>18</sup> By contrast, your neighbour is not allowed to let rainwater drip directly from his roof on to your land, much less channel water or sewage underneath it, unless he has an easement to that effect, an easement being a right to have an otherwise impermissible effect on a neighbour's land; it may arise in several ways, by express or implied grant, presumption of grant, or prescription.

As to flooding of dwellings, one may well have no claim the first time one is flooded by water or even by sewage coming from the apartment above, unless one can prove negligence in maintenance or control.<sup>19</sup> If water escapes from the mains, however, the water authority is strictly liable by statute. The position is quite different where water or sewage escapes from the public drains: while the authority may be liable if it fails to keep the existing drains in order, it is not liable at common law for failing to renew a system which is suffering from overload. So held a unanimous House of Lords, reversing the Court of Appeal.<sup>20</sup>

As to deprivation of water, distinctions are drawn depending on whether it is in a stream or not. If the water is merely percolating through the soil, you have no right to receive it at all: it may be intercepted and abstracted with impunity, as Bradford Corporation found when, with a view to forcing a purchase, Mr Pickles prevented the water under his land from reaching their reservoir.<sup>21</sup> But where water in a defined channel is flowing through, alongside, or under one's land one is entitled to receive a reasonable amount from it: to put it another way, upstream occupiers may take only a reasonable amount. A distinction is drawn between abstraction and pollution, for there is liability for polluting even percolating water which a lower occupier would otherwise receive.<sup>22</sup>

## Distinctions

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These examples show that some seemingly quite narrow distinctions are drawn in cases to be found in the nuisance chapter. Are such distinctions justified? The answer depends on whether one is trying to explain the law or to solve disputes, the latter being the more important. After all, there can be little doubt whether one's house has been flooded or burnt down, whether the water was in a stream or not, and whether one is trying to see out of one's building or see within it. Very occasionally, it is true, there may be a borderline case, as where the defendant forced hot water into his land in order to pump up the salt thus liquefied into brine. Was he draining or digging?<sup>23</sup> The fact that the Court of Appeal in that case found the distinction absurd indicates our current preference for generalization over distinctions, even distinctions which are obvious, simple, and

useful. Consider damage done by trees. The law used to be clear: if the roots of my tree knocked down your house (by sucking up the water and drying out your subsoil) then I was liable, no questions asked, but if the branch of my tree fell on your greenhouse, I was liable only if I should have realised that this might well occur and should have prevented it. Now, however, the rules have been 'harmonised', and I am liable for the damage done by my tree roots only if I am in some way at fault.<sup>24</sup> A single opinion in the House of Lords has confirmed this development, with two glosses: first, that suit may be brought by an owner who repairs damage done before he bought the property, and secondly, that the victim must notify the owner of the tree which was doing the damage.<sup>25</sup>

It is not clear that this development is advantageous; the distinction between root and branch caused no practical problems, the distinction between what is visible above ground and what is invisible underground is not a trivial one, and it hardly conduces to neighbourly relations if you have to show that your neighbour was at fault, the more so since the exposure to harm from these causes is perfectly mutual. The change may be seen as linked to a general trend from a position where the occupier was strictly liable for the damage done by any activity of his, but not liable for inactivity, to a position where he may be liable for failing to protect his neighbour when he reasonably could have done so (Lord Atkin and Lord Wilberforce, the proponents of negligence law, leading the campaign on this point) and may not be liable for damage due to his activity unless he or his people were somehow at fault.

## Failure to Act

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Where the defendant is charged with failing to protect his neighbour, fault is clearly necessary, and seems increasingly to be treated as sufficient. The line of development leading to the case of the hotel which fell into the sea is clear. First it was held that the occupier was liable for a flood due to the misplacing, by persons who had no right to be on the land at all, of a grid in a culvert; the defendants were said to have 'adopted' the nuisance, with the suggestion that they had done something positive, whereas, being monks, they had done nothing whatever, and doubtless had not even noticed the risk, though they could have done so.<sup>26</sup> Next was a fire case: when a tree in the outback was struck by lightning and set aflame, the aged though muscular occupier, having taken professional advice, very sensibly felled it, but then decided to let it burn itself out. He was held liable when a wind arose and fanned the embers into a disastrous fire.<sup>27</sup> Next, and worst, was a decision of the Court of Appeal. In the dry summer of 1976 a hill owned by the National Trust started to crumble and bits of it fell on the plaintiff's vintage house nestling underneath it. Although the Trust had done nothing whatever to cause the fall of earth, it had to meet the bill for sticking its hill together again, as it was required by court order to do. One of the judges rightly doubted whether it is reasonable to make an occupier pay to protect a neighbour from the effect of gravity on the natural condition of land, even if his resources are to be taken into account.<sup>28</sup> Indeed it was only because this anomalous duty of care is said to be a 'measured' one that the Court of Appeal was able to avoid awarding damages to the Holbeck Hall Hotel which fell into the sea off Scarborough after the local authority had failed to proceed with very expensive coastal protection works. In a subsequent case with considerable implications for public expenditure, these twentieth-century decisions were relied on by the Court of Appeal as justifying their view that Victorian precedents to the effect that a sewerage authority was under no common law duty to replace overloaded drains were now obsolete.

The House of Lords, however, was of a different view: Lord Hoffmann made it clear that the old authorities are ‘not about general principles of the law of nuisance. They are cases about sewers’ and still good law.<sup>29</sup> It is refreshing to find sensible distinctions being maintained against the relentless determination to treat unlike cases alike under the umbrella of an abstract rule.

Another case where the defendant was held liable for the effects of gravity was where pigeons resting or roosting on its bridge over Balham High Street fouled the highway beneath it.<sup>30</sup> As a claim in private nuisance it was problematical, since the claimant highway authority neither owned nor possessed the highway, but it was argued and accepted that this was a public nuisance for which the local authority had statutory power to sue, on the basis that the situation on the defendant’s property was prejudicial to the public at large in their use of the highway. As to the damages, it can be noted that the claimant was required to mitigate its loss—the cost of cleaning the highway every day—by accepting the defendant’s offer to let it abate the nuisance at its own, lesser expense. It may be said in passing that public nuisance is quite different from private nuisance, for in the former the claimant need not have any interest in property adjacent to the trouble and provided that the defendant has done something improper which adversely affects a large number of people, such as obstructing a highway, may claim even for merely economic loss provided that it is specific to him over and above what is suffered by the generality.<sup>31</sup>

If the occupier must take steps to deal with actual hazards on his premises, even if he has done nothing to create them, lest they cause damage next door, must he take steps to prevent such hazards arising? The issue was ventilated, but not really resolved, in a case where young hooligans entered a closed-down cinema and deliberately used some film scrap there to start a fire which burnt down the pursuer’s church. Lord Goff was of the opinion that there was no general duty on an occupier to take steps to protect his neighbour from the misdoings of trespassers, though there were particular instances where such a duty did arise. The better view may well be to accept that there is a duty to take reasonable steps when they are called for by the likelihood of trespassers entering and doing damage, and to decide the matter in relation to breach, as Lord Griffiths did in that case.<sup>32</sup>

## Nature of the Occupier’s Duty

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Is the duty of the occupier ‘non-delegable’, such that he will be liable if his independent contractor causes harm by negligence? The tendency is certainly towards making the occupier liable to his neighbour. It is true that one of the leading authorities against making an occupier liable for the torts of his independent contractor was one in which paid tree-fellers cut down a tree in the occupier’s garden so incompetently that it fell against wires over the highway and caused personal injuries to a person, actually the neighbour’s son, who was trying to remove the hazard,<sup>33</sup> but it is far from clear that liability would have been denied had the tree fallen on the neighbour’s greenhouse. The Court of Appeal has imposed liability on a householder whose contractors, in replacing his roof, failed to make a proper seal with the existing roof of his neighbour, but only by holding, contrary to the evident fact, that the operation was fraught with danger.<sup>34</sup> It would be easier to say that the mutual duties of neighbours not to cause each other harm are non-delegable; after all, the person who

employs the contractor knows whom he has employed, and will be able to claim from him either for breach of contract or for a contribution to any damages payable to his neighbour, who may well have no means of identifying the contractor.

## Disamenity

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The tort of nuisance would be simpler if it dealt only with disamenity between neighbours, but even then it could not be very simple, because almost anything a neighbour does—cooking exotic foods, playing the trombone, running a school, adding an extension—affects the person next door or above or below him. Yet since he, just like the claimant, is entitled to enjoy his property, there must be some accommodation between a person's right to hold a party and his neighbour's right to sleep undisturbed: both are asserting the same right to enjoy their property.

We have suggested that disamenity, rather than actual damage, is the characteristic of nuisance law, since the latter is compensable in negligence and the former is not. On this point a problem is caused by the decision of the House of Lords in *Hunter v Canary Wharf* which laid down categorically that the (sole) function of the tort of nuisance was to protect land rather than its occupants,<sup>35</sup> and peremptorily overruled a decision of the Court of Appeal that Miss Khorasandjian could sue 'in nuisance' a person who made her life at home intolerable by constant phone calls, the ground for the reversal being that she was not herself the householder but only his daughter.<sup>36</sup> Since one consequence of the Court of Appeal's decision had been that infants in the affected property started to sue their neighbours in order to benefit from better legal aid than their parents could obtain, it was quite sensible for the House of Lords to restrict the number of possible plaintiffs to those with a legal interest in the property. It is, however, odd to say that noises and smells affect the land itself, which has neither ears nor nose.

## The Human Rights Act 1998

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Miss Khorasandjian had no claim in nuisance, according to the House of Lords, because although she was at home it was not her house. The European Convention, by contrast, provides in Article 8 that everyone has 'the right to respect for his... home...'. Accordingly, when the plaintiffs in the *Hunter* case, disappointed in the House of Lords, went off to Strasbourg, the Commission held that their right under this Article had been infringed, though the national interest in constructing Canary Wharf and its substructures provided a justification. The national interest has also been held (but only on appeal to the Grand Chamber) to justify the government's statutory approval of the large number of flights in and out of Heathrow Airport which gravely disturbed the home life of the groundlings underneath the flight paths,<sup>37</sup> a decision which was relied on by the House of Lords in reversing the decision of the Court of Appeal that Mr Marcic, whose home was regularly flooded by water and sewage from the public drains, could base a claim on Article 8 of the European Convention.<sup>38</sup>

## Common Law: Disamenity

If we revert to the common law on disamenity, we must agree that on the one hand, one cannot complain of everything which one finds annoying or ‘a nuisance’, for it is simply impossible to live close to another without suffering some inconvenience. On the other hand, one has no right to make one’s neighbour’s life a misery, even if one thinks that what one is doing, and doing quite deliberately, is perfectly reasonable, such as playing heavy metal or Wagner *fortissimo*. Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot, by being unduly sensitive, constrain one’s neighbour’s freedoms), but what objectively a normal person would find it reasonable to have to put up with. If the claimant is suffering to an objectively intolerable extent, the defendant has to stop or limit what he was doing. Characteristic is a case where the plaintiff was a musical family whose members played instruments a very great deal, to which the defendant reacted by banging on the walls. The musicians had admittedly gone beyond what it was reasonable for the defendant to have to put up with, but the defendant, unlike them, was guilty of what Italian road signs call ‘*rumori inutili*’, so the court subjected the defendant to a permanent injunction but only imposed music hours, so to speak, on the plaintiff.<sup>39</sup>

The defendant here was retaliating, and could be described as acting maliciously. So, too, in another case. The sound of shooting is a feature of country living (and urban living, too, in some areas, alas) but when it was shown that the farmer shooting close to his boundary with the plaintiff’s land was doing so purely to cause the plaintiff’s silver foxes to abort and eat their cubs, the court had no hesitation in enjoining him.<sup>40</sup> Of course there was actual damage to property in that case, and intended damage at that (though not trespassory, because the defendant had not shot the foxes, though he had killed them by shooting).

Gratuitous noise is much more irritating than noise intrinsic to an estimable occupation, such as running a school. As in a claim for negligence, it is relevant whether the defendant’s activity is worthwhile or not. Thus one cannot complain of the noise of church bells unless the bell-ringing practice occurs too frequently or goes on too long, but whether the nuisance is gratuitous or not is only one of the factors to be taken into account in deciding whether what the claimant had to put up with was excessive and unreasonable. All the factors in the context are to be taken into account—the severity of the inconvenience, its duration, and the nature of the surroundings. Building works are inevitably noisy, but permissible if they are not unduly prolonged or nocturnal, and noise and dust are reduced to the practicable minimum. Occupants are entitled to only a reasonable amount of peace and quiet, and the test is objective, much affected by the nature of the neighbourhood. It is very much a matter of judgment, like deciding in a negligence suit whether the defendant was or was not in breach of his duty to take reasonable care, with the difference that the focus here is on the reasonableness of the effect rather than that of the conduct.

It is often said that ‘Live and let live’ is the order of the day (and night), but living and letting live may be incompatible in fact or unprocurable in law. In *Baxter* the parties lived in adjacent apartments in a Victorian house which had been subdivided by the local authority conformably with standards at the time but whose insulation was so poor that the noise made by the occupants of apartment A, which was no more than the normal noise of daily living (television, dishwashing, toilet flushing, lovemaking), made life intolerable for the occupant of apartment B who could hear, and could not avoid hearing, everything that went on next door. In

the lawsuit brought by the occupant of apartment B against their common landlord the House of Lords held that the conduct of those in apartment A did not amount to a nuisance, since they were behaving absolutely normally.<sup>41</sup>

Of course the occupants of apartment B were not at fault in doing what comes naturally, but that is not the critical point. What if it is impossible to blame the neighbour though his distressing conduct is not normal at all? Although at common law the person whose abnormal conduct is making your life a misery is automatically liable to an injunction or an eviction order, any such remedy may be barred by the Disability Discrimination Act of 1995 if all the intolerable and antisocial shouting, banging, swearing, gobbling and raving is due to a condition defined by the Act as a disability—and much (most?) antisocial conduct is due to a disability as defined. The situation is both a social and a legal nightmare, and though the Court has gone some way to relieve the situation and afford some protection to the distressed victim by giving a very extensive meaning to ‘health’ in the provision which legitimates eviction of a disabled occupier if that is objectively necessary to avoid endangering the ‘health or safety of any person’ (s 21D(4)), one understands its pained cry for help from Parliament, whose failure to join up its legislation is at the root of the mess.<sup>42</sup>

## Landlord and Tenant

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In *Baxter* there was nothing for the landlord to be liable for, though it had let the premises for the purposes of living in, but in any case the landlord could not be liable because the condition complained of was already in existence when the claimant’s tenancy started. So it raised two issues: when is a landlord liable for a nuisance committed by a tenant, and when is it a defence that the claimant accepted the situation now said to constitute a nuisance? The first question, whether a landlord can be sued for what the tenant does, is not easy to answer. After all, the tenant has exclusive possession of the premises, and in the common law it is possession, physical control, to which entitlements and liability principally attach. It appears that, even if the landlord knows that his tenant will make, or is actually making, life a total misery for those in the area, even other tenants of his own, he will not be liable if in the lease he has forbidden the tenant to create a nuisance (unlike the employer, who cannot escape vicarious liability simply by forbidding his employee to commit torts). Thus in one case a local authority which installed a problem family under a lease which forbade the creation of a nuisance was held not liable when the family made the neighbours’ lives an unbearable misery.<sup>43</sup> This decision may be incompatible with claimants’ rights under Article 8, and if the troublesome tenants resist eviction on the basis of their own rights under that Article, they may be met by Article 17 which prevents a person invoking his Convention rights as a justification for invading those of others. It is true that the landlord may have power to evict the tenant who, in breach of that term of the lease, does indeed commit a nuisance, but he is not bound to do so at the instance of third parties affected or even those tenants to whom he has promised quiet enjoyment. Over licensees, however, occupiers of land have much greater powers of control, and may well be liable to neighbours for their activities.<sup>44</sup>

## ‘Coming to the Nuisance’

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The second issue, that a tenant cannot complain of a situation existing at the start of the tenancy, is out of step with a questionable rule of nuisance law which is commonly put in the form ‘It is no defence that the plaintiff came to the nuisance’. In other words the fact that you chose to move next door to a chip shop does not prevent your complaining of the attendant noise and smell, if excessive in the area. Although this is inconsistent with the principle underlying the defence of *volenti non fit injuria*, it is quite understandable in terms of history. Until fairly recently, the tort of nuisance was the only way environmental pollution could be controlled: the system depended on private citizens bringing a civil action to stop it. To allow the polluter to carry on polluting just because he started polluting before the plaintiff arrived on the scene would have frustrated this function and stymied *embourgeoisement* and gentrification. Now that we have very powerful administrative methods of reducing such pollution, we could well abandon this rule of private law, as Lord Denning was prepared to do in a case where a person who bought a Wimpey house overlooking a village cricket ground sought to stop cricket being played there on the basis that the cannonade of balls made her feel (and be) unsafe in her garden.<sup>45</sup>

## Administrative and Legislative Authorisation

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Doubtless planning permission had been obtained to build houses next to the village cricket pitch, for such permission is required for any change of use of land, but the fact that it has been obtained does not insulate one from liability in nuisance. This is quite right: administrators cannot authorise torts. Parliament, however, may do so, and if the defendant has statutory authority for its activity, as may well be the case where the activity is a really major one like running an oil terminal, it will not be liable even for the very serious effects of its activity provided that it causes no more harm and disruption than is entailed in the exercise of the authority granted to it. Thus although the Manchester electricity company had statutory authority to run a power plant, it was subjected to an injunction precisely because it was operating it without proper concern for the people in the neighbourhood.<sup>46</sup> Where the authorised public works are properly executed, so that a claim in nuisance at common law is barred, the person affected may well be able to claim compensation from public funds, much as one can claim compensation for expropriation.<sup>47</sup> Alternatively one can sail up the Rhine to Strasbourg (a city, as A. E. Housman noted, ‘still famous for its geese’) and complain, with a fair chance of success, that the legislature in authorising the works or activity paid too much attention to the national interest and too little to the affected individuals.

Many common law nuisances, such as disturbance by noise, fumes, and so on, are also classified as ‘statutory nuisances’.<sup>48</sup> This gives the local authority extensive powers, indeed imposes on it a duty, to require or effect their ‘abatement’. Likewise, while you yourself may not enter your neighbour’s dwelling and impound the hi-fi gear which is generating an illicit number of nocturnal decibels, the local authority may do so, though it is no longer under a duty, but has only a discretionary power, to respond to a householder’s complaint.<sup>49</sup>

Statutory nuisances go further, however. For example, premises which are ‘in such a state as to be prejudicial

to health' constitute a statutory nuisance of which the occupants themselves can complain, as they could not at common law, and have the local authority, which may itself be the landlord, remedy the situation. In this respect the regime has an effect on the quality of housing as well as on that of the environment.

## Notes

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- 1 *Hunter v Canary Wharf* [1997] 2 All ER 426.
- 2 *Dalton v Angus* (1881) 6 App Cas 740.
- 3 *Stephens v Anglia Water Authority* [1987] 3 All ER 379.
- 4 *Holbeck Hall v Scarborough Borough Council* [2000] 2 All ER 705.
- 5 *Allen v Flood* [1898] AC 1 at 46.
- 6 *Allen v Greenwood* [1979] 1 All ER 819.
- 7 *Carr-Saunders v Dick McNeil Associates* [1986] 2 All ER 888.
- 8 *Aldred's Case* (1610) 77 ER 816.
- 9 *Hunter v Canary Wharf* [1997] 2 All ER 426.
- 10 *Anglian Water v Crawshaw Robbins* [2001] BLR 173.
- 11 Town and Country Planning (General Development) Order (SI 1995/418), Sch 2.
- 12 *Kane v New Forest DC* [2001] 3 All ER 914.
- 13 *Wheeler v Saunders* [1995] 2 All ER 697.
- 14 *Ribee v Norrie* [2000] TLR 825.
- 15 *Balfour v Barty-King* [1957] 1 All ER 156.
- 16 *Blake v Woolf* [1898] 2 QB 426.
- 17 *Rylands v Fletcher* (1868) LR 3 HL 330.
- 18 *Palmer v Bowman* [2000] 1 All ER 22.
- 19 *WHSmith v Daw* (CA, 31 March 187).
- 20 *Marcic v Thames Water Utilities* [2003] UKHL 66.
- 21 *Bradford Corp v Pickles* [1895] AC 587.
- 22 *Cambridge Water Co v Eastern Counties Leather* [1994] 1 All ER 53.
- 23 *Lotus v British Soda Co* [1971] 1 All ER 265.
- 24 *Solloway v Hampshire CC* [1981] 79 LGR 449.
- 25 *Delaware Mansions v Westminster CC* [2001] 4 All ER 737.
- 26 *Sedleigh-Denfield v O'Callagan* [1940] 3 All ER 349.

- 27 *Goldman v Hargrave* [1966] 2 All ER 989.
- 28 *Leakey v National Trust* [1966] 2 All ER 989.
- 29 *Marcic v Thames Water Utilities* [2003] UKHL 66.
- 30 *Wandsworth LBC v Railtrack* [2002] Env LR 9.
- 31 *Tate & Lyle Industries v GLC* 1983] 1 All ER H59.
- 32 *Smith v Littlewoods Organisation* [1987] 1 All ER 710.
- 33 *Salsbury v Woodland* [1969] 3 All ER 863.
- 34 *Alcock v Wraith* [1991] TLR 600.
- 35 *Hunter v Canary Wharf* [1997] 2 All ER 426.
- 36 *Khorasandjian v Bush* [1993] 3 All ER 369.
- 37 *Hatton v UK* (App. No. 36022/97) (2003) 37 EHRR 28.
- 38 *Marcic v Thames Water Utilities* [2003] UKHL 66.
- 39 *Christie v Davey* [1893] 1 Ch 316.
- 40 *Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468.
- 41 *Baxter v Camden LBC* [1999] 4 All ER 449.
- 42 *Manchester CC v Romano* [2004] EWCA Civ 834.
- 43 *Smith v Scott* [1972] 3 All ER 645.
- 44 *Lippiatt v South Gloucestershire Council* [1999] 4 All ER 149.
- 45 *Miller v Jackson* [1977] 3 All ER 338.
- 46 *Manchester Corp v Farnworth* [1930] AC 17.
- 47 *Wildtree Hotels v Harrow LBC* [2000] 3 All ER 289.
- 48 Environmental Protection Act 1990, s 79fr.
- 49 Anti-Social Behaviour Act 2003, s 42.

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