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NUISANCE AND THE UNRULY TENANT

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PEOPLE do not always behave with circumspection at home, and the wry maxim that "good fences make good neighbours"[1] is a sound one. But the sad truth is that fences cannot always be impregnable, and breaches sometimes lead to conflict severe enough to involve the law. The social importance of the whole area cannot be doubted,[2] and the legal interest of one particular aspect of it, when the culprit is not the freehold owner, is considerable. This is especially so given recent pronouncements upon the topic by the Court of Appeal.[3] Important issues which are raised include the boundaries of the tort of nuisance, as recently considered by the House of Lords,[4] and another facet of the much-litigated question of public authorities' liability in tort. This article examines the liability of both landlord and tenant at common law, and concludes with a brief survey of statutory developments which may provide alternative remedies.

I. THE UNRESOLVED CONFLICT: *SMITH* V. *SCOTT* AND *PAGE MOTORS*

The leading case on landlords' liability for nuisances committed by their tenants is *Smith* v. *Scott*.[5] Here, the plaintiff[6] (P) was faced with conduct "altogether intolerable both in respect of physical damage and of noise" on the part of his next door neighbours, the Scotts. He sought an injunction to restrain such behaviour as against Mr. and Mrs. Scott, and also against their landlord, the Lewisham L.B.C. Argument centred on the position of the defendant Council (D), Pennycuick V.-C. holding them not to be

* Magdalen College, Oxford. I am indebted to Roger Smith and David Ibbetson, who should not however be taken to adopt or continue my errors and infelicities.

[1] Robert Frost, "Mending Wall" (1914).

[2] A recent survey found that three quarters of English local authority and Registered Social landlords considered they had a "medium" or "big" problem with neighbour nuisance: J. Nixon, C. Hunter and S. Shayer, *The Use of Legal Remedies by Social Landlords to Deal With Neighbour Nuisance* (Sheffield 1999).

[3] *Hussain* v. *Lancaster City Council* [2000] Q.B. 1; *Lippiatt* v. *South Gloucestershire Council* [2000] Q.B. 51, noted by Janet O'Sullivan, [2000] C.L.J. 11. See also M. Davey [2001] Conv. 31, 48–60.

[4] *Hunter* v. *Canary Wharf* [1997] A.C. 655.

[5] [1973] Ch. 314.

[6] As claimants used to be known, prior to their rebranding by Lord Woolf.

liable under any of the heads maintained, namely nuisance, *Rylands* v. *Fletcher*[7] and negligence.

The *Rylands* v. *Fletcher* submission was founded on *A.-G.* v. *Corke*,[8] but foundered upon the doubtfulness of the same. In that case, caravan dwellers licensed to dwell upon D's land were held to have been a dangerous "thing", and to have "escaped" much as did the water from Rylands' reservoir.[9] The Vice-Chancellor brushed this precedent aside, remarking that in *Corke*, D might just as easily have been liable as the licensor of a nuisance. He also dealt swiftly with the submissions upon negligence, holding that in the well-regulated field of duties between neighbouring landowners, there was no place for Lord Atkin's rather looser concept of neighbourhood, with all the far-reaching changes in the law which would inevitably follow.[10] However, such a peremptory exclusion of negligence is surely too wide, as shown by cases such as *Miller* v. *Jackson*.[11] Nevertheless (at least in England), *Rylands* and nuisance retain an important role in landowners' disputes.[12]

The real interest of *Smith* v. *Scott* is on the question of nuisance. Here, Pennycuick V.-C. applied the rule in *Harris* v. *James*, *i.e.* that a landlord is not liable for the nuisance committed by a tenant unless, exceptionally, he can be said to have authorised it.[13] This has been held to mean either express authorisation, or (at the minimum) where the nuisance is virtually certain to result from the purposes for which the property is let.[14] Pennycuick V.-C. commented that the test was authorisation and not foresight, and so although the Council knew the Scotts were likely to cause a nuisance, that knowledge was insufficient when the conditions of tenancy expressly prohibited the committing of a nuisance, thus confounding any possible argument of implied authority.[15]

[7] (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.
[8] [1933] Ch. 89.
[9] With respect to Bennett J. a finding which looks nearly as odd as suggesting that the woollen underpants in *Grant* v. *Australian Knitting Mills* [1936] A.C. 85 were a *Rylands* v. *Fletcher* "dangerous thing" which "escaped" from D's factory. Both seem remote from the typical *Rylands* situation, in that the "escape" would be the conscious decision of the caravan-dwellers or the factory-owner respectively.
[10] Such reasoning would certainly surprise Mason C.J. and the majority of the High Court of Australia in *Burnie Port Authority* v. *General Jones* (1994) 120 A.L.R. 42, holding that *Rylands* v. *Fletcher* is within ordinary *Donoghue* v. *Stevenson* [1932] A.C. 562 principles.
[11] [1977] Q.B. 966 (cricket balls hit over fence; liability in both nuisance and negligence). But *cf.* *O'Leary* v. *Islington L.B.C.* (1983) 9 H.L.R. 81, where *Smith* v. *Scott* was approved by the Court of Appeal on this point (no duty carefully to enforce [nuisance] clause in tenancy agreement for benefit of a fellow tenant).
[12] See *e.g.* *Cambridge Water Co.* v. *Eastern Counties Leather plc* [1994] 2 A.C. 264.
[13] (1876) 35 L.T. 240. See also *Malzy* v. *Eichholz* [1916] 2 K.B. 308.
[14] See *Rich* v. *Basterfield* (1847) 4 C.B. 783; *Pwllbach Colliery* v. *Woodman* [1915] A.C. 634.
[15] Cf. *Tetley* v. *Chitty* [1986] 1 All E.R. 663, where the emphasis was firmly upon the foreseeability of future nuisance, when the land was let for the purposes of a go-carting track.

The most serious objection to this approach is that it is incompatible with the House of Lords' decision in *Sedleigh-Denfield* v. *O'Callaghan*,[16] where it was held that an occupier of land may be liable in nuisance for the acts of a third party (*in casu* a trespasser), providing he could be said to have "continued or adopted" the nuisance created. Since "continuing" is simply a matter of failing to stop the nuisance once there is knowledge or means of knowledge, the *Harris* v. *James* test of "express or implied authorisation" might be said to set the threshold of liability too high. Yet the two approaches are in fact quite distinct, the older landlord rule focusing upon the moment of the initial demise (at which point the need for express/implied authority makes obvious good sense), with *Sedleigh-Denfield* being an *ongoing* potential liability. Thus the rules may in fact coexist, that is to say subsequent *Sedleigh-Denfield* liability is additional to any liability based upon the lease itself (where authorisation is still the key). However, as *Sedleigh-Denfield* was apparently not cited in *Smith* v. *Scott*,[17] the Vice-Chancellor may simply not have considered the additional possibility for liability in nuisance, and so his decision might well be seen as *per incuriam* on the vital point. The question was however considered in *Page Motors* v. *Epsom and Ewell B.C.*,[18] where P claimed damages from the defendant authority for the depredations wreaked by gypsies who had been encamped on D's neighbouring land for some five years. The Court of Appeal held D liable, essentially after a straightforward application of the *Sedleigh-Denfield* principle. Having cited from the speech of Lord Wright in that case,[19] Ackner L.J. held that in failing to remove the gypsies (indeed, the D Council had obtained two High Court possession orders, but failed to enforce them), D had adopted and continued their damaging activities. He dismissed an argument by D's counsel that an occupier must evince a positive desire to make use of the nuisance for his own benefit, before he may be said to "adopt" it. Later, Ackner L.J. noted that *Sedleigh-Denfield* was not cited, and the relevant point not taken, in *Smith* v. *Scott*.[20] While the latter was not explicitly overruled in *Page Motors*, one would of course expect the later decision of the Court of Appeal to prevail when the two cases are apparently irreconcilable. Against this, it has to be admitted that *Smith* v. *Scott* was referred to with approval by the

[16] [1940] A.C. 880.
[17] [1973] Ch. 314.
[18] (1982) 80 L.G.R. 337.
[19] [1940] A.C. 880, 904.
[20] *Ante*.

House of Lords in *Southwark L.B.C.* v. *Mills*.[21] Yet that approval is purely obiter, since the central point of the decision was that the activities complained of could not amount to a nuisance, and "if the neighbours are not committing a nuisance, the [landlords] cannot be liable for authorising them to commit one."[22] Further, the matter under consideration here was not discussed in argument, nor was *Page Motors* even cited to their Lordships.

II. The Reconciliation? *Hussain* and *Lippiatt*

After a period of dormancy, the issue has recently received the full attention of the appellate courts in *Hussain* v. *Lancaster C.C.*[23] and *Lippiatt* v. *South Gloucestershire Council*.[24] In *Hussain*, P kept a shop which was subjected to a disgracefully long and persistent campaign of racially motivated harassment. The perpetrators being (in the main) tenants on the D council's estate, P claimed in both nuisance and negligence; the action failed on both counts. Here we shall concentrate upon the nuisance claim. One ground for the decision was that there was insufficient connexion between the assailants and D's land (*i.e.* they were not acting *qua* tenants at all, see *post*); the second ground was to apply *Smith* v. *Scott*. Counsel for P argued that that case had been superseded by *Page Motors*, on the grounds described above. With respect, the response of the Court of Appeal was unconvincing. Hirst L.J. (with whom Thorpe and Hutchison L.JJ. agreed) was content to distinguish *Page Motors* on the ground that in that case there were positive acts of adoption of the gypsies' nuisance (provision of water supply, rubbish skips and so forth), these being absent in *Hussain*. But this distinction is surely tenuous: the universally accepted interpretation of *Sedleigh-Denfield* v. *O'Callaghan*[25] is that occupiers are liable for adopting *or* continuing a nuisance created by a third party, liability not turning on whether there are positive acts of adoption or merely passive continuation (failure to abate). This is pellucidly illustrated by the very passage from Lord Porter's speech which Hirst L.J. himself quotes earlier on in *Hussain*: "[T]he true view is that the occupier of land is liable for a nuisance existing on his property to the extent that he can reasonably abate it, even though he neither created it nor received any benefit from it. It is enough if he permitted it to continue after he knew, or ought to have known,

[21] [2001] A.C. 1, 15 (Lord Hoffmann). See, similarly, Lord Millett's express approval at p. 22 of *Malzy* v. *Eichholz* [1916] 2 K.B. 308.
[22] [2001] A.C. 1, 16, *per* Lord Hoffmann.
[23] [2000] Q.B. 1.
[24] [2000] Q.B. 51.
[25] [1940] A.C. 880.

of its existence."[26] There is no authority for the distinction drawn by Hirst L.J. It runs contrary to many decisions where passive continuation has been the basis for liability.[27]

A more convincing reconciliation of *Smith* v. *Scott* with *Page Motors* is to be found in *Lippiatt* v. *South Gloucs. Council*.[28] In that case, P farmers complained of the damage done by travellers living upon the adjoining land of the D council; distinguishing *Hussain*, the Court of Appeal allowed P's appeal against the judge's striking out of his claim as disclosing no cause of action. Sir Christopher Staughton noted that *in casu* (as in *Page Motors*) the perpetrators were licensees of the occupier, whereas *Hussain* and *Smith* v. *Scott* concerned tenancies *stricto sensu*. Thus he distinguished between licensors' liability for nuisances of licensees (where the *Sedleigh-Denfield* approach applies in the normal way) and landlords' liability for tenants (the more restrictive rule in *Harris* v. *James*[29]). While this effects a neat restoration of harmony to the authorities (and indeed was the basis upon which nuisance liability in *A.-G.* v. *Corke*[30] was suggested in *Smith* v. *Scott*), it may be questioned whether the lease-licence distinction should be the key to liability in such cases.

The leading authority on that distinction, enjoying great importance for the applicability of the Rent Acts is *Street* v. *Mountford*,[31] where the House of Lords held that, fundamentally, the question is whether the occupier has exclusive possession *vis-à-vis* the freeholder. If so, there is a lease. If not, a licence: the licensee does not enjoy exclusive possession as against the licensor. By contrast, as Lord Templeman says, a tenant is to be viewed truly as "owner *pro tempore*" during the period of the tenancy.

Yet should exclusive possession by the creator of the nuisance provide the touchstone for excluding applicability of *Sedleigh-Denfield*? Since liability under that case depends upon the defendant's opportunities to learn about and to abate the nuisance, would not the extent of those opportunities be a more appropriate test for liability? Certainly, the *Street* v. *Mountford* lease-licence distinction is not coterminous with the degree of factual control. So a landlord, although excluded from possession while the tenancy persists, may yet be in a strong position to control the tenants' user

[26] *Ibid.* at p. 919.
[27] See *e.g. Goldman* v. *Hargrave* [1967] 1 A.C. 645 (failure to extinguish fire started by lightning). Lord Wilberforce commented that "The basis of the occupier's liability lies not in the use of his land; in the absence of 'adoption' there is no such use; but in the neglect of action in the face of something which may damage his neighbour.": *ibid.* at p. 661.
[28] [2000] Q.B. 51.
[29] (1876) 35 L.T. 240.
[30] [1933] Ch. 89.
[31] [1985] A.C. 809.

of the land either by express terms of the lease enabling him to enter and abate the nuisance, or by (the threat of) termination of the tenancy. A periodic tenancy is terminable on notice equivalent to one of the periods, and this may commonly be as short as one week.[32] Even for secure tenancies under the Housing Act 1985 and assured tenancies under the Housing Act 1988, "conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality" provides a ground for repossession by the landlord.[33] The extreme example of de facto control by the landlord is the tenancy at will, in which the occupier is a true "tenant in possession" (who may therefore maintain a trespass action against strangers), but whose right of occupation may be terminated at any time by the landlord, without notice. At the other extreme, of course, is the long lease for term of years, with payment of a small ground rent, where the tenant is truly in the position of a freehold owner *pro tempore*. But it hardly follows that in every grant of a lease (exclusive possession) the landlord loses all power to abate nuisance committed on the land by the tenant.

Conversely, it may be that a licensor's ability to control licensees is far from absolute. It is clear that with a contractual licence, the courts may be willing to grant both negative injunctions and specific performance to enforce compliance with the terms of the contract.[34] During the period of its duration, therefore, temporary as it may be, the licence can be just as irrevocable as the lease for term of years—contrast the terminability of a periodic tenancy. Quite how much control the licensor retains will depend on the terms of the contract, and the court might well imply into an otherwise irrevocable licence the condition that the licensee be of good behaviour. Certainly, in the situation of a licensee creating an actionable nuisance to neighbouring occupiers it is virtually inconceivable that the court would grant discretionary equitable remedies to restrain his ejection by the licensor: he who comes to equity must come with clean hands. Still, the point is that in principle, the situations where a landowner divests himself of effective control of the land do not coincide precisely with the grant of a tenancy.

The argument that degree of control should be the relevant test receives support from *Mint* v. *Good*, where the Court of Appeal decided that a right to enter for the purposes of repair should be

[32] Although the minimum notice is four weeks for residential premises: Protection From Eviction Act 1977.

[33] See Housing Act 1996 ss. 144 and 148; also Rent Act 1977, Schedule 15, Part I, Case 2.

[34] *E.g. Verrall* v. *Great Yarmouth B.C.* [1981] Q.B. 202 (party conference; performance of licence not yet commenced).

implied into a weekly tenancy, even when not expressly reserved by the landlord. Accordingly, the landlord was rendered liable to passers-by injured by the defective state of the premises.[35] Denning L.J. (with whom Birkett L.J. agreed) commented:

> [T]he occupying tenant of a small dwelling-house does not in practice do the structural repairs, but the owner does ... If a passer-by is injured ... he should be entitled to damages from someone, and the person who ought to pay is the owner, because he is in practice responsible for the repairs. This practical responsibility means that he has de facto control of the structure for the purpose of repairs and is therefore answerable in law for its condition ... I cannot think that the liability of the owner to passers-by depends on the precise terms of the tenancy agreement between the owner and the tenant, that is to say, on whether he has expressly reserved a right to enter or not. It depends on the degree of control exercised by the owner, in law or in fact, for the purpose of repairs.[36]

In the related area of occupiers' liability[37] there is a very similar approach to the question of who is an "occupier". In the leading case the emphasis of the House of Lords is firmly upon deciding who has control of the premises (and dual control can lead to concurrent occupation).[38] Admittedly the context of both these areas is somewhat different from our concerns here, and Somervell L.J. in *Mint* v. *Good*[39] found no guidance from the speeches in *Sedleigh-Denfield*.[40] Yet if a landowner can be made liable for the state of premises on the grounds of his de facto control, it is hard to see why such control should not also determine his liability for acts of third parties thereon.

The only distinction between *Sedleigh-Denfield* and the "defective premises" sort of case is the interpolation of a human actor between the landowner and P's damage. In other words, the "real" cause of the damage is the trespasser/licensee/tenant, not the owner himself. Of course, it is a familiar and robust principle of common law that I am not my brother's keeper (forcefully expounded by Lord Goff[41]). But this individualistic philosophy gives way in the face of particular reason why I should control my brother: and prominent amongst those exceptional cases are

[35] [1951] 1 K.B. 517. See now Defective Premises Act 1972, s. 4.
[36] *Ibid.* at p. 527.
[37] Now governed by the provisions of the Occupiers' Liability Acts 1957 and 1984.
[38] *Wheat* v. *Lacon* [1966] A.C. 552 (brewery remained in occupation of quarters above pub, despite manager living there).
[39] [1951] 1 K.B. 517, 524.
[40] [1940] A.C. 880.
[41] In *Smith* v. *Littlewoods* [1987] A.C. 241.

situations where D is de facto well-placed to exercise such control.[42] Of course, that rationale can account also for *Sedleigh-Denfield* itself, albeit that that case was seen as a restriction of occupier's strict liability in nuisance, as opposed to positive creation of a duty of care *in vacuo*.

It is hard to resist the conclusion that a pure *Sedleigh-Denfield* test, dependent on degree of control, should now be recognised as supplementing the rule in *Harris* v. *James*.[43] There is no good justification to retain a special rule limiting the lessor's liability to his authorisation at the time of executing the lease. The editor of *Winfield and Jolowicz* warns that it would be "a great step" to apply *Sedleigh-Denfield* to a D not in occupation.[44] In one sense this simply restates a preference for the exclusive possession test of liability already rejected, with regard to the freeholder's liability.[45] But a more serious concern is the width of potential liability once any link with the land is severed: could Environmental Health Officers be liable in nuisance for failing to close down noisy parties, on the basis that they have failed to exert their legal powers of control? This seems highly unlikely in the light of *Stovin* v. *Wise*, where the House of Lords took a very restrictive view of liability for failing to exercise statutory powers.[46] If the position of landlords is different it is because the simple fact of ownership of the land gives them additional responsibility for what is taking place upon it, over and above those more distantly involved. This provides reason not to accept for landlords the justifications for general absence of liability for pure omissions identified by Lord Hoffmann in *Stovin*.[47] The obligations of ownership both single them out from the crowd, and provide a reason for them to take action. Indeed this was expressly conceded in *Stovin* itself.[48] So whatever the undoubted merits of *Street* v. *Mountford*[49] in its own sphere of influence, it cannot be right to leave landlords' liability in

[42] *E.g. Carmarthenshire C.C.* v. *Lewis* [1955] A.C. 549, child and school; *Dorset Yacht Co.* v. *Home Office* [1970] A.C. 1004, Borstal boys and prison officers.
[43] (1876) 35 L.T. 240.
[44] 15th edn., p. 521, n. 30.
[45] Unless "occupier" has the meaning given to it in *Wheat* v. *Lacon* [1966] A.C. 552, in which case occupation and control are equated, which is consistent with the *Sedleigh-Denfield* approach.
[46] [1996] A.C. 923.
[47] *Ibid.* at pp. 943–944: "In political terms it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect. A moral version of this point may be called the 'why pick on me?' argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another?"
[48] "The ownership or occupation of land may give rise to a duty to take positive steps for the benefit of those who come upon the land and sometimes for the benefit of neighbours": *ibid.* at p. 944 *per* Lord Hoffmann, on the authority of *Goldman* v. *Hargrave* [1967] 1 A.C. 645.
[49] [1985] A.C. 809.

nuisance under its sway just because no-one thought to consider *Sedleigh-Denfield's Case* in *Smith* v. *Scott*.[50] But perhaps only the House of Lords is in a position to restore order.[51]

III. Standard of Care Demanded of Landlords

What standard of care is demanded from the landowner held responsible for acts of third parties? It will be noted that this question still requires an answer even if the *Harris* v. *James*[52] rule continues to hold the field *vis-à-vis* lessees, since no-one doubts that *Sedleigh-Denfield*[53] applies to trespassers and licensees in any event. In that case itself, the House of Lords simply said that a landowner must take reasonable care to abate a nuisance of which he has (means of) knowledge. The main question is the applicability of *Goldman* v. *Hargrave*[54] (accepted to represent English law in *Leakey* v. *National Trust*[55]). Both of those cases involved the defendant landowner being faced with a natural hazard on his land, threatening damage to his neighbours (burning tree and crumbling Burrow Mump respectively). It was held that in deciding whether D took reasonable care when faced with such an emergency, subjective factors such as his physical strength and pecuniary resources should be taken into account (in contrast with the normal objective standard[56]).

In *Page Motors* v. *Epsom and Ewell B.C.*[57] it was held that this approach applied equally to the situation under consideration (removal of nuisance-creating licensees). Indeed, this seems to have been conceded by the plaintiff, for argument centred around the exact scope of the *Goldman* principle, rather than its applicability, and in particular whether the court may consider factors other than the financial and physical resources of D. It was contended by P's

[50] [1973] Ch. 314.

[51] In *Mowan* v. *Wandsworth L.B.C.* (21 December 2000) the Court of Appeal again applied *Smith* v. *Scott*. The claimant argued that the common law should be developed so as to protect her right to private and family life (Article 8, European Convention on Human Rights, given domestic effect by the Human Rights Act 1998). Sir Christopher Staughton held that the *Smith* v. *Scott* principle was too well established to permit of such development (describing this as a "lamentable result"). He relied in particular upon the House of Lords' decision in *Southwark L.B.C.* v. *Mills* [2001] A.C. 1, although, as suggested above, on this point their Lordships' dicta were quite unnecessary for the decision of the case, and the matter had not been canvassed in argument. Peter Gibson L.J. (the other member of the court) rejected the argument that the claimant would be bereft of a remedy, and thus that the Convention required the court to fashion one. He pointed to the possibility of an injunction against the neighbour (at least doubtful, given her mental disorder: see *Wookey* v. *Wookey* [1991] Fam. 121), and also the possibility of judicial review (*sed quaere*).

[52] (1876) 35 L.T. 240.

[53] [1940] A.C. 880.

[54] [1967] 1 A.C. 645 (P.C.).

[55] [1980] Q.B. 485 (C.A.).

[56] See *e.g. Nettleship* v. *Weston* [1971] 2 Q.B. 691, especially Lord Denning M.R.

[57] (1982) 80 L.G.R. 337.

counsel that the trial judge (Balcombe J.) had erred in taking into account the various other matters which gave the Borough Council pause for thought in their eviction procedure—not least the fact that both Surrey County Council and the Department of the Environment had requested them not to act before a proper strategy for accommodating the gypsies was in place. Otherwise, it was feared (with good reason) that an early eviction would simply transfer the same difficulty somewhere else. The Court of Appeal unanimously upheld Balcombe J.'s judgment. They were well aware of the difficulties in which the D council found themselves, and refused to read *Goldman* and *Leakey* restrictively: "I do not think that the extent of the duty in such a case as the present can be adequately considered without a broad review of the circumstances of the defendant."[58] As Ackner L.J. noted, "the Council acted reasonably in carrying out the democratic process of consultation, and this, as the judge found, takes time".[59] Indeed, Sir David Cairns thought that the judge had been too severe in allotting the Council only a year in which to act.[60] This seems entirely correct.

It may be very difficult to decide exactly what steps are required of the landlord, once it is conceded that he could and should have intervened.[61] In particular, when his basic sanction against unruly conduct is eviction, it may be that the courts would take a cautious approach towards requiring its use.[62] It would seem very harsh to evict tenants on the basis of one bad party, and it should not be forgotten that any court proceedings will be a significant drain upon the time and resources of the landlord himself. As the tools of control are rather crude in effect, their use can be obligatory only in clear cases where force is obviously justified.

IV. The Special Position of Public Authorities

All of the above is of general application to private landlords, housing associations, and local authority landlords alike. Clearly, though, special considerations may arise regarding the last named, in particular because their decision to evict unruly tenants (in effect, their ability to do this) will be constrained by their obligation to house the homeless.[63] The first question which arises is thus the

[58] *Per* Fox L.J. at p. 354.
[59] *Ibid.* at p. 351.
[60] *Ibid.* at p. 356.
[61] For the delicacy of the task see, *e.g.* D. Hughes, V. Karn and R. Lickiss (1994) 16 J.S.W.F.L. 201, and J. Nixon, C. Hunter and S. Shayer, *Neighbour Nuisance, Social Landlords and the Law* (Sheffield 2000).
[62] Although, for the preference of Manchester C.C. for using injunctions instead of eviction, see: B. Pitt [2000] J.H.L. 90. For some advantages of using injunctions to enforce "no nuisance" covenants, see Hughes, Karn and Lickiss, *op. cit.* at pp. 218–221.
[63] Housing Act 1996, Part VII (especially s. 193).

defence of statutory authority. In a sense, ordinary provision of council housing (*i.e.* not in the course of housing the homeless) seems a simple exercise of landowners' inherent rights of letting; at one remove, however, it is an indirect performance of the authority's statutory housing duty, since it bears the ultimate responsibility for those who cannot find accommodation elsewhere.[64] The leading modern case on statutory authority as a defence in nuisance is *Allen* v. *Gulf Oil*.[65] The key point is that there is immunity from suit if a nuisance is bound to result from the activity required or authorised by the statute (*i.e.* provided there is no "negligence": there must be all reasonable regard and care for the interests of other persons).[66] This gives rise to great difficulties of application in the context of the duty to house (assuming the relevant person to be unneighbourly in comportment). In one sense there is no obligation to house him next to the particular (notional) complainant, and so there is a wide discretion which must be exercised so as not to interfere with private rights.[67] On the other hand, wherever he is sited someone will be affected, so the nuisance might truly be viewed as "the inevitable result of the [conduct] authorised."[68] Is there a duty to cite problematic tenants in a secure unit or somewhere else where their activities do not harm neighbouring landowners? Such questions would be difficult for a court to answer; the scenario has also moved a long way from the typical *Smith* v. *Scott* type situation (where the steps would have to be: eviction by council; homelessness;[69] performance of duty to house, before the issue was faced).

If it is indeed impossible for a council to perform its function without causing nuisance to at least some neighbouring landowners, it would stultify performance of the housing duty altogether were the court to grant injunctions against the council (*i.e.* requiring eviction of the tenants: the cycle would then begin again). It might be thought an acceptable compromise to grant damages in lieu of the injunction; thus the council could perform the statutory duty, while the loss would be spread among the community instead of lying heavy upon the immediate neighbours. It must be said that such an approach, whatever its merits, is ruled out by very strong authority.[70] In particular, *Kennaway* v. *Thompson*[71] reaffirms the

[64] *Ibid.*
[65] [1981] A.C. 1001.
[66] *Ibid.* at p. 1011 (Lord Wilberforce).
[67] *Metropolitan Asylum District* v. *Hill* (1881) 6 App. Cas. 193 (liable for choosing to build a pox hospital where it would constitute a nuisance).
[68] *Per* Viscount Dunedin in *Manchester Corporation* v. *Farnworth* [1930] A.C. 171, 183.
[69] This might be deemed intentional under the Housing Act 1996: see ss. 190, 191.
[70] See, generally, S. Tromans [1982] C.L.J. 87 on the question of injunctions as against damages in nuisance, criticising the English courts' fixation with the injunction.
[71] [1981] Q.B. 88, reasserting orthodoxy after *Miller* v. *Jackson* [1977] Q.B. 966.

rule in *Shelfer's Case* that "the circumstance that the wrongdoer is in some sense a public benefactor ... [has never] been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed."[72] This philosophy indeed underlies the whole statutory authority line of cases: action in nuisance means injunction, which means stultifying authorised statutory function. There is no attempt to reconcile the will of Parliament with the need to compensate the victim of nuisance.[73]

These matters reflect the broader issue of whether there should be public compensation for lawful government action.[74] As we have seen, there is no general common law principle to that effect.[75] Statute has sometimes provided a remedy: a highly relevant example is the Land Compensation Act 1973, which requires the relevant public body to compensate for depreciation of land values as a result of physical factors arising from public works.[76] The Act would seem not to apply to the instant problem: while unruly neighbour-nuisance might be forced within the list of physical factors[77] it seems hard to believe that housing of tenants could be "any [other] public works" on an *ejusdem generis* construction of the two specific examples given (highway; aerodrome).[78] Whether there should be a wider right to compensation for lawful action is a matter of ongoing debate. Pro-liability is simple fairness: when the whole community enjoys benefit from an activity it should compensate one upon whom the burden specifically falls. In France the courts have long applied such a risk principle, although it is severely restricted by the need for special and abnormal damage.[79] The basic problem with any such theory is in defining the limits: land values blighted by building of prison or ugly office block or school; business harmed when bypass reduces trade in town; amenity loss on closure of playground, post office, village school, etc. None of these has strong claims on the public purse, yet it would be extremely difficult to come up with any coherent theory to delimit the truly deserving cases. Perhaps we should not be surprised if in France "the decisions are unpredictable and not

[72] *Shelfer* v. *City of London Electric Lighting Co.* [1895] 1 Ch. 287, 316 *per* Lindley L.J.
[73] The injustice of authorising, by statutory implication, uncompensated infringement of P's property rights weighed heavily with Lord Keith, dissenting, in *Allen* v. *Gulf Oil* [1981] A.C. 1001.
[74] See C. Harlow, *Compensation and Government Torts* (London 1982).
[75] Contrast the implication of a duty to compensate for (lawful) destruction of property under the war prerogative in *Burmah Oil* v. *Lord Advocate* [1965] A.C. 75 (reversed by War Damage Act 1965!).
[76] Section 1(1).
[77] *Ibid.* s. 1 (2) "noise, vibration, smell, fumes, smoke ... discharge onto land of any solid or liquid substance".
[78] *Ibid.* s. 1(3).
[79] See Harlow, *op. cit.* pp. 102–106.

entirely consistent, and there is such difficulty in extracting any clear rules of liability that it can be argued that the alleged 'principle' cannot be formulated at the level of a general principle at all: rather the courts simply have a discretion to give relief in exceptional cases".[80] The English rule at least provides a bright line of no-recovery.

Despite the theoretical interest and difficulty, the question of public authority liability for tenants has received little judicial attention (and the question of statutory authority apparently none at all). In *Page Motors*, Schiemann Q.C. argued that in deciding not to evict the gypsies, the Council had been acting within the limits of its discretion (in the *Wednesbury* sense[81]), and, accordingly, could not be liable in nuisance.[82] This was flatly rejected by the Court of Appeal, whose reasoning is not, however, with respect convincing. Ackner L.J. was content to distinguish cases such as *Cannock Chase D.C.* v. *Kelly*[83] and *Anns* v. *Merton L.B.C.*[84] on the basis that these cases concerned statutory powers, whereas there was no specific power in *Page Motors* itself. In the case at hand, he held, there was no question of the council acting differently from any other landowner.[85]

But this seems highly contestable. Especially given that the court proceeded to approve the judge's consideration of the special political difficulties of the council, which no private landlord would have had to face. If this justifies giving the council extra leeway in the abatement of the nuisance, why maintain that there are no special issues at stake? The focus on statutory powers might also seem to hint at a strict conception of the ultra vires doctrine untenable since the House of Lords reviewed the non-statutory power in *C.C.S.U.* v. *Minister for the Civil Service*.[86] The court was perhaps seizing on the traditional "rights infringement" approach to nuisance, where the emphasis is on P's rights in land, these not to be outweighed by considerations of the public interest.[87] But in the corner of nuisance governed by *Sedleigh-Denfield* v. *O'Callaghan*,[88] the fault basis of liability is quite patent, and any approach founded upon strict protection of property rights is wholly inappropriate. As the liability is effectively based on

[80] S. Arrowsmith, *Civil Liability and Public Authorities* (Hull 1993), p. 246.
[81] *Associated Provincial Picture Houses* v. *Wednesbury Corpn.* [1948] 1 K.B. 223.
[82] (1982) 80 L.G.R. 337—see P.F. Cane [1983] P.L. 202.
[83] [1978] 1 W.L.R. 1.
[84] [1978] A.C. 728.
[85] (1982) 80 L.G.R. 337, 347, similarly *per* Fox L.J. at p. 353.
[86] [1985] A.C. 374. But see H.W.R. Wade, *Constitutional Fundamentals* (London 1980), pp. 46–53, criticising invocation of the term "Prerogative" in such contexts.
[87] *Shelfer's Case* [1895] 1 Ch. 287, see further *ante*.
[88] [1940] A.C. 880.

negligence (and the courts in *Goldman* and *Leakey* significantly declined to distinguish the two torts), it would be more consistent for the court to apply the jurisprudence relating to duties of care owed by public authorities.[89] Unfortunately, *Hussain* and *Lippiatt* also fail to consider this point. In the former, *X (Minors)* v. *Bedfordshire County Council*[90] was interpreted to preclude a duty of care in *negligence*, but no mention of this was made with respect to the nuisance claim.[91] In *Lippiatt*, the preliminary issue revolved around the question of the third parties' nexus with D's land and so, again, nuisance was not argued on the basis of public authority immunity.[92]

It is beyond the scope of this article to examine in detail the voluminous case law upon public authorities' liability in negligence.[93] A rich seam if ever there was one, the issue has merited two recent visits to Strasbourg[94] and continues to act as an ineluctable source of fascination for the House of Lords.[95] A tentative conclusion from all of this (for the time being) is that there is (still) an area of public authority activity which cannot give rise to a claim in negligence (see especially *X* v. *Bedfordshire*[96]), now to be known as non-justiciability.[97] This was explained in the following way by Lord Clyde in *Phelps*: "Where a statutory authority has to make a choice between various courses of action, all of which are within its powers, and the choice involves a weighing of resources and the establishment of priorities, it will in general be inappropriate that someone injured through the particular decision which the authority has made should have a remedy in damages."[98] It will be noted that this might seem easily to cover the decisions of local authorities faced with illegal gypsy encampments, or problem tenants. But the tenor of the two most recent House of Lords cases has been to draw this "no-go area"[99] as narrowly as possible, and instead to concentrate upon the weighing of policy factors (under the rubric of "fair just and

[89] *Quaere* whether negligence in this sense would preclude any reliance on defence of statutory authority: *cf.* text to n. 65 above, *et seq.*
[90] [1995] 2 A.C. 633.
[91] [2000] Q.B. 1.
[92] [2000] Q.B. 51.
[93] See *e.g.* S.H. Bailey and M.J. Bowman, *Public Authorities Liability Revisited* [2000] C.L.J. 85, and the references therein.
[94] See *Osman* v. *United Kingdom* (1998) 29 E.H.R.R. 245; *Z* v. *UK*, 10 May 2001.
[95] *X (Minors)* v. *Bedfordshire C.C.* [1995] 2 A.C. 633, *Stovin* v. *Wise* [1996] A.C. 923, *Barrett* v. *Enfield L.B.C.* [1999] 3 W.L.R. 79, *Phelps* v. *Hillingdon L.B.C.* [2000] 3 W.L.R. 776.
[96] [1995] 2 A.C. 633
[97] See the speeches of Lord Slynn and Lord Hutton in *Barrett* v. *Enfield L.B.C.* [1999] 3 W.L.R. 79.
[98] [2000] 3 W.L.R. 776, 810.
[99] The term used by Bailey and Bowman, *loc. cit.*

reasonable"[100]), in the context of the facts of individual cases.[101] This is no doubt a tacit response to the decision of the European Court of Human Rights in *Osman* v. *U.K.*,[102] which held[103] that striking out claims on the basis of a blanket "immunity" (*in casu* for the police[104]) without adverting to the particular facts of the case was a denial of the right to a fair trial under Article 6 of the European Convention. An alternative to "fair, just and reasonable" as a tool for controlling liability is the flexible test for *breach* of duty, as emphasised by Lord Hutton in *Barrett*.[105] Breach is a factual question *par excellence*. The effect of *Osman* is therefore to place the ball firmly in the court of the trial [*sic*] judge: opportunities for consistent development of the law by appellate courts are dwindling in the face of the overwhelmingly factual emphasis.

What then are the implications for public authority landlords? It is arguable that housing decisions are so delicate as to be non-justiciable. The special difficulty for the authority is its "no-win situation": if it moves problem tenants they will likely as not make an equal nuisance of themselves in the new location. Or travellers moved-on will congregate in the next town, or park, or grass verge. With the obligations incumbent upon them to provide housing,[106] these are problems which authorities cannot avoid. Essentially this raises the same sorts of issue considered above, in relation to the defence of statutory authority. But it has to be recognised that the current climate for striking-out claims on the ground of non-justiciability is frosty indeed.[107] More likely, then, that the policy issues involved will be considered broadly on the facts of each case; this cannot, of course, in nuisance, lead to a denial of duty altogether, as in negligence, since the parties are ex hypothesi "proximate". Rather, the authority's difficulties must be taken into account in deciding whether it acted reasonably,[108] which was, of course, the approach taken by the Court of Appeal in *Page Motors*.[109] It may be that, after all, that case is consistent with current doctrine; it is not that an authority is in exactly the same

[100] Caparo Industries v. *Dickman* [1990] 2 A.C. 605.
[101] *E.g.* Lord Slynn giving the leading judgment of their Lordships in *Phelps*.
[102] *Ante*.
[103] To the evident displeasure of Lord Browne-Wilkinson in *Barrett*, *ante*. See also the acidic comments of Lord Hoffmann (who gave the leading judgment in *Stovin*) in 62 M.L.R. 162–164.
[104] *Osman* v. *Ferguson* [1993] 4 All E.R. 344, applying *Hill* v. *Chief Constable of the West Yorkshire Police* [1989] A.C. 53.
[105] [1999] 3 W.L.R. 79, 115. See also *per* Lord Slynn *ibid.* at pp. 97–98.
[106] Housing Act 1996, Part VII.
[107] See in particular *Stovin* v. *Wise* [1996] A.C. 923, *Barrett* v. *Enfield L.B.C.* [1999] 3 W.L.R. 79.
[108] Lord Hutton in *Barrett*, n. 105 above.
[109] (1982) 80 L.G.R. 337.

position as a normal landowner (pace Ackner L.J.) but, rather, that its special position renders it liable to a different extent. Alternatively, the courts might assert themselves by striking claims out in limine as non-justiciable, or uphold a defence of statutory authority.[110]

V. Nexus Between Culprits and Land

Again, this issue applies to landowners' liability for nuisances of third parties generally, and is not confined to the landlord-tenant situation. Of course, the point did not arise in *Sedleigh-Denfield* v. *O'Callaghan*, where the nuisance of the blockage-prone culvert was created upon the land of D and stayed there.[111] The matter may be different when the nuisance is the itinerant tenants themselves. So in *Hussain* v. *Lancaster C.C.*, Hirst L.J. declared that the essence of a nuisance was D's use of D's land, and that since the outrageous harassment had taken place in P's shop and its environs, and was not linked to the tenants' occupation of the D council's accommodation in any particular way, there was no nuisance for which the council was liable.[112] In *Lippiatt* v. *South Gloucs. Council* this was distinguished. The damage there was in large part due to the travellers on D's land coming onto the adjacent land of P. Rejecting a submission that the nuisance must take place upon D's land, the Court of Appeal held that it was enough that the land was used as a base for the activities complained of, as, arguably, South Gloucestershire Council's land had been.[113] The distinction may be difficult to apply, at the margins, but the principle is sensible and indeed inevitable. No-one could suggest that a University would be liable for the activities of its undergraduate tenants during an Ibizan vacation, however much havoc they might cause there.

It will be noted that Hirst L.J. expresses himself in wider terms than were strictly necessary for the resolution of the case, talking indeed of the very essence of the tort of private nuisance being "the defendant's use of the defendant's land". This addresses the liability of the culprits themselves. It is respectfully submitted that the authority relied upon for the oracular pronouncement is weak, and,

[110] There remains the possibility of challenging the authority's inactivity by way of judicial review. All the reasons suggested in this passage for caution in negligence claims would apply equally to a *Wednesbury* unreasonableness challenge. It seems most unlikely that the court would effectively take over the running of the authority's housing stock by issuing specific mandatory orders (formerly "*mandamus*"), as opposed to requiring it to think again, were *Wednesbury* unreasonableness made out. And, of course, a tort must still be shown if damages are sought.

[111] [1940] A.C. 880.

[112] [2000] Q.B. 1.

[113] *Cf. A.-G.* v. *Corke* [1933] Ch. 89, *Thompson-Schwab* v. *Costaki* [1956] 1 W.L.R. 335.

moreover, the limitation would have undesirable effects on the development of the tort.

As for authority, Hirst L.J. quotes from *Sedleigh-Denfield's Case*, *e.g.* Lord Wright's reference to "interference by the defendants *in the user of their land*"[114] (emphasis of Hirst L.J.), and similar statements. But nothing of significance can attach to such statements in the context of that case, in which the nuisance *did* arise on D's land, and no-one would have said otherwise. Lord Wright cannot be ruling out liability of the trespasser who installed the defective drain, because this question was simply irrelevant in the case. Secondly, Hirst L.J. cites Lord Goff in *Hunter* v. *Canary Wharf*,[115] and in particular his Lordship's approval of Newark's article "The Boundaries of Nuisance".[116] But these pronouncements, too, are unconvincing in the present context, the eminence of their sources notwithstanding. It is true that Professor Newark gave as the first of his theses that he would "nail to the door of the Law Courts and defend against all comers" this general definition: "The term 'nuisance' is properly applied only to such actionable *user of land* as interferes with the enjoyment by the plaintiff of rights in land."[117] Yet the words emphasised are really "obiter", since throughout the article Professor Newark focuses upon the plaintiff, and whether he has an action, and if so what interest of the plaintiff's is protected. Nowhere does he consider who may be *liable*, so this dictum can be of little authority. Much the same problem bars reliance upon Lord Goff and his approving citation in *Hunter*. Since the issue was who may sue (and for what), and the altogether different question of who might be liable was not in any way relevant, Lord Goff cannot be taken to speak with that particular matter in mind.

Hunter v. *Canary Wharf* is notable for the clear reaffirmation of private nuisance as a tort to land. Thus the ratio decidendi that only the occupier of that land has *locus standi* to sue in the tort.[118] Furthermore, Lords Lloyd, Hoffmann and Hope were quite clear that damages in nuisance should be assessed according to the diminished capital or amenity value of P's land, and not proportionate to the personal discomfort caused (if any).[119] Lord Hoffmann went so far as to suggest that personal injury was never actionable in private nuisance.[120] Now all of this has impeccable

[114] [1940] A.C. 880, 903–904.
[115] [1997] A.C. 655.
[116] F.H. Newark (1949) 65 L.Q.R. 480.
[117] *Ibid.* at p. 489 (emphasis added).
[118] The heretical decision of the Court of Appeal in *Khorasandjian* v. *Bush* [1993] Q.B. 727 being overruled on this point.
[119] [1997] A.C. 655, at pp. 696, 706 and 724, respectively.
[120] *Ibid.* at p. 706.

historical pedigree, since nuisance has a clear and continuous descent from the twelfth century real actions, and always has been, therefore, a land-holder's action.[121] Until negligence devours all of the other torts, it must be recognised that different actions protect different interests, and have different rules of liability. *Pro tanto* the courts would do well to recall the plea of Lord Raymond C.J. in *Reynolds* v. *Clarke*: "We must keep up the boundaries of actions, or we will introduce the utmost confusion."[122] Hence the correctness of *Hunter*. But still this entirely proper concern cannot justify the proposed definition of Hirst L.J. in *Hussain*.[123] While it is true that the Assize of Nuisance in the time of Bracton was an action between freeholders,[124] the action on the case which came to supplement the real action in the 1360s and supplant it by 1601[125] was never so limited.[126] It would be a superlative example of ghostly forms of action ruling us from the grave[127] were the courts to ignore such developments and turn the clock back to the mid-13th century, out of an ahistorical desire for symmetry between P's rights and D's liabilities.

So *Hussain* cannot be justified by precedent, whether ancient or modern.[128] Nor would the results be desirable. Can we really want to exempt the hooligans themselves from liability? (And note that, somewhat inconsistently, Hirst L.J. ends his judgment with the observation that the remedies against the perpetrators which the plaintiffs "undoubtedly have" would be difficult to pursue.[129]) In *Lippiatt* it was suggested that the remedy in *Hussain* should be public nuisance,[130] but it is unlikely that in these situations (unless on the public highway) the conduct will always affect a class of Her Majesty's subjects generally, so as to be "public" enough for the criminal offence.[131] It should be noted that Sir Christopher Staughton, in his short judgment in *Lippiatt*,[132] is deeply sceptical about this aspect of *Hussain*.

[121] See D.J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 1999), pp. 98–106 and Newark, *loc. cit.*
[122] (1725) 1 Strange 634, 635.
[123] *Ante.*
[124] Bracton f. 234, apparently following Justinian, *Institutes*, 2.3.3.
[125] *Cantrell* v. *Church* Cro. Eliz. 845.
[126] Indeed, it was commonly argued that D's not being a freeholder was a reason why Case would lie rather than the Assize, *e.g.* Y.B. M.11 Hen. IV f.25 pl.48; Y.B. T.33 Hen. VI f.26 pl.10.
[127] *Cf.* Lord Atkin in *United Australia* v. *Barclay's Bank* [1941] A.C. 1, 29.
[128] And by contrast, Devlin J., Denning L.J. and Lord Radcliffe all assumed that a stricken tanker *at sea* could give rise to liability in private nuisance in *Southport Corpn.* v. *Esso Petroleum* [1953] 3 W.L.R. 773, [1954] 2 Q.B. 182 and [1956] A.C. 218 (*sub nom. Esso Petroleum* v. *Southport Corpn.*).
[129] [2000] Q.B. 1, 27.
[130] [2000] Q.B. 51, 61 *per* Evans L.J.
[131] *A.-G.* v. *P.Y.A. Quarries* [1957] 2 Q.B. 169. *Quaere* whether a group of aliens might also suffice.
[132] [2000] Q.B. 51, 64–65.

A final argument as to the undesirability of Hirst L.J.'s definition is that it would stymie the use of nuisance in the protection of privacy. While the controversy about the effect of the Human Rights Act 1998 upon private law is doubtless far from over,[133] we can recall here that in the House of Lords debate upon Lord Wakeham's proposed amendment to halt a law of privacy developing from incorporation of the European Convention, the Lord Chancellor stated that "the true view is that the courts will be able to adapt and develop the common law by relying on existing domestic principles in the laws of trespass, nuisance, copyright, confidence and the like, to fashion a common law of privacy".[134] In referring to nuisance, Lord Irvine L.C. perhaps had in mind a dictum of Griffiths J. in *Lord Bernstein* v. *Skyways*.[135] While holding that a single aeroplane flight over the plaintiff's country house was not an actionable nuisance, the learned judge remarked, significantly, that "if the circumstances were such that a plaintiff was subjected to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, I am far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief". Clearly, such an intrusion, and many other privacy invasions emanating from public places (the ubiquitous paparazzi) would not be actionable if the boundaries of nuisance are where Hirst L.J. holds them to be in *Hussain*.[136]

VI. Statutory Protection

Finally, and returning to the specific issue of "neighbours from hell" it will be considered if there is really any need to press common law nuisance into service, given the various alternative avenues which exist as a result of parliamentary activity. It is pertinent to consider what remedies are sought by victims in these cases. The primary requirement will be for some sort of legal intervention to restrain the objectionable conduct. On the other hand, it should not be thought that damages for past loss are irrelevant; in both *Page Motors*[137] and *Lippiatt*[138] the cases were important enough to be taken to the Court of Appeal when the perpetrators had been removed from the councils' lands, and so only damages remained as a live issue.

[133] See, *e.g.* M. Hunt [1998] P.L. 423; Buxton L.J. (2000) 116 L.Q.R. 48; Sir H.W.R. Wade (2000) 116 L.Q.R. 217; N. Bamforth (2001) 117 L.Q.R. 34.
[134] *Hansard*, HL Deb. Vol. 583 Col. 785 (24 November 1997), Lord Irvine of Lairg.
[135] [1978] Q.B. 479.
[136] *N.b.* even if the victim were within the seclusion of his house or garden.
[137] (1982) 80 L.G.R. 337.
[138] [2000] Q.B. 51.

(a) Anti-social behaviour

There are two overlapping provisions here. The Housing Act 1996[139] allows the local authority to apply for an injunction against (*inter alia*) behaviour which causes a nuisance to persons residing in various local authority accommodation.[140] The Crime and Disorder Act 1998[141] empowers the local authority, or the senior police officer of the relevant area, having consulted each other to apply to the magistrate's court for an order against an individual who has been causing harassment, alarm or distress in the area.

The obvious comment to make is that these are not self-help provisions, but rely upon local authority intervention. Given that it was the absence of such intervention which gave rise to the litigation in *Smith* v. *Scott, Page Motors, Hussain* and *Lippiatt*[142] in the first place, this poses a major problem. Of course, where the disruption is due to the tenants of a recalcitrant private landlord, the local authority may well consider applying for an order against them (it is hardly likely to do so when it is itself the offending landlord: the remedy has always existed, if it is willing to employ it). Finally, there is a possibility that the police might be prevailed upon to apply for an order under the Act of 1998, even against council tenants, and even in the face of local authority opposition. But given the requirement that the police consult that authority,[143] this must be somewhat unlikely. Still, some have welcomed the repositioning of such antisocial behaviour as a criminal justice matter, not one exclusively of housing management.[144] The court may attach a power of arrest to provisions of an injunction under the Housing Act 1996;[145] it seems there is no power of arrest for breach of an order made under section 1 of the Crime and Disorder Act, although breach can result in a maximum penalty of five years' imprisonment.[146]

(b) Protection From Harassment Act 1997

Although it has its origins in concern over high-profile "stalking" cases, this Act seems veritably pregnant with possibility (in this as in so many other contexts). It creates both a crime[147] and a statutory tort[148] of "harassment",[149] which seems to be a

[139] Section 152.
[140] See B. Pitt [2000] J.H.L. 90.
[141] Section 1.
[142] [1973] Ch. 314; (1982) 80 L.G.R. 337; [2000] Q.B. 1; [2000] Q.B. 51.
[143] Section 1(2).
[144] C. Hunter and T. Mullen (with S. Scott), *Legal Remedies for Neighbour Nuisance* (Joseph Rowntree Foundation, 1998), p. 47.
[145] Section 152(6).
[146] Section 1(10).
[147] Section 2.
[148] Section 3.
[149] Section 1.

remarkably wide concept (left undefined save that it includes causing a person alarm or distress[150]). The only limitation is that the harassment must arise from a "course of conduct",[151] but that would not pose an obstacle in the present context. The offence of harassment is an arrestable one,[152] and can lead to imprisonment for six months.[153] The victim may bring a civil action for both damages and an injunction to prevent continuation of the conduct. He can apply for a warrant for the arrest of the subject of such an injunction, if there has been breach thereof.[154]

Clearly this is a remedy which in no way depends upon local authority co-operation. No doubt the victim would prefer police assistance, but even if this is not forthcoming, the remedies are (in theory at least) in his hands. The only thing which remains to be seen is the way in which the courts interpret the Act, and its central concept of harassment. It seems to embrace a sweeping variety of conduct. Perhaps the "escape-hatch" is that harassment is not made out where D can show that in the circumstances, his conduct was reasonable.[155] But whether that would often be plausible in a neighbour-nuisance case serious enough to come to court must be doubted. It might also be the case that simple, unthinking boorishness would lack the "directed" quality which seems implicit in the idea of harassing someone; a strict adherence to such an approach would retard the use of the Act in this area.[156]

(c) Statutory nuisance

The relevant provisions are now to be found in the Environmental Protection Act 1990. Section 79 defines such a nuisance; section 80 gives the local authority powers to serve an abatement notice within its area; section 82 gives to any person aggrieved by such a statutory nuisance the right to apply to magistrates for an order requiring abatement. This last section avoids the problems of an unco-operative authority, discussed above. Indeed, the authority has a duty to inspect its area from time to time, and to take such steps as are reasonably practicable to investigate any complaint made to it by a person living within the area.[157] Breach of an abatement notice or order is an offence which carries a fine, that penalty increasing for each day in which the nuisance continues, following

[150] Section 7(2).
[151] *I.e.* at least two occasions, s. 7(3).
[152] PACE 1984 s. 24(2)(n), as inserted.
[153] Section 2(2).
[154] Section 4(3).
[155] Section 1 (3)(c).
[156] I am grateful to Professor Ibbetson for this point.
[157] Section 79(1).

conviction.[158] This avoids the need continually to re-apply to the court, as can occur with an injunction.

A problem arises, however, with the very definition of statutory nuisance, which seems not readily to cover the situation of neighbour harassment.[159] "Any premises" seems to envisage the building itself, not its inhabitants; to treat tenants as an "accumulation or deposit" seems highly dubious.[160] There is a specific mention of noise emitted from premises so as to constitute a nuisance; while this would not encompass all forms of harassment, it will invariably be one component thereof, so maybe this would form a "way in" to the provisions (although any abatement notice or order would inevitably suffer the same limitation). A major drawback with statutory nuisance is that it provides no remedy in damages.[161] There is a general power to make compensation orders in criminal matters, up to a limit of £5000 under the Powers of Criminal Courts Act 1973.[162] But this power will not avail the complainant in a situation giving rise to complicated issues of quantification. In *R.* v. *Liverpool Crown Court, ex parte Cooke*[163] it was held that "the Magistrate's Court is not a suitable court to entertain any but simple, straightforward claims for compensation ... Otherwise claimants must be left to bring [civil] proceedings in the county court, which is more accustomed to assessing damages".[164] In these cases, a common law nuisance action must be brought.

(d) Conclusion

To sum up, there is undoubtedly scope to deal with the problem of un-neighbourly conduct using these statutes; the Protection From Harassment Act 1997 in particular may provide the victim with remedies in civil and criminal courts. Statutory nuisance may also be a useful adjunct, when complex damages claims are not

[158] Sections 80(5) and 82(8).

[159] Section 79(1): "... the following matters constitute 'statutory nuisances' for the purposes of this Part, that is to say—(a) any premises in such a state as to be prejudicial to health or a nuisance; (b) smoke ... (c) fumes or gases ... (d) any dust, steam, smell or other effluvia ... (e) any accumulation or deposit which is a danger to health or a nuisance; (f) any animal ... (g) noise emitted from premises so as to be prejudicial to health or a nuisance ... (h) any other matter declared by any enactment to be a statutory nuisance ..."

[160] Although *cf. A.-G.* v. *Corke* [1933] Ch. 89.

[161] *Issa* v. *Hackney L.B.C.* [1997] 1 W.L.R. 956. Described by Brooke L.J. as an "apparent lacuna in the law": *ibid.* at p. 964. His Lordship refused to close the lacuna, however, commenting that "resolution of this injustice lies in decisions being taken about the allocation and distribution of public sector finance ... which are for Ministers and Parliament to take and not for judges ...": *ibid.* at p. 965.

[162] Section 35.

[163] [1997] 1 W.L.R. 700.

[164] *Ibid.* at p. 706, *per* Leggatt L.J.

involved. And co-operation from police in the general area of anti-social behaviour may help too.

All of these remedies are targeted specifically against the troublemakers themselves, rather than their landlords. It would be trite to point out that the same is true for nuisance itself: no-one would suggest for a minute that the tenants themselves were not liable in *Smith* v. *Scott*. As a matter of personal responsibility, it is no doubt ethically right and proper to focus upon the miscreants. Yet for the victims of persistent harassment and abuse on a council estate, it is quite unrealistic to expect them to take matters into their own hands and bring their tormentors to court and then, moreover, to ensure that the court's orders are complied with. How much better, from the victim's point of view, for landlords to take their social obligations seriously, and bring pressure to bear upon nuisance tenants[165] or, that failing, to evict them altogether. Only the development in nuisance argued for can make this social duty *enforceable*. It can be assumed that a landlord sued by the victim will be better able to satisfy any order for compensation, and also more likely faithfully to comply with the court's order to abate the nuisance. In effect, the burden of dealing with the unruly tenants is shifted from the victim to the landlord. He will usually be in the best position to exert the necessary control, and it is socially desirable that he should. Inactivity in the face of notorious, misery-making tenants like the Scotts should no longer be condoned by the law.

[165] Including injunctions: see above.