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Chapter 12

Interference with comfort and enjoyment

A The establishing of liability

Reasonableness

[12.01] The majority of disputes concerning the use and enjoyment of land involve complaints of discomfort or inconvenience caused by noise or smell. In resolving such disputes the court attempts to balance the conflicting interests of the parties by using, as far as possible, external gauges of the *reasonableness* or otherwise of the defendant's conduct and the complainant's complaint. The concept of reasonableness lies, albeit in different ways and with different methods of application, at the heart of so much of the common law. It is more important to work out how it applies in any given context than to debate whether the context in question should be formally classified as 'nuisance' or 'negligence'. Nevertheless, it remains appropriate to follow the language of the cases in using the terminology of nuisance when dealing with the situations with which the present chapter is concerned.

Robust approach

[12.02] The approach implied by the test of reasonableness in the context of disputes about interference with the enjoyment of land is a robust one. In *Walter v Selfe*[1] Knight Bruce V-C said[2]:

> '... both on principle and authority the important point next for decision may properly, I conceive, be thus put: ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes of living, but according to plain and sober and simple notions among the English people'.

The application of this principle necessarily depends on the facts of each case. Conflicts of evidence as to the extent of the alleged interference are common and the value in this context, as elsewhere, of positive evidence over negative has often been emphasised. Sargant J once remarked, in a case which concerned the alleged emanation of offensive smells from a sewage farm, that 'one person who gives accurate evidence that he observed something is worth more than that of four or five persons who simply say that they never did observe that thing'[3].

[1] *(1851) 4 De G & Sm 315, 20 LJ Ch 433.*

[2] See above at 322. See also *Vanderpant v Mayfair Hotel Co Ltd [1930] 1 Ch 138* at 165, *per* Luxmoore J.

[3] *Bainbridge v Chertsey Urban Council (1914) 84 LJ Ch 626* at 628. See also *Bareham v Hall (1870) 22 LT 116* at 117–118, *per* Stuart V-C; *Bosworth-Smith v Gwynnes Ltd (1919) 89 LJ Ch 368, 122 LT 15.*

Liability imposed

[12.03] A typical example of a nuisance causing interference with comfort and enjoyment is provided by the case of *A-G v Gastonia Coaches Ltd*[4]. The defendant company owned a fleet of thirty-two coaches which they operated from their premises situated in an enclosed residential area. Eighteen of the vehicles were parked overnight on or near the premises but the remainder also visited them for refuelling and repairs. Several neighbouring householders brought an action alleging both private and public nuisance. Whitford J found the case proved in respect of smell caused by the emission of diesel fumes from the coaches and noise from the 'revving' of their engines. On the other hand, noises caused by the carrying out of repairs and cleaning were held not sufficiently serious to warrant relief. The plaintiffs were ultimately awarded both damages and an injunction, the latter suspended for one year, and four-fifths of their costs.

[1] *[1977] RTR 219.*

Extent to which 'locality' is important

[12.04] The nature of the area in which the parties live is, at least in theory, a relevant factor in cases of nuisance by discomfort or annoyance. But as has already been explained[1], the principle is one which judges are reluctant in practice to apply. Indeed, even in cases which might seem to call for the application of the principle the judges are meticulous in examining the precise extent of the interference to see whether it exceeds that to be expected in an area in which that general type of interference has to be tolerated. Thus in *Rushmer v Polsue and Alfieri*[2] a unanimous Court of Appeal and House of Lords upheld the grant of an injunction to restrain the defendants from using their printing presses at night, despite the fact that their premises were situated adjacent to Fleet Street in London and surrounded by other printing establishments some of which also ran at night. In a dictum which was subsequently quoted with approval in the House of Lords[3] Cozens-Hardy LJ said[4]:

> 'It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard, and it would be no answer to say that the steam hammer is of the most modern approved pattern and is reasonably worked. In short, if a substantial addition is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy, and that the defendants' machinery is of first class character'[5].

[1] See above CHAPTER 11.
[2] *[1906] 1 Ch 234, 75 LJ Ch 79*; affd *[1907] AC 121, 76 LJ Ch 365.*
[3] *[1907] AC* 121 at 123, *per* Lord Loreburn LC.
[4] *[1906] 1 Ch* 234 at 250–251.
[5] See also *Crump v Lambert (1867) LR 3 Eq 409, 15 LT 600; Roskell v Whitworth (1871) 19 WR 804.*

An exceptional case

[12.05] There are, however, occasionally decisions in which the nature of the area is treated as material. Thus in one case the 'locality' principle was applied in the

defendants' favour in a situation in which the passage of heavy dockyard traffic was considered to have converted an area from a residential to a commercial one, thereby depriving the plaintiffs of any right to complain of what would formerly have been a public nuisance[1]. It is significant, however, that the correctness of the approach adopted in the case has been questioned in the Court of Appeal[2]. In any event the converse obviously does not apply, ie a defendant cannot avail himself of the 'locality' principle merely because an area, which is quiet and residential at the time of the complaint, can be shown to have been noisy and industrial at some former time[3].

[1] See *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd [1993] QB 343, [1992] 3 All ER 923.*
[2] See *Wheeler v JJ Saunders Ltd [1995] 2 All ER 697, [1995] 3 WLR 466.*
[3] *Bosworth-Smith v Gwynnes Ltd (1919) 89 LJ Ch 368, 122 LT 15.*

B Noise and vibration[1]

Limitless possibilities

[12.06] The number of possible sources of nuisance by noise is infinite. The cases show that the following have all been held to give rise to good causes of action at common law: church bells[2], building[3] and demolition[4] operations, speedway[5] and go-kart[6] races, singing lessons[7], background music in a restaurant audible in the flat above[8], fun fairs[9], circuses[10], cockerels[11], cattle[12] and horses[13], printing presses[14], steam hammers[15], locomotives[16], circular saws[17], power stations[18], milk churns[19], boiler-houses[20], coaches[21], lorries[22], aero engines[23], children's playgrounds[24], 'problem families'[25] and caravan-dwellers[26]. As far as nuisance by vibration is concerned its effects are not necessarily confined to discomfort and interference with enjoyment. In particular, activities such as pile driving can easily give rise to actual structural damage[27].

[1] See generally, Kerse *The Law Relating to Noise* (London, 1975).
[2] *Soltau v De Held (1851) 2 Sim NS 133, 21 LJ Ch 153* (for an interesting historical account of this case, see Thomas Glyn Watkin 'Ring Happy Bells' (1994) NLJ 1775); *Haddon v Lynch* [1911] VLR 230 (Aus). Cf *Hardman v Holberton* [1866] WN 379.
[3] *Andreae v Selfridge & Co Ltd [1938] Ch 1, [1937] 3 All ER 255; Matania v National Provincial Bank Ltd and Elevenist Syndicate Ltd [1936] 2 All ER 633, 106 LJ KB 113; Webb v Barker [1881] WN 158.*
[4] *Clark v Lloyd's Bank Ltd (1910) 79 LJ Ch 645, 103 LT 211.*
[5] *Stretch v Romford Football Club Ltd (1971) 115 Sol Jo 741; Field v South Australian Soccer Association [1953] SASR 224.*
[6] *Tetley v Chitty [1986] 1 All ER 663:* 'The most common comparisons of the noise were to either a chain saw or a bee inside a jar: a persistent buzzing which penetrated closed windows and doors into living rooms': *per* McNeill J at 665.
[7] *Motion v Mills (1897) 13 TLR 427.*
[8] *Hampstead and Suburban Properties Ltd v Diomedous [1969] 1 Ch 248, [1968] 3 All ER 545.*
[9] *Winter v Baker (1887) 3 TLR 569; Bedford v Leeds Corpn (1913) 77 JP 430.*
[10] *Inchbald v Robinson (1869) 20 LT 259.* Cf *Kinney v Hove Corpn (1950) 49 LGR 696.*
[11] *Leeman v Montagu [1936] 2 All ER 1677.*
[12] See *London, Brighton and South Coast Rly Co v Truman (1885) 11 App Cas 45, 55 LJ Ch 354.*
[13] *Ball v Ray (1873) 8 Ch App 467, 30 LT 1.*
[14] *Rushmer v Polsue and Alfieri Ltd [1906] 1 Ch 234*; affd *[1907] AC 121, 76 LJ Ch 365; Heather v Pardon (1877) 37 LT 393.* Cf *Smith v Jaffray (1886) 2 TLR 480.*
[15] *Roskell v Whitworth (1871) 19 WR 804; Goose v Bedford* (1873) 21 WR 449.
[16] See *Hammersmith and City Rly Co v Brand (1869) LR 4 HL 171, 38 LJ QB 265.*
[17] *Husey v Bailey (1895) 11 TLR 221.*
[18] *Colwell v St Pancras Borough Council [1904] 1 Ch 707, 73 LJ Ch 275; Knight v Isle of Wight Electric Light and Power Co (1904) 73 LJ Ch 299, 90 LT 410.* Cf *Heath v Brighton Corpn (1908) 98 LT 718, 24 TLR 414.*

[19] *Tinkler v Aylesbury Dairy Co Ltd (1888) 5 TLR 52.* Cf *Fanshawe v London and Provincial Dairy Co (1888) 4 TLR 694.*
[20] *Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145, [1961] 1 WLR 683.*
[21] *A-G v Gastonia Coaches Ltd [1977] RTR 219.*
[22] *Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145, [1961] 1 WLR 683.* See also *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd [1993] QB 343, [1992] 3 All ER 923.*
[23] *Bosworth-Smith v Gwynnes Ltd (1919) 89 LJ Ch 368, 122 LT 15.*
[24] *Dunton v Dover District Council (1978) 76 LGR 87*; cf *Moy v Stoop (1909) 25 TLR 262.*
[25] *Smith v Scott [1973] Ch 314, [1972] 3 All ER 645.*
[26] *A-G v Corke [1933] Ch 89, 148 LT 95* (decided under the rule in *Rylands v Fletcher*).
[27] See *Hoare & Co v McAlpine [1923] 1 Ch 167, 92 LJ Ch 81.*

Principles applied

Playground noise

[12.07] The approach of the court is well illustrated by *Dunton v Dover District Council*[1]. The plaintiff owned a small hotel with a garden which was surrounded by grazing land. In 1975 the local council, which owned the grazing land, built a housing estate upon it. A playground, which unfortunately adjoined the plaintiff's garden, was provided for the children of the estate. The playground was used from dawn to dusk by children of all ages causing noise which the plaintiff and his wife found intolerable. The trial judge, Griffiths J, emphasising that he had 'to hold the balance between the young and the old', awarded the plaintiff £200 damages for his past suffering. He also granted an injunction which restricted the opening of the playground to the hours between 10 am and 6.30 pm and limited its use to children aged twelve years and under. He did not, however, agree to order the closure of the playground for a period during the afternoon 'when more elderly people sometimes want to have a sleep'.

[1] *(1977) 76 LGR 87.*

Aircraft

[12.08] In *Dennis v Ministry of Defence*[1] the claimants lived close to an RAF base which was in constant use for the training of Harrier Jump Jet pilots. The claimant had written that 'the noise was so deafening that I could feel the juddering vibration in the house ... It is virtually impossible to talk and I'm concerned that the noise could affect the children's eardrums'[2]. Buckley J concluded that 'in respect of the nature and extent of the noise disturbance, it seems plain to me that the noise is ... a nuisance'[3]. His lordship awarded the claimants £950,000 in damages, but he declined to issue a declaration on the ground that it was not in the public interest to do so: the training of the pilots was essential to national security and it was not practicable to do it elsewhere without causing a similar nuisance[4].

[1] *[2003] Env LR 34.* See Roderick Bagshaw 'Private Nuisance and the Defence of the Realm' (2004) 120 LQR 37.
[2] See above at para 26.
[3] See *[2003] Env LR 34* at para 34. The claimants also had a valid claim under the *Human Rights Act 1998* (under Article 1 and Article 8 of the Convention): see *[2003] Env LR 34* at 61.
[4] On public interest as a defence, see below CHAPTER 23.

Disturbing sleep

[12.09] The courts have shown a particular willingness to restrain noise at night-time and have indicated that defendants cannot expect to deprive complainants of sleep

then, even if only for one night, without incurring liability[1]. There is, however, no inflexible rule of law relating to sleep. In *Murdoch v Glacier Metal Co*[2] the claimants lived near to a factory which operated at night, and the noise level was found to be just above that at which a report of the World Health Organisation had indicated that sleep could be affected. Nevertheless the Court of Appeal upheld a decision of the trial judge who, finding for the defendants, had said that 'taking into account the neighbourhood and the lack of complaint from the immediate neighbours' it had not been proved to him that the interference 'was sufficiently serious to constitute a nuisance'.

[1] See above CHAPTER 11. See also *Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145, [1961] 1 WLR 683.*
[2] *[1998] Env LR 732.*

Claimants who are peculiarly susceptible to noise

[12.10] In *Gaunt v Fynney*[1] Lord Selborne LC stressed that the court should exercise particular care in noise cases not to allow a hypersensitive plaintiff to impose excessive restraints on the defendant. He said[2]:

> '... a nervous, or anxious, or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance, originating within himself, sounds which at other times would have been passively heard and not regarded'.

In that case the plaintiffs complained in 1870 of noise and vibration caused by the working of a steam engine in the defendant's mill. The engine had, however, been in operation since 1865 and the plaintiffs conceded that it had caused them no annoyance until five years later. The defendant called evidence to show that there had been no change in the operation of the engine and that it had been worked at the same level throughout. The Lord Chancellor accepted that the plaintiffs honestly thought that the noise had become worse in 1870, but felt that this was because of an extraneous factor which had suddenly made them hypersensitive in that year to a noise which had always existed and yet had previously been regarded by them as unobjectionable[3].

[1] *(1872) 8 Ch App 8, 42 LJ Ch 122.*
[2] See above at 13.
[3] Cf *Dunton v Dover District Council (1977) 76 LGR 87* at 92.

Effect upon invalid

[12.11] On the other hand, a claimant who is able to prove that his ordinary comfort in the use of his home has been interfered with, will not fail merely because he has only been prompted into taking action by the effect of the noise upon an invalid who lives with him. In *Spruzen v Dossett*[1] the plaintiff complained of noise from a steam organ operated at 'Dossett's Forest Retreat' in Epping Forest. He relied particularly upon the distress which the noise caused to his invalid wife and the difficulty which it caused to the vicar when he visited her and tried to read to her. In granting the plaintiff an injunction Stirling J treated this evidence as relevant. He pointed out that although allegations of nuisance could not be considered solely from the point of view of a person in bad health[2], nevertheless, the fact that one of its inmates was an invalid gave a houseowner a good reason for insisting to the full on the enjoyment of such rights as the law allowed him.

[1] *(1896) 12 TLR 246.*
[2] Cf *Bloodworth v Cormack [1949] NZLR 1058* at 1064, *per* Callan J: 'This branch of the law pays no regard to the special needs of invalids'.

Measurement

[12.12] Nowadays the judicial process in noise cases may be facilitated by taking decibel readings with a sound-level meter in order to introduce a degree of objectivity into the collection and assessment of evidence[1]. In *Halsey v Esso Petroleum Co Ltd* Veale J sai2.

> 'Scientific evidence is helpful in that it may tend to confirm or disprove the evidence of other witnesses. The scale of decibels from nought to 120 can be divided into colloquial descriptions of noise by the use of words: faint, moderate, loud, and so on. Between 40 and 60 decibels the noise is moderate, and between 60 and 80 it is loud. Between 80 and 100 it is very loud, and from 100 to 120 it is deafening'[3].

In that case readings taken outside the plaintiff's house indicated noise from the defendants' oil-storage plant of up to 68 decibels, rising to 83 decibels when one of the defendants' oil-tankers passed along the road. The plaintiff was awarded an injunction restraining the defendants from so operating their plant, and so driving their vehicles, as to cause a nuisance by noise to the plaintiff between the hours of 10 pm and 6 am Measurement of noise levels was also considered at length in the much more recent case of *Dennis v Ministry of Defence*. Buckley J quoted from a report put before him which pointed out that noise is now normally measured in 'A' weighted decibels or dB(A), explaining that '"A" weighting reflects the ear's frequency response to sound and therefore provides values which have some relation to subjective reactio4. His lordship continued:

> 'For example, a heavy lorry at 3m is 90 dB(A); the kerbside of a busy street is 80 dB(A); a high speed train at 2m is 105–110 dB(A)'.

Readings taken in the *Dennis* case itself 'recorded and gave a range for each day which typically was from the upper 70s to well over 100'[5].

[1] On the measurement of noise see Penn *Noise Control* (2nd edn, 1995).
[2] *[1961] 2 All ER 145* at 156A–B, *[1961] 1 WLR 683* at 697.
[3] See also *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd [1993] QB 343* at 356, *[1992] 3 All ER 923* at 931 *per* Buckley J: 'It is interesting to note that a quiet bedroom is about 35 on the scale, at 55 communication starts to become difficult, a car travelling at a steady 60 kph at 7 metres is just over 70, a heavy diesel lorry at 40 kph at 7 metres is 85, a pneumatic drill at 7 metres is 95 and 120 is the threshold of pain'.
[4] *See [2003] Env LR 34* at para 14. Apparently there are also 'B' and 'C' weighting networks but these are not often used: see Taylor *Noise* (2nd edn, 1975) pp 59–60.
[5] See *[2003] Env LR 34* at paras 15–16. See also para 21: 'It is helpful when seeking to compare the noise with the everyday examples given, to bear in mind the agreed expert evidence that a 10dB(A) increase equates to a doubling of loudness'.

Limits of expert evidence

[12.13] Expert evidence does, however, have its limits. In the final analysis the court has to form an impression of the volume of noise in terms of day to day experience. In *Dunton v Dover District Council* Griffiths J said[1]:

> '... it is a fact of life that when one gathers together a considerable number of small children, they are likely from time to time to make a great deal of noise. I have had it all turned into decibels by various experts. I am bound to say that I do not find such evidence very helpful because unless I am looking at a machine and at the same time listening to a child scream so that I can correlate the number of decibels with the noise I hear, I am unable to appreciate just how loud a sound is by being told that it is 60 or 50 decibels. It means nothing to the uninstructed, but I am satisfied on all the evidence that I have heard that from time to time there was a fearful racket coming from the playground, which is to be expected'.

[1] *(1977) 76 LGR 87* at 89–90.

C Fumes, dust and smell

Modern cases

[12.14] In recent times legislation such as the Public Health and Clean Air Acts[1] has largely put an end to the situation that gave rise to many of the classic nineteenth-century nuisance cases[2]. Foul smoke pouring from factory chimneys is now a relatively rare occurrence, and most litigation in this area concerns the spread of dust by such activities as quarrying[3] or demolition[4], and the emission of powerful smells as a result of agricultural or industrial processes. It would, however, be wrong to suppose that the emission of noxious fumes or gases has ceased completely to be a source of litigation in modern times. In *Halsey v Esso Petroleum Co Ltd*[5], decided in 1961, the plaintiff recovered damages as a result of the emission of smuts containing sulphuric acid from the chimneys of the defendants' boiler-houses. The smuts had burnt holes in the plaintiff's laundry when it was hung out to dry, and had also damaged the paintwork of his car[6]. In the 1954 Scottish case of *Watt v Jamieson*[7] the Court of Session gave a pursuer leave to seek reparation for damage allegedly caused to his flat by the discharge of sulphur-impregnated water vapour from a defective gas water heater installed in the flat below[8].

[1] See, generally, *Garner's Environmental Law*, Div V.
[2] See *St Helen's Smelting Co v Tipping (1865) 11 HL Cas 642, 35 LJQB 66*. The emission of fumes from the burning processes used in the manufacture of bricks was a particularly fertile source of litigation in the last century, see *Walter v Selfe (1851) 4 De G&Sm 315, 20 LJ Ch 433*; *Pollock v Lester (1853) 11 Hare 266*; *Hole v Barlow (1858) 4 CBNS 334, 27 LJCP 207. Bamford v Turnley (1860) 3 B&S 62*; *Cleeve v Mahany (1861) 25 JP 819*; *Cavey v Ledbitter (1863) 13 CBNS 470, 32 LJCP 104.*
[3] See *A-G v PYA Quarries Ltd [1957] 2 QB 169, [1957] 1 All ER 894.* Cf *Pwllbach Colliery Co Ltd v Woodman [1915] AC 634, 84 LJKB 874.*
[4] See *Andreae v Selfridge & Co Ltd [1938] Ch 1, [1937] 3 All ER 255.* See also *Matania v National Provincial Bank [1936] 2 All ER 633, 106 LJKB 113.* Cf *Hunter v Canary Wharf Ltd and London Docklands Development Corpn [1995] NLJR 1645, CA* (deposit of dust held capable of giving rise to a cause of action in negligence).
[5] *[1961] 2 All ER 145, [1961] 1 WLR 683.*
[6] See also *McKinnon Industries Ltd v Walker [1951] 3 DLR 577*; *Russell Transport Ltd v Ontario Malleable Iron Co [1952] 4 DLR 719.*
[7] *(1954) SC 56.*
[8] See also *Federic v Perpetual Investments Ltd (1969) 2 DLR (3d) 50.*

Smell

[12.15] It is nevertheless true that offensive smells now provide the most frequent instances of this type of nuisance to come before the courts. It is not necessary to prove

injury to health in order to succeed in an action for nuisance by smell[1], but further generalisation as to the types of smell which will create liability is probably impossible. As Lindley LJ said in *Rapier v London Tramways Co*[2]:

> 'The fact that somebody with a sensitive nose smells some ammonia and does not like it will not prove a nuisance; it is a question of degree. You can only appeal to the common sense of ordinary people. The test is whether the smell is so bad and continuous as to seriously interfere with comfort and enjoyment'.

The reports provide several relatively recent examples of successful actions under this head. In addition to all the other mischiefs to which it gave rise the defendants' depot in *Halsey v Esso Petroleum* occasionally emitted a pungent and nauseating smell, against which the plaintiff was awarded an injunction[3]. Similarly in *A-G v Gastonia Coaches*[4] the plaintiffs obtained relief in respect of smells caused by diesel fumes.

1 See *Crump v Lambert (1867) LR 3 Eq 409, 15 LT 600.*
2 *[1893] 2 Ch 588* at 600.
3 See *[1961] 2 All ER* 145 at 154A–155D, *[1961] 1 WLR* 683 at 694–696.
4 *[1977] RTR 219.*

'Nausea-making'

[12.16] In *Shoreham-By-Sea UDC v Dolphin Canadian Proteins Ltd*[1] Donaldson J granted the plaintiff council an injunction to restrain the defendants from emitting an odour, described by his Lordship as 'all-pervasive' and 'nausea-making', from their factory at which they manufactured by-products out of chicken residues produced by the broiler chicken industry. Pig-farming figures prominently in the reported cases as a recurrent source of complaint. In *Wheeler v JJ Saunders Ltd*[2] the plaintiffs were awarded damages and an injunction after being subjected to 'constant malodorous air which frequently caused nausea' and often forced them to leave their property in order to eat; and relief was granted in *Bone v Seale*[3] in similar circumstances.

1 *(1972) 71 LGR 261.*
2 *[1995] 2 All ER 697, [1995] 3 WLR 466, CA.*
3 *[1975] 1 All ER 787, [1975] 1 WLR 797, CA.* See also *Milner v Spencer (1976) 239 EG 573.* Cf *Bainbridge v Chertsey Urban Council (1914) 84 LJ Ch 626; Lord Chesham v Chesham UDC (1935) 79 Sol Jo 453.*

D Further situations

Precise definition impossible

[12.17] In *Thompson-Schwab v Costaki*[1] Lord Evershed MR observed that 'the forms which activities constituting actionable nuisance may take are exceedingly varied' and therefore 'not capable of precise or close definition'[2]. In that case the plaintiffs complained that the defendants used their own neighbouring premises for the purposes of prostitution. It was alleged that the sight of prostitutes and their clients entering and leaving premises, in what had hitherto been a good class residential street, diminished the enjoyment by the plaintiffs and their families of their own houses and reduced the value of those houses. The defendants were restrained by injunction from using their premises for the purposes of prostitution so as to cause a nuisance, despite a strenuous argument advanced on their behalf that matters of this kind, which did not interfere in any physical way with the use and enjoyment of their

houses by the plaintiffs, were outside the scope of the tort. This argument was emphatically rejected by the Court of Appeal. A defendant's activities are not free from the risk of being categorised as an actionable nuisance 'merely because they do not impinge upon the senses, for example, the nose or the ear, as would the emanation of smells or fumes or noises'[3]. Another apparently novel situation for which liability was imposed, in a New Zealand case, concerned dazzling glare caused by reflected sunlight.[4]

1 *[1956] 1 All ER 652, [1956] 1 WLR 335.*
2 *[1956] 1 All ER 652* at 653–654, *[1956] 1 WLR 335* at 338.
3 *Thompson-Schwab v Costaki per* Lord Evershed MR. The decision in *Thompson-Schwab v Costaki* was applied in *Laws v Florinplace [1981] 1 All ER 659* (sex shop). See also *Poirier v Turkewich (1964) 42 DLR (2d) 259.*
4 See *Bank of New Zealand v Greenwood [1984] 1 NZLR 525*: 'The dearth of authority should ... present no great obstacle, for nuisance is one of those areas of the law where the courts have long been engaged in the application of certain legal concepts to a never-ending variety of circumstances; and that will continue to be so, for by its very nature the law of nuisance is intimately involved with the developing use of the environment, both natural and manmade, in which we all live': *per* Hardie Boys J at 530.

Games and protests

[12.18] Even normally harmless pastimes such as the playing of golf[1] or cricket[2] may be a legitimate source of complaint. Holding a protest meeting adjacent to the claimant's premises may also constitute a private nuisance. In *Hubbard v Pitt*[3] a majority of the Court of Appeal treated a protest demonstration on the highway outside the plaintiff's business premises as an actionable private nuisance, and in the earlier case of *J Lyons & Sons v Wilkins*[4] the picketing of a man's house from the highway during an industrial dispute was similarly treated.

1 *Lester-Travers v City of Frankston [1970] VR 2 (Aus).*
2 *Miller v Jackson [1977] QB 966, [1977] 3 All ER 338.* Cf *Bolton v Stone [1951] AC 850, [1951] 1 All ER 1078.*
3 *[1976] QB 142, [1975] 3 All ER 1,* Stamp and Orr LJJ, Lord Denning MR dissenting.
4 *[1899] 1 Ch 255, 68 LJ Ch 146.*

E Light

The easement of light

[12.19] Although the freedom to enjoy a reasonable measure of natural light might seem to belong to the same category of a landowner's legitimate expectations as freedom from noise or smell, the protection given to enjoyment of light has not been put by the law on the same footing as other areas of nuisance. At common law a landowner has no inherent right to the passage of natural light over his land[1]. The right can only exist as an *easement* and has to be thus acquired[2]. In practice, however, once the claimant is able to prove the existence of such an easement the approach nowadays adopted by the court to situations involving interference with it closely resembles that followed in other cases of interference with comfort or enjoyment.

1 He does, however, have the right to restrain trespassers into his air-space (see *Kelsen v Imperial Tobacco Co Ltd [1957] 2 QB 334, [1957] 2 All ER 343*) and may thereby acquire a degree of protection indirectly.
2 On easements and their acquisition see, generally, *Gale on Easements,* 17th edn, 2002 (Gaunt and Morgan eds), Jackson, *Law of Easements and Profits,* London, 1978.

Strict approach in former times

[12.20] It was not always the case that the conventional tests used in other interference situations were used in disputes about light. In former times the theoretical basis of the enjoyment of light as a species of property led some judges to regard litigation in this area 'as an action to prevent the infringement of a right rather than an action to redress a wrong'[1]. Accordingly, a strict approach was often adopted towards defendants, and a plaintiff who was able to prove the existence of an easement was given a greater degree of protection than would have been possible had the more flexible tests used elsewhere in the law of nuisance been applied also to cases involving light[2]. Thus 'for many years the tendency of the courts [was] to measure the nuisance by the amount taken from the light acquired, and not to consider whether the amount left was sufficient for the reasonable comfort of the house according to ordinary requirement. If a man had a house with unusually excellent lights, it was treated as a nuisance if he was deprived of a substantial part of it, even although a fair amount for ordinary purposes was left'[3].

1 *Per* Lord Macnaghten in *Colls v Home and Colonial Stores Ltd [1904] AC 179* at 186.
2 See *Parker v Smith (1832) 5 C&P 438*; *Scott v Pape (1886) 31 Ch D 554, 55 LJ Ch 426.*
3 *Per* Farwell J in *Higgins v Betts [1905] 2 Ch 210* at 215 cited in *Gale on Easements*, p 267.

Nuisance tests now applied

[12.21] The decision of the House of Lords in *Colls v Home and Colonial Stores Ltd*[1] marked a turning point in this branch of the law. In this case it was held that a plaintiff who is able to rely on a right to light will not succeed in proving infringement merely by showing that, as a result of the construction of the defendant's building, he receives less light than he did before[2]. There has to be a substantial deprivation of light such as to render the occupation of the house uncomfortable according to the ordinary notions of mankind[3]. In the words of Lord Lindley[4]:

> '... the right to light is in truth no more than a right to be protected against a particular form of nuisance, and ... an action for the obstruction of light which has in fact been used and enjoyed for twenty years without interruption or written consent cannot be sustained unless the obstruction amounts to an actionable nuisance; and this often depends upon considerations wider than the facts applicable to the complainant himself'.

1 *[1904] AC 179, 73 LJ Ch 484.*
2 In the Court of Appeal the plaintiff had been awarded a mandatory injunction for the demolition of the defendant's building (see *[1902] 1 Ch 302, 71 LJ Ch 146*), but the House of Lords, reversing the Court of Appeal, held that the plaintiff had no cause of action at all.
3 The difficulty of applying this test to the facts is, however, illustrated by the case of *Kine v Jolly [1905] 1 Ch 480, 74 LJ Ch 174*; affd sub nom *Jolly v Kine [1907] AC 1, 76 LJ Ch 1*. In this case Kekewich J held that there had been a nuisance by obstruction of light and his judgment was upheld by a majority in the Court of Appeal. In the House of Lords the four law lords who heard the appeal were equally divided and the judgment in the Court of Appeal therefore stood. Lords Robertson and Atkinson, who would have decided the case differently, however, considered that the decision of the Court of Appeal was impossible to reconcile with *Colls*' case.
4 *[1904] AC* 179 at 212–213.

Flexible principles

[12.22] Thus it would appear that a defendant is now entitled to insist upon the relevance of such flexible nuisance principles as that concerning the nature of the

claimant's locality[1] if, eg the inhabitants customarily enjoy less light than is usually found elsewhere[2]. Nor does a claimant have any proprietary right to particular 'cones' or 'pencils' of light coming from any particular direction[3]. On the contrary, a defendant whose activities actually increase the amount of light flowing to the claimant's building from one direction is entitled to have that taken into account to his credit when the overall amount of light left to the claimant is being assessed[4]. In making this assessment a judge is 'entitled to have regard to the higher standards expected for comfort as the years go by'[5] and, although expert evidence as to the degree of diminution is useful[6], the Court of Appeal has emphasised that the decision is ultimately one of fact, in the making of which the trial judge might find a view to be helpful[7].

1 See above CHAPTER 11.
2 See *Ough v King [1967] 3 All ER 859* at 861G–H, *[1967] 1 WLR 1547* at 1552G–H, *per* Lord Denning MR. In practice, however, questions of locality will rarely be of importance in cases of nuisance by obstruction of light since 'the human eye requires as much light for comfortable reading or sewing in Darlington Street, Wolverhampton, as in Mayfair', *per* Russell J in *Hortons' Estate Ltd v James Beattie Ltd [1927] 1 Ch 75* at 78. Cf *Fishenden v Higgs and Hill Ltd (1935) 153 LT 128* at 140, *per* Romer LJ and 142–143, *per* Maugham LJ.
3 See *Davis v Marrable [1913] 2 Ch 421, 82 LJ Ch 510.*
4 *Davis v Marrable [1913] 2 Ch 421.* The claimant is, however, entitled to have disregarded light which he at present enjoys but of which he could at any moment be deprived by a third party: see *Gale on Easements*, p 274.
5 *Per* Lord Denning MR in *Ough v King [1967] 3 All ER 859* at 861H, *[1967] 1 WLR 1547* at 1553A.
6 On the methods of assessing diminution, including the well known test associated with the name of Mr P J Waldram, see Anstey and Chavasse, *The Right to Light* (London, 1963) (published by Estates Gazette).
7 *Ough v King [1967] 3 All ER 859, [1967] 1 WLR 1547.* A principle was at one time thought to exist that the right was not infringed if the plaintiff still had 45° of unobstructed light left, but this has since been repudiated and the figure of 45° is not conclusive for or against establishment of infringement of the right: see *Colls v Home and Colonial Stores [1904] AC 179, 73 LJ Ch 484* and Anstey and Chavasse, *The Right to Light*, Ch 7.

Internal arrangement of rooms

[12.23] The internal arrangement of the rooms behind the windows, which may be changed by internal reconstruction of the building, cannot in itself be decisive in the assessment. In *Carr-Saunders v Dick McNeil Associates*[1] Millett J observed that the owner of the dominant tenement:

> '... is entitled to such access of light as will leave his premises adequately lit for all purposes for which they may reasonably be expected to be used. The court must, therefore, take account not only of the present use, but also of other potential uses to which the dominant owner may reasonably be expected to put the premises in the future'.

1 *[1986] 2 All ER 888* at 894.

Not confined to illumination

[12.24] The protection accorded to a claimant by the easement of light is not limited to the enjoyment of the rays of the sun for the purposes of illumination. In *Allen v Greenwood*[1] the plaintiffs had an ordinary domestic greenhouse on their land which they had used in the normal way for over twenty years. The defendants erected an obstruction which limited the amount of light reaching the greenhouse and thereby

rendered it useless for the purpose for which it existed, ie the cultivation of plants and flowers. There was still sufficient light reaching the greenhouse, however, to enable it to be used for other purposes such as reading a book or a newspaper. The plaintiffs sought an injunction to compel the removal of the obstruction but the defendants argued that the scope of the right to light did not extend to the use of the sun's rays for the purpose of providing heat, or other beneficial properties. This argument failed. The Court of Appeal held that the easement protected the normal use of the sun's rays for all purposes for which the type of building in question was ordinarily used. In the case of a greenhouse[2] this necessarily involved the provision of heat as well as light. Buckley LJ said[3] that even in the case of a dwelling-house it might well be argued that 'adequate light was important not only for illumination but also for health and hygiene'[4]. Their Lordships did, however, reserve their position on questions which might arise in the future in relation to special uses of the sun's rays for such purposes as solar heating.

1 *[1980] Ch 119, [1979] 1 All ER 819.*
2 A greenhouse is a 'building' for the purposes of the *Prescription Act 1832*: *Clifford v Holt [1899] Ch 698, 68 LJ Ch 332.*
3 *[1980] Ch* 119 at 135G, *[1979] 1 All ER* 819 at 829c.
4 Moreover even if keeping a greenhouse were to be regarded as an unusual use of land, and so not protected by the notion of ordinary user, the Court of Appeal held, as an alternative ground of decision, that a right to the additional protection required was capable of being acquired by prescription: *[1980] Ch* 119 at 131F–132E, *[1979] 1 All ER* 819 at 825h–826e, *per* Goff LJ; *[1980] Ch* 119 at 137F–138B, *[1979] 1 All ER* 819 at 830g–831c, *per* Buckley LJ.

No right of prospect

[12.25] It has long been clear that the law of nuisance does not confer protection upon enjoyment by an occupier of an attractive view or 'prospect', since that is 'a matter only of delight, and not of necessity'[1]. In *Hunter v Canary Wharf Ltd and London Docklands Development Corpn*[2] the House of Lords applied this principle in a novel context by holding that it prevented interference with television reception, caused by a large new building blocking the signal, from being actionable[3].

1 See *Aldred's case (1610) 9 Co Rep 57b.* Cf *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479.*
2 *[1997] 2 All ER 426.*
3 For interference with television reception, see above CHAPTER 11.

F Air

Need for defined channels

[12.26] In the case of air, as distinct from that of light, a right to the free access of air flowing from the land of one's neighbour is unknown to the law and cannot be acquired even by prescription[1]. Although the right to air is therefore more limited than the right to light it is not altogether non-existent. A right to air can be acquired by prescription provided that the air flows through defined and limited channels or apertures. In *Bass v Gregory*[2] the cellar of the plaintiffs' public-house was ventilated by a subterranean shaft which had been cut through the ground so as to lead into a disused well, which was situated in an adjoining yard owned and occupied by the defendant. The air from the cellar passed through the shaft and out at the top of the well. The cellar had, with the knowledge of the defendant, been ventilated in this way

for at least forty years. In these circumstances Pollock B held that the plaintiffs had acquired by prescription a right to the free passage of air from the cellar through the well, and granted an injunction to prevent the defendant from blocking up the mouth of the well[3].

1 See *Gale on Easements*, 17th edn, 2002 (Gaunt and Morgan eds).
2 *(1890) 25 QBD 481, 59 LJQB 574.*
3 See also *Hall v Lichfield Brewery Co (1880) 49 LJ Ch 655*; *Cable v Bryant [1908] 1 Ch 259.*

A possible exception?

[12.27] It is possible that, as an exception to the general rule, a claimant who has acquired a cause of action against a defendant for infringement of his right to light might be able to claim additional redress for interference with the flow of air to his property, even if that flow was not through a defined channel. The argument for this exception is based on the interesting case of *Chastey v Ackland*[1]. The plaintiff and defendant lived in adjoining terraced houses in a row of such houses. To the rear of the houses were conveniences for the use of the occupants and a urinal attached to a nearby drill hall. The defendant erected a large building in the yard at the back of his house which slightly interfered with the plaintiff's right to light, and also cut down the free flow of air which had previously ventilated the yard at the back of the plaintiff's house. As a result the air stagnated and the smells from the various conveniences and from the urinal became oppressive. The plaintiff was awarded £10 damages for the interference with his right to light and this award was accepted by the defendant. However, the plaintiff also sought an injunction to restrain the defendant from maintaining the new building so as to obstruct the free passage of air. At first instance Cave J granted an injunction but the Court of Appeal, applying the orthodox rule, held that the defendant had committed no legal wrong in obstructing the air and discharged the injunction. The plaintiff's loss was *damnum absque injuria*. The plaintiff then appealed to the House of Lords. According to the brief report in the appeal cases, 'during the argument several of their Lordships expressed dissent from the reasoning and the decision of the Court of Appeal'[2]. The observations thus made were enough to persuade the respondent to settle the appeal on terms favourable to the appellant. Although the respondent kept his building the appellant received £300 by way of damages, ie £290 in excess of the sum which he had been awarded for infringement of the right to light. The appellant also received all his costs in the House of Lords and the courts below.

1 *[1895] 2 Ch 389, 64 LJQB 523, CA*; *[1897] AC 155, 76 LT 430, HL.*
2 See *[1897] AC 155.* A rather more extensive report, from which an impression of the nature of the views expressed in the House can be obtained, is to be found in *(1896–7) 13 TLR 237.* The report in *(1897) 76 LT 430* is as brief as that in the appeal cases.

Dependent upon infringement of right to light

[12.28] Since the settlement precluded the House from reaching a decision in the case, the extent to which in such a decision they would have expressed their dissent from the reasoning of the Court of Appeal is a matter of speculation. One possible solution, however, is to be found in an observation of Lindley LJ in the Court of Appeal itself. His Lordship appears to have suggested, in the course of argument, that the fact that the building was unlawful, by virtue of its infringement of the right to light, might enable other damage it did to be taken into account even if that damage

would not have been actionable independently[1]. This proposition is not unattractive[2]. Since all the adjoining owners were in the same position with respect to the location of their conveniences it was inherently unreasonable for one owner to shut off the ventilation enjoyed by his neighbours.

1 See *[1895] 2 Ch 389 at 393*. This point is not mentioned in his Lordship's judgment.

2 Cf *McKinnon Industries v Walker [1951] 3 DLR 577* (damage otherwise irrecoverable on grounds of hypersensitivity not too remote a consequence of an actionable nuisance), see further CHAPTER 11 above.