

# What is to be done about noise nuisance?

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# Statutory Nuisance

- Two limbs:
  - “prejudicial to health *or* a nuisance”  
[since 1990: s.79(1) EPA 1990]
  - To be a statutory nuisance, the nuisance must amount to interference with personal comfort. It must, firstly, come within s.79 of the EPA and, secondly, interfere in a material or substantial way with personal comfort  
*Wivenhoe Port v Colchester BC* [1985].

## Section 79(1) EPA 1990 – Statutory noise nuisances

....

(g) noise emitted from premises so as to be prejudicial to health or a nuisance;

(ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street;

...

# Excluded noise nuisances

EG aircraft, by Air Navigation (General) Regulations 2005

- But possible use with ancillary activities
- Art. 8 ECHR: ***Dennis v Ministry of Defence* [2003]**
- Statutory exclusions cover nuisance, but what if health effects?
- What if noise result of negligence in carrying out operations?
- Statutory authority (eg Planning Act 2008)

# Planning Act 2008, s 158

## **158 Nuisance: statutory authority**

- (1) This subsection confers statutory authority for—
  - (a) carrying out development for which consent is granted by an order granting development consent;
  - (b) doing anything else authorised by an order granting development consent.
- (2) Statutory authority under subsection (1) is conferred only for the purpose of providing a defence in civil or criminal proceedings for nuisance.
- (3) Subsections (1) and (2) are subject to any contrary provision made in any particular case by an order granting development consent.

# London assize of nuisance 1301

William de Béthune complains that the cess-pit of the privy of William de Gartone adjoins so closely his stone wall that the sewage penetrates his cellar. The def. says that he and his ancestors have been seised of the privy in question time out of mind, and prays that the assize do nothing in prejudice of his free tenement. The pl. says that long seisin contrary to the statute ought not to prejudice his case. After adjournment the assize comes upon the land on Fri. 3 Mar. 1301, and it is adjudged that within 40 days the def. remove his cess-pit 2½ ft. of masonry from the pl.'s wall.

# Common law nuisance

‘The word nuisance introduces an equivocation which is fatal to any hope of a clear settlement’,

adding the words that guaranteed him perpetual fame:

‘this cause of action is immersed in undefined uncertainty’

[Erle CJ in *Brand v Hammersmith & City Railway Co.* (1867) QB 223]

# Common law nuisance

In ***Stone v Bolton*** [1949]:

“Whether such an act does constitute a nuisance *must* be determined:-

*not merely* by an abstract consideration of the act itself,

but by reference to

*all the circumstances of the particular case,*

including,

*for example:*

# Common law nuisance

- **the time** of the commission of the act complained of
- **the place** of its commission
- **the manner of committing** it, that is, whether it is done **wantonly** or in the **reasonable exercise of rights**
- **the effect of its commission**, that is, whether those effects are transitory or permanent, occasional or continuous

# Reasonability

In ***Cambridge Water Co. Ltd. v Eastern Counties Leather plc.*** [1994] Lord Goff said:

"... if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have used reasonable care and skill to avoid it".

# Reasonability – “give and take”

Lord Cooke in *Canary Wharf* added:

“The principle may not always conduce to tidiness, but tidiness has not had a high priority in the history of the common law. What has made the law of nuisance a potent instrument of justice throughout the common law world has been largely its flexibility and versatility. “

***Hunter v Canary Wharf* [1997] AC 655, 711.**

# Best Practicable Means

- Original intention to balance needs of industry with interests of residents
- Has discretion built in to balancing process
- Enough to show BPM adequate to ‘prevent, or to counteract the effects of, the nuisance’

***EG Manley v New Forest DC [2000]; Budd v Colchester BC [1999]***

- BPM has to be considered in decision about nuisance: is use of land reasonable?

## Section 79(9) EPA 1990

- (a) 'practicable' means reasonably practicable having regard among other things to local conditions and circumstances, to the current state of technical knowledge and to the financial implications;
  
- (b) the means to be employed include the design, installation, maintenance and manner and periods of operation of plant and machinery, and the design, construction and maintenance of buildings and structures;

# Type of evidence – fact and opinion

- level and type of noise
- duration
- time of day or night
- any annoying characteristics present
- any unreasonable aspect to the noise
- characteristics of the neighbourhood
- number / proportion of persons affected
- what measures could reduce or modify the noise
- whether best practicable means (BPM) used

## Quality of investigation: ‘*Rottenberg Lousy*’

- Expert evidence provided by the EHPs was no more probative than evidence provided by a member of the public
- “If the standard were an objective one, to be measured by some yardstick such as the level of decibels of noise at particular times of day, the case might have been very different...” [David Clarke J]
- Are there good reasons for not using noise monitoring?  
*R (on the application of Hackney LBC) v Rottenberg* [2007]
- Monitoring: basis of expert opinion as well as direct evidence

# Drafting the notice

- “Where satisfied ... the local authority shall serve a notice”
  - no discretion [***R v Carrick DC, ex p Shelley (1996)***]
- Wide discretion on type of notice to serve
- Each case needs to be considered according to its particular facts
- Scope of reasonability : approach of local authority
- No ambiguity in wording [***Elvington Park v York DC (2009)***]
- Policy only to serve simple notices and to eschew specific works notices would be to give itself a power to limit its discretion and would therefore be unlawful [**Anisminic (1969)**]

# Notice requirements

## Consultation

- No duty to consult
- But if you do, have to do it properly  
***(Falmouth & Truro PHA, ex p South West Water [2000])***
- Difficult to appeal against notice where proper consultation has taken place

# Public nuisance

“The essence of the right that is protected by the tort of private nuisance is the right to enjoy one's property ... The essence of the right that is protected by the crime and tort of public nuisance is the *right not to be adversely affected by an unlawful act or omission whose effect is to endanger the life, safety, health etc of the public*”.

**[Dyson LJ, *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463]**

# Public nuisance

No exhaustive list. Examples include:

- quarry-blasting
- emission of noxious smells from a chicken-processing factory
- storage of large amounts of inflammable material
- allowing refuse and filth to be deposited on vacant land in a densely populated part of London
- holding an all-night 'rave' in a field
- holding noisy events, such as motocross.

***East Dorset DC v Eaglebeam Ltd* [2006] EWHC 2378 (QB).**

# Common element requirement

“Some public nuisances ... can often be established without the necessity of calling a number of individual complainants as witnesses. In general, however, a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances.”

**Romer LJ in *Att Gen v PYA Quarries Ltd* [1957] 2 QB 169, 187.**

# Common element requirement

In the criminal case of ***R v Rimmington* [2005] UKHL 63** at [47], in which the defendant was accused of distributing hate mail to a number of individuals, Lord Rodger found that:

‘a core element of the issue of public nuisance is that the defendant’s act should affect the community, a section of the public, rather than simply individuals’.

# Public/Statutory Nuisance

“Where conduct fell within the ambit of a particular statutory offence, it was not possible to say that it would never be appropriate to prosecute for the common law offence of nuisance, but good practice and respect for the primacy of statute law required that the offence should be prosecuted under the relevant statutory provision unless there was a good reason for doing otherwise; but the avoidance of a time limit, of a particular defence or of a maximum penalty that applied to the statutory offence could not ordinarily amount to a good reason.” ***R v Rimmington [2005]***

# Noise and the Licensing Act 2003

In *Betterton*, Holt CJ found that:

“playhouses are not in their own nature nuisances; but only as they draw together great numbers of people and coaches, and sharpers thither, which prove generally inconvenient to the places adjacent.”

***Betterton's Case* (1680) Holt 538.**

# Licensing conditions

“In the context of preventing public nuisance, it is again essential that conditions are focused on measures within the direct control of the licence holder or club. Conditions relating to public nuisance caused by the anti-social behaviour of customers once they are beyond the control of the licence holder, club or premises management cannot be justified and will not serve to promote the licensing objectives.”

***Guidance issued under section 182 of the Licensing Act 2003, 2.38.***

# DCMS and Public Nuisance

“It is important to remember that the prevention of public nuisance *could ...include low-level nuisance perhaps affecting a few people living locally* as well as major disturbance affecting the whole community (my emphasis).”

***Guidance issued under section 182 of the Licensing Act 2003, 2.33***

# My attempts to use Parliament

**From:** john pointing [mailto:johnpointing@hotmail.com]

**Sent:** 14 January 2008 10:42

**To:** POUND, Steve

**Subject:** FW: Public nuisance and the Licensing Act

Dear Mr Pound,

You don't appear to have responded to this. Could you please confirm whether or not you are still an MP?

Thanks,

John Pointing

# My attempts to use Parliament

Subject: RE: Public nuisance and the Licensing Act

Date: Thu, 17 Jan 2008 19:32:04 +0000

Dear Mr. Pointing

I do apologise for not having responded but have no record of having received the earlier message.

I will contact the Minister and see if I can find out what happened to the response that you should have received.

Yours sincerely,

Stephen Pound.

# My attempts to use Parliament

- **From:** john pointing [mailto:johnpointing@hotmail.com]  
**Sent:** 18 January 2008 08:41  
**To:** POUND, Steve  
**Subject:** RE: Public nuisance and the Licensing Act

Dear Mr. Pound,

Thanks for your reply. Glad you are still there (or here)!

John Pointing

# My attempts to use Parliament

RE: Public nuisance and the Licensing Act

From: **POUND, Steve** (PoundS@parliament.uk)

Sent: 18 January 2008 14:41:14

To: john pointing (johnpointing@hotmail.com)

My further grovelling apologies!

# Is the Guidance unlawful?

Burton J did not find the guidance defective, though invited to do so by counsel appearing for the applicant, but did decide that it:

**‘was not unlawful’**

*R (on the application of Hope and Anchor Public House Ltd) v City of Westminster Magistrates’ Court* [2009] EWHC 1996 (Admin) at [64].