

## Public nuisance re-visited?

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### Abstract:

Recent decisions involving environmental disasters, such as the Buncefield refinery explosion and the failure of Corby Borough Council to remediate the disused Corby steelworks site, have suggested that the orthodox position on public nuisance is no longer sustainable. Instead of conceptualising it as a property tort operating on a larger scale than private nuisance, public nuisances may also be seen as a separate, personal rights based tort. The flexibility of public nuisance has been apparent over several centuries and this continues to make it a useful cause in a civil action involving threats to the life, health and safety of the public as well as an environmental offence for egregious crimes.

**Keywords:** common law, environmental protection, public nuisance, tort

### Introduction

Since time immemorial the boundaries of nuisance have disturbed tidy-minded lawyers and jurists. Often, confusion results from the assumption that a public nuisance is merely a larger-scale form of private nuisance affecting a large (but unquantified) section of the public. On the other hand, public nuisance can be seen as an environmental tort (and offence), as the last ditch protecting the right not to be adversely affected by the unlawful act or omission whose effect was ‘to endanger the life, health, property, or comfort of the public’ (Archbold, 2010: 31-40). This conceptualisation posits a quite separate tort from an unlawful interference in a proprietary right, germane to private nuisance.

The tension between property-based and rights-based forms of public nuisance has been brought into focus by a number of important cases, culminating in the Court of Appeal’s decision in respect of the failure of Corby District Council to properly remediate the site of the old Corby steelworks.<sup>1</sup> An important implication of *Corby* is that it strengthens the position of public nuisance as a separate, rights-based tort from private nuisance: one that does not depend on the victim having a proprietary interest in land. Dyson LJ quoted with approval the position in the United States, where: ‘Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land’.<sup>2</sup> He added:

...it does not follow that the right which is interfered with in a public nuisance case is properly to be regarded as a right to enjoy property. 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.<sup>3</sup>

For a very long time the seminal work on the boundaries of nuisance has been Professor Newark’s piece published over 60 years ago in the *Law Quarterly Review* (Newark, 1949).

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<sup>1</sup> *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463.

<sup>2</sup> American Law Institute, *Restatement of the Law, Second, Torts 2d* (1979) chapter 40 para 821B (h).

<sup>3</sup> *Corby Group Litigation* (n 1 above) at [29].

This article is very appealing to traditional property lawyers, who prefer their hedges neat, their boundaries tightly drawn. Professor Newark's position is simple: the proper place for nuisance is that it is a tort to land, or one directed against the plaintiff's enjoyment of rights over land, including interference with an easement or profit (Newark, 1949: 482). Any deviation from this position creates uncertainty and conceptual turmoil amounting to heresy. The Court of Appeal in *Corby*, in turning away from such orthodoxy, rejected Professor Newark's monistic formulation, finding that public and private nuisance should be seen as separate torts protecting different rights.<sup>4</sup>

There is some evidence that straying from orthodoxy produces perplexing and confused results, so vindicating Professor Newark's anxieties. For example, a government department has managed recently to confuse itself so completely that in its guidance to local authorities on implementing the Licensing Act 2003 it proclaims that a public nuisance, such as noise emanating from licensed premises, includes: 'low-level nuisance perhaps affecting a few people living locally' (DCMS, June 2007: para 2.33). This matter will be considered further towards the end of this paper.

### **Judges who stray beyond the proper boundaries are brought to order**

The prim and proper monistic conception of nuisance becomes adulterated once the idea is admitted that personal injuries could be compensated in an action for public nuisance. The basic proposition placed before the Court of Appeal as a preliminary issue in the *Corby* litigation by the defendant local authority was that compensation for personal injuries should not be available to the victims of a public nuisance.<sup>5</sup> In the final action heard in the High Court, Corby District Council were found liable in negligence, for breach of statutory duty and in public nuisance.<sup>6</sup> The local authority were held responsible for birth defects caused from the exposure of 18 mothers to toxic chemicals released because of the inadequate remediation of the old Corby steelworks which they had supervised.

The earlier, Court of Appeal decision in *Corby* had been on a preliminary issue about whether the import of two recent House of Lords decisions in *Canary Wharf*<sup>7</sup> and *Transco*<sup>8</sup> was such that earlier cases awarding compensation for personal injuries in public nuisance had been wrongly decided. But the overarching authority employed by the local authority in *Corby* at the Court of Appeal was none other than Professor Newark, or rather, his venerable text. So the question arises of whether *The Boundaries of Nuisance* truly deserves the sacerdotal qualities heaped upon it?

Professor Newark places the blame for setting 'the law of nuisance on the wrong track' on Mr Justice Fitzherbert, for it was he who 'sent subsequent generations wrong in their law' in deciding that an action could be maintained for damages for personal injuries caused by an obstruction to the highway (Newark, 1949: 483-4). Thus it was his Lordship who, in 1535, during the reign of Henry VIII, uttered the words unlinking nuisance as an exclusive tort to land and allowing the possibility of claiming an award of special damages for the consequences of an obstruction to the highway (Spencer, 1989: 74). No doubt Fitzherbert CJ was doing what all good common law judges do when trying to find a justification for providing a remedy to a meritorious claim: he strained the law.

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<sup>4</sup> *Corby Group Litigation* (n 1 above) per Dyson LJ at [27-30].

<sup>5</sup> *Ibid* at [10].

<sup>6</sup> *Corby Group Litigation v Corby District Council* [2009] EWHC 1944 (TCC).

<sup>7</sup> *Hunter v Canary Wharf* [1997] AC 655.

<sup>8</sup> *Transco plc v Stockport MBC* [2003] UKHL 61; [2004] 2 AC 1.

As if a man make a trench across the highway, and I come riding that way by night, and I and my horse together fall in the trench so that I have great damage and inconvenience in that, I shall have an action against him who made the trench across the road because I am more damaged than any other man.<sup>9</sup>

For Lord Cooke, giving his minority judgement in *Canary Wharf*, 'if this was indeed an indiscretion on Fitzherbert's part, to rue it now might seem a little late'.<sup>10</sup> Quite so.

Over the centuries, the main focus of nuisance cases has been on incompatible uses of land between neighbours. These cases have primarily been to do with private nuisance: with interferences in the use or enjoyment of land. Some have been concerned with physical damage to the land; relatively few cases have dealt with public nuisance as their central point. The House of Lords in *Canary Wharf* had little to say about public nuisance. In respect of the interference in television signals, Lord Cooke found 'no material difference... between public and private nuisance'.<sup>11</sup> This is surprising given the proportion of Her Majesty's subjects who had been materially affected by the dust nuisance and from interference in their reception of television signals caused by the construction of the Canary Wharf tower. But the position of the majority of the House of Lords in *Canary Wharf* represents the high point of monistic orthodoxy, in which public nuisance is eschewed as an independent tort and private nuisance firmly put in its place as a property-based tort (Kidner, 1998; Wightman, 1998).

### Public nuisance in the 21<sup>st</sup> Century

Civil actions in private and in public nuisance have been available for a long time. Public nuisance is also a crime; an either-way offence for which an unlimited fine and/ or a maximum sentence of life imprisonment are available on conviction in the Crown Court.<sup>12</sup> The crime of public nuisance is defined in very broad terms in *Archbold* (2010: 31-40) as follows.

A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.

This definition was accepted by Lord Bingham in *R v Rimmington* as 'clear, precise, adequately defined and based on a discernible rational principle', a definition which applies as much to the tort of public nuisance as to the crime.<sup>13</sup>

Civil actions in public and private nuisance are not mutually exclusive. In determining the preliminary issues arising from the Buncefield oil storage explosion, the High Court rejected a monistic view of nuisance:

It is accordingly difficult to discern any difficulty in categorizing the incident at Buncefield as a public nuisance ... A very large number of people were affected. Those who had an interest in land suffered private nuisance. The explosion

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<sup>9</sup> Y.B. 27 Hen. 8, Mich. pl. 10.

<sup>10</sup> *Hunter v Canary Wharf* (n 7 above) at 718.

<sup>11</sup> *Ibid*, at 722.

<sup>12</sup> In one of the most serious public nuisances in modern times, a sentence of 17 years' imprisonment was upheld by the Court of Appeal in *R v Bourgass* [2007] 2 Cr App R (S) 40. The convict had been the prime mover in a conspiracy to commit acts of terrorism (but charged as a conspiracy to cause a public nuisance) involving the use of poisons and explosives intended to destabilise the community by causing disruption, fear and injury.

<sup>13</sup> *R v Rimmington; R v Goldstein* [2006] 1 AC 459; [2005] UKHL 63 at [7, 36]. Lord Bingham's speech is a comprehensive analysis of the law of public nuisance, and his words on the rationality of the principle have great authority.

endangered the health and comfort of the public at large. Subject to establishing a loss which was particular, substantial and direct ... there is a claim in public nuisance.<sup>14</sup>

Environmental forms of public nuisance will include those caused by smells, noise, waste deposits and water pollution, but there is no exhaustive list for this common law form of nuisance. Examples include: quarry-blasting;<sup>15</sup> emission of noxious smells from a chicken-processing factory;<sup>16</sup> storage of large amounts of inflammable material;<sup>17</sup> allowing refuse and filth to be deposited on vacant land in a densely populated part of London;<sup>18</sup> holding an all-night 'rave' in a field;<sup>19</sup> holding noisy events, such as motocross.<sup>20</sup>

In the civil action of *Attorney-General v PYA Quarries Ltd*, Denning LJ<sup>21</sup> decided that the basic requirement for a public nuisance is for it to be so:

widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

So if a class of people or a neighbourhood suffer sufficiently from an unreasonable interference in their use of land or from physical damage to their property, then a public nuisance action could be brought by the local authority. A person could sue those responsible<sup>22</sup> in a relator action brought in the name of the Attorney-General if he can prove that he suffered special damage over and above that of the community at large.<sup>23</sup>

A prosecution for public nuisance may be appropriate for egregious environmental crimes. In the major oil pollution incident caused by the grounding of the *Sea Empress*, the Milford Haven Port Authority pleaded guilty in the Crown Court to a strict liability offence under section 85(1) of the Water Resources Act 1991. They received a fine of £4 million, reduced on appeal to £750,000 by the Court of Appeal. The conviction was the result of a plea bargain in which the Environment Agency dropped the public nuisance charge on the indictment in exchange for a guilty plea for the lesser charge. The late Michael Hill QC, who prosecuted Milford Haven Port Authority on behalf of the Environment Agency, conceded (during a conference held by the United Kingdom Environmental Law Association) several years later that dropping the more serious charge may have been a mistake.<sup>24</sup>

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<sup>14</sup> *Colour Quest Ltd and Others v Total Downstream UK Plc and Others (Rev 1)* [2009] EWHC 540 (Comm) at [434], per David Steel J; reversed in part (but not on the public nuisance parts) by *Colour Quest Ltd v Total Downstream UK Plc* [2010] EWCA Civ 180.

<sup>15</sup> *A-G v PYA Quarries Ltd* [1957] 2 QB 169.

<sup>16</sup> *Shoreham-by-Sea UDC v Dolphin Canadian Proteins* (1972) 71 LGR 261.

<sup>17</sup> *R v Lister and Biggs* (1857) 26 LJMC 196.

<sup>18</sup> *A-G v Tod Heatley* [1897] 1 Ch 560.

<sup>19</sup> *R v Shorrock* [1993] 3 All ER 917. In this case the defendant farmer was found guilty of public nuisance for a 'rave' organised by another person but taking place on the farmer's land whilst he was elsewhere. Mr Shorrock was found guilty on the basis that he knew or ought to have known that there was a real risk of the event causing a public nuisance.

<sup>20</sup> *East Dorset DC v Eaglebeam Ltd* [2006] EWHC 2378 (QB).

<sup>21</sup> Per Denning LJ in *A-G v PYA Quarries Ltd* [1957] 2 QB 169, at 190–191. The applicability of this passage to criminal proceedings in public nuisance was doubted by Lord Rodger in *R v Rimmington*; *R v Goldstein* [2005] UKHL 63 at [44].

<sup>22</sup> The person responsible could be a local authority, as in the case of *Corby Group Litigation v Corby DC* [2009] EWHC 1944 (TCC), where the council was found liable for public nuisance in causing, allowing or permitting the dispersal of dangerous or noxious contaminants that resulted in birth defects.

<sup>23</sup> Establishing what comprises special damage is problematic. In the Delphic words of Mr Justice More-Bick, in *Jan de Nul v NV Royale Belge* [2002] 2 Lloyd's Rep 700 at 715: 'In the end the question whether the plaintiff's injury is sufficiently "special" and "direct" must depend very much on the facts of the case.'

<sup>24</sup> The Crown Court prosecution is reported in *Environment Agency v Milford Haven Port Authority And Andrews (The "Sea Empress")* [1999] 1 Lloyd's Rep 673.

Unlike a person, who can sue only by way of a relator action in the name of the Attorney-General, a local authority can bring an action in public nuisance in its own name under section 222 of the Local Government Act 1972. The local authority may do so where it 'considers it expedient for the promotion or protection of the interests of the inhabitants of its area'. In *Railtrack plc v Wandsworth LBC*<sup>25</sup> the local authority sought an injunction and a declaration that the company should be held responsible for the costs of cleaning the pavements from the faecal deposits of pigeons roosting in the girders underneath the railway bridge of a south London railway station. The council succeeded in obtaining a declaration and the court found the company liable in public nuisance for damage caused by the pigeons.

A common element is necessary for a public nuisance to be proven, as distinct from a series of nuisances affecting different individuals as separate instances. A common element may be present where there is a sufficiently large number of individual private nuisances and where the offence affects individual victims simultaneously. In *PYA Quarries Ltd*, Romer LJ<sup>26</sup> opined:

Some public nuisances (for example, the pollution of rivers) 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.

The courts have given no precise guidance as to what might constitute a sufficient number of individuals. The Court of Appeal in *PYA Quarries Ltd*, somewhat quaintly, referred to 'a class of Her Majesty's subjects', but did not place a number on the persons needing to be affected by the quarrying activity to bring it within the scope of a public nuisance.<sup>27</sup> Romer LJ did say that it was not necessary to prove that every person in the locality of the nuisance needed to be affected, adding that for an injunction to be granted in public nuisance a 'representative cross-section of the class' would have to be affected.<sup>28</sup> The use of the word 'representative' in this context is curious since it implies a sample; perhaps his Lordship meant it to mean a significant proportion of the total number that could be affected by the nuisance.

A series of separate acts affecting individual members of the community would not constitute the necessary common element required to establish a public nuisance. In the criminal case of *R v Rimmington*, 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'.<sup>29</sup> Consequently, the prosecution for a public nuisance failed as each of the letters constituted a separate act of vile racism.

There is another, crucial way of distinguishing public from private nuisances besides the 'common element' requirement. The Court of Appeal in *Corby*<sup>30</sup> rejected the formulation of

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<sup>25</sup> [2001] EWCA Civ 1236; [2002] QB 756.

<sup>26</sup> *A-G v PYA Quarries Ltd* [1957] 2 QB 169, 187.

<sup>27</sup> *Ibid.*, 184.

<sup>28</sup> *Ibid.*

<sup>29</sup> [2005] UKHL 63 at [47]. After *Hunter v Canary Wharf* [1997] AC 655, in which the House of Lords overruled the Court of Appeal decision in *Khorasandjian v Bush* [1993] QB 727, it would not be arguable to claim that the sending of race hate letters could constitute a private nuisance, since this act would not be a tort against a property right.

<sup>30</sup> *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463.

public nuisance as needing to be based on an interference with rights to enjoy land in favour of the right not to be adversely affected by the unlawful act or omission whose effect was to endanger the life, health or safety of the public. The latter formulation is thus akin to a personal rather than a proprietary right. The Court of Appeal's decision in *Corby* relied heavily on that of the House of Lords in *R v Rimmington* and *R v Goldstein*.<sup>31</sup> The use of a non-proprietary rights-based formulation in these decisions could be seen to give a new lease of life to public nuisance both as a crime and as a tort. *Corby* also provides further justification for allowing recovery of damages for persons whose health, life and safety have been particularly endangered by the unlawful act or omission in question.

The crucial case for distinguishing public nuisance from private nuisance and for defining it as a separate, personal rights-based tort sufficiently affecting the public with a common element, is the High Court decision in *Colour Quest*.<sup>32</sup> Although concerned with preliminary issues in the Buncefield litigation, the consideration of public nuisance is given a very full treatment which has not been subject to challenge at the Court of Appeal.<sup>33</sup> In the High Court, David Steel J came to the following conclusion:

No suggestion emerges from the authorities that, where a sufficient body of the public has been subjected to the nuisance, the only claim lies in public nuisance and any claim in private nuisance is barred or vice versa:

- a) Private nuisance involves interference with someone's private right to enjoy his own land. Public nuisance involves the endangering of the health, comfort or property of the public.
- b) It follows that a collection of private nuisances can constitute a public nuisance: but it does not follow either that in consequence the claim in private nuisance is subsumed or that a public nuisance involving interference with health or comfort cannot be freestanding.<sup>34</sup>

The basis for his Lordship's argument is that public and private nuisances should be seen as separate torts, protecting different categories of rights. But where there is a common injury, a private nuisance can become a public nuisance. Just before the passage quoted above, his Lordship had found that:

a private owner's right to the enjoyment of his own land is not a right enjoyed by him in common with other members of the public, nonetheless any illegitimate interference, being the very same interference contemporaneously suffered by other members of the public, constitutes a common injury satisfying the public nature of a public nuisance.<sup>35</sup>

Whilst this may be a correct statement of the law, some will find this position defies logic. At the very least it is unfortunate to be stuck with such a fuzzy boundary between a private and public nuisance.

### **Noise and the Licensing Act 2003**

Public nuisances can result from the behaviour of crowds. Even before the Industrial Revolution, the owner of premises attracting a motley crowd largely drawn from the 'ragged, criminal and dangerous classes' could be liable in nuisance (Himmelfarb, 1984: ch 15). In *Betterton*, Holt CJ found that:

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<sup>31</sup> [2005] UKHL 63.

<sup>32</sup> *Colour Quest Ltd and Others v Total Downstream UK Plc and Others (Rev 1)* [2009] EWHC 540 (Comm).

<sup>33</sup> *Colour Quest Ltd v Total Downstream UK Plc* [2010] EWCA Civ 180.

<sup>34</sup> *Colour Quest Ltd and Others v Total Downstream UK Plc and Others (Rev 1)* [2009] EWHC 540 (Comm) at [432].

<sup>35</sup> *Ibid.*, at [430].

playhouses are not in their own nature nuisances; but only as they draw together great numbers of people and coaches, and sharpers<sup>36</sup> thither, which prove generally inconvenient to the places adjacent.<sup>37</sup>

In *R v Moore*, the defendant used his premises for the lawful activity of pigeon-shooting, which attracted great crowds. In finding against him Lord Tenterden opined:

The defendant asks us to allow him to make a profit to the annoyance of all his neighbours; if not, it is said we shall strain the law against him. If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. And this is an old principle.<sup>38</sup>

Such cases illustrate the existence of an established line of authority in which public nuisance succeeded as a cause of action to control noise and the associated problems of crowds where the problem existed outside the defendant's premises. It was not a requirement that the offending activity be confined to what took place within the premises as the problem was compounded on the surrounding land. This line of authority fell into abeyance by the end of the nineteenth century, but is relevant to the noise implications of crowds in and around public houses as this comes within the scope of the Licensing Act 2003.

The Licensing Act 2003 requires licensing authorities to form a judgment about what constitutes public nuisance and decide what is necessary to avoid it by attaching conditions to premises licences and club premises certificates.<sup>39</sup> Avoidance of public nuisances – such as from noise, light pollution, noxious smells and litter - is therefore a licensing objective. Licensing and responsible authorities are also required to assess the impact of the licensable activity on persons living and working in the vicinity when coming to conclusions on licensing conditions (DCMS, June 2007).<sup>40</sup>

Local authorities and the police are the front-line authorities for making judgements about whether a state of affairs might amount to a public nuisance. Unfortunately, neither of these entities has much experience in bringing actions in public nuisance. Local authority environmental health departments utilize their statutory powers under section 80 of the Environmental Protection Act 1990, but these apply in respect of statutory nuisance which has its own procedure. The modern police force is placed in the invidious position of having very little (if any) experience or expertise with respect to the prosecution of environmental public nuisances.

The problem of controlling public nuisance for regulators is further compounded because changes to the licensing system came into effect less than two years before the ban on smoking was imposed. The application of the Health Act 2006 to ban smoking in all enclosed work places and public spaces has included pubs, restaurants, members' clubs and entertainment venues. It has resulted in increased noise disturbance from nicotine addicts and their associates congregating outside premises where licensable activities take place. Government advice is that licensing conditions to control a public nuisance cannot be imposed where the problem is caused beyond the vicinity of the premises (DCMS, June 2007: para 2.39). However, it might be argued that where a disturbance amounts to a public

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<sup>36</sup> The *Oxford English Dictionary* defines a 'sharper' as 'a cheat, swindler, rogue; one who lives by his wits and by taking advantage of others; esp. a fraudulent gamester'. Today's equivalent might be a merchant banker or a market trader.

<sup>37</sup> *Betterton's Case* (1680) Holt 538.

<sup>38</sup> *R v Moore* (1832) 3 B & Ad 184; 110 ER 68.

<sup>39</sup> Licensing Act 2003, s 4.

<sup>40</sup> Licensable activities includes the provision of regulated entertainment as well as the provision of alcohol. Schedule 1 to the Licensing Act 2003 sets down types of regulated entertainment.

nuisance, although manifested beyond the vicinity of the regulated premises, it would not have occurred but for the licensable activity taking place on such premises. There may be some grounds for concluding, on the basis of the line of authority from *Betterton's Case*,<sup>41</sup> that the scope of liability in public nuisance is wider than the guidance allows.

Advice from government has been supplied munificently. The Department of Culture, Media & Sport (DCMS) has tried to smooth the implementation of the Licensing Act 2003 and reconcile it with the object of the Anti-social Behaviour Act 2003. Buried within its copious guidance for local authorities is the following advice:

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) (DCMS, June 2007: para 2.33).

The authors of the guidance fail to show how their advice might be reconciled with *A-G v PYA Quarries*,<sup>42</sup> and it would appear to be advice given without consideration of any kind of case law authority. It probably reflects policy objectives based on a very loose interpretation of the scope of the Anti-social Behaviour Act 2003, or, perhaps, a manful and retrospective attempt by the government to try and make the Licensing Act 2003 more effective than Parliament had originally intended.<sup>43</sup>

### Concluding comments

When giving judgment in *Hunter v Canary Wharf*, Lord Cooke commented on the principle of 'give and take' - central to a proprietorial formulation of nuisance but vague – that:

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.<sup>44</sup>

Tension between a property-based and a rights-based conceptualisation of public nuisance could be interpreted, therefore, as a feature of the common law in which logic is subordinate to justice.

Perhaps this tension cannot be resolved without recourse to a 'shapely code' (Radzinowicz, 1985, para. 6). Some may conclude that the guidance provided to local authorities by the DCMS in June 2007 on public nuisance constitutes the kind of error that Professor Newark warned us about long ago in *The Boundaries of Nuisance* (Newark, 1949). The guidance appears to suggest that noise amounting to no more than a private nuisance suffered by a few residents would be enough to trigger a licensing review or result in the closure of premises, or even that a low level interference not amounting to a nuisance in law could do so. This is misleading and remains a source of confusion for enforcers, licensees and the public generally. It could be that the position taken on public nuisance is a simple mistake committed by government advisers having little expertise in nuisance law. The problem with this interpretation is that it implies that the large number of individual civil servants consulted

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<sup>41</sup> (1680) Holt 538.

<sup>42</sup> [1957] 2 QB 169.

<sup>43</sup> The DCMS guidance is inconsistent with that provided by DEFRA, which states, correctly, in its *Guidance to Local Authorities The Noise Act 1996 as amended by the Anti-social Behaviour Act 2003 and the Clean Neighbourhoods and Environment Act 2005: Guidance to Local Authorities in England* (Defra: March 2008), at [143]: 'Although "public nuisance" is not defined in statute for the purposes of the Licensing Act 2003 or the Anti-social Behaviour Act 2003, it is generally taken by the courts to be a nuisance which affects the public at large where it would not be reasonable to expect an individual to take proceedings to resolve the matter...'

<sup>44</sup> *Hunter v Canary Wharf* [1997] AC 655, 711.



beforehand about the precise wording to be used in the guidance would each have had to have made the same error. A policy to make the guidance appear more relevant and enforceable that it really could be in controlling the British binge-drinking culture is perhaps a more plausible explanation.

But tension in the law of public nuisance would seem to have played a part and subsequent case law has not helped to resolve the difficulties. In a hastily constituted application for leave for judicial review of a licensing case concerning the fortunes of *The Endurance*, a public house in Soho, Burton J did not find the guidance defective though invited to do so by counsel for the company, who had argued the point fully and effectively. Somewhat lamely, his Lordship decided that the guidance 'was not unlawful'.<sup>45</sup> In this case the noise generated by the licensed premises had been found by the district judge at first instance to be a public nuisance, having been 'higher on the scale than something that fell within the category of simply a private nuisance'. Burton J accepted this finding, though without questioning what sort of scale the learned district judge had had in mind, and so his comments as regards the lawfulness of the guidance were *obiter*.<sup>46</sup> Seen in another light, his Lordship may have been doing what all good common law judges do: he strained the law to suit the justice of the case. Let us hope that Mr Justice Burton does not follow Mr Justice Fitzherbert in being reviled for straying beyond the boundaries of nuisance for the next 450 years or so.<sup>47</sup>

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<sup>45</sup> *R (on the application of Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court* [2009] EWHC 1996 (Admin) at [64].

<sup>46</sup> *Ibid.*

<sup>47</sup> Y.B. 27 Hen. 8, Mich. pl. 10.