

**October 2014**

## **NUISANCE (PRIVATE) ENGLAND AND WALES**

### **The Civil wrong (tort) of Private Nuisance**

1. This Legal Topic Note deals with the subject of private nuisance. A separate Legal Topic Note (LTN 66 – Nuisance Public and Statutory) considers public and statutory nuisances.
2. The law of nuisance is closely related to (i) negligence and (ii) occupiers' liability. Those subjects are set out in separate legal topic notes (LTNs 68-Negligence and 42-Occupiers Liability). It is sometimes difficult to distinguish between these three areas of the law and if in doubt reference should also be made to all three Legal Topic Notes.

### **What is Private Nuisance?**

3. A private nuisance may be defined as an act that indirectly causes physical damage to land or buildings or which substantially interferes with the use or enjoyment of land and where, in either case, the damage or interference is unreasonable. In a claim for nuisance the courts will try to balance each party's right to use their respective land as they wish.
4. Private nuisance is a civil wrong (a tort). The person suffering a nuisance can sue whoever is responsible and obtain compensation (damages) and possibly a Court Order to abate the nuisance or to prevent it from recurring (an injunction). Claims are brought in either the County Court or High Court depending on the complexity of the case and the amount of damages claimed.
5. A claim can only be brought if all the following requirements are met: -
  - there must be damage to land owned or occupied by the claimant or interference with the use or enjoyment of his land;
  - the damage or interference must be unreasonable;
  - the damage or interference must generally be more than an isolated incident;

- the damage or interference must be caused or permitted by the defendant; and
- normally the claimant must actually suffer damage or interference.

### **What does physical damage to land or interference with the use of land mean?**

6. The first of these concepts (physical damage) is quite straightforward but the second (interference with the use or enjoyment of land) is not always quite so straightforward. An individual's enjoyment of land can be affected in various ways including smell, noise, and the interference with rights to light, air or a view. In the case of *Pemberton v Southwark LBC* a tolerated trespasser (a former tenant) was able to sue the council in nuisance because it failed to abate a cockroach infestation.

### **What is Unreasonableness?**

7. What is "unreasonable" will depend upon the circumstances prevailing in the area where the nuisance is alleged to occur. Thus "reasonable" noise levels in an industrial area will be higher than in a rural area. Similarly, a person living next to a farm may have to accept a greater incidence of smell than would be reasonable in a residential suburb.
8. Where there is no actual damage to land or buildings a claimant must show substantial interference with his use or enjoyment of his property in order to establish 'unreasonableness'. In *Miller v Jackson* the Court decided that the proximity of a cricket's club pitch and the likelihood of balls entering the claimant's property was a substantial interference.
9. An isolated incident cannot usually amount to a private nuisance although a single incident may do so where the state of the claimant's premises gives rise to the nuisance. Thus a fire resulting from defective wiring, which damages an adjoining property, could amount to a nuisance; it is the defective wiring, which is the ultimate cause of the damage, and this constitutes a continuing state of affairs, not an isolated event. Similarly allowing a culvert to remain blocked, resulting in the flooding of adjoining land could amount to a nuisance.
10. The person who is responsible for causing, or continuing, a nuisance is always liable.
11. A person who owns land, and lets or licences it to another person who causes a nuisance, may also be liable where he knows that his land is being used for committing a

nuisance, even though he has not authorised or condoned it. A local authority that granted a lease to a go-kart club to enable the club to use the land for a race track was held liable in nuisance for authorising the noise caused by use of the track (*Tetley v Chilty*). A landowner may also be liable where occupiers or even trespassers on his land are, to his knowledge, using it as a base to commit wrongful acts against neighbouring land. A local authority that neglected to clear gypsies from its land was held responsible for the regular damage, which they caused to adjacent farmland (*Lippiatt and another v Gloucestershire Council*).

12. A claimant can only succeed if (with two exceptions - following paragraph) he shows that he has suffered loss or damage. The loss may be specific (e.g. the cost of replacing a broken window), or it may be general (e.g. discomfort, inconvenience or distress caused by excessive noise or smell), or it may comprise both.
13. Actual loss or damage does not need to be shown where the claimant alleges interference to an easement, such as a right of way, or where he brings an action for an injunction to prevent a nuisance occurring in the future.

### **What are the defences to a private nuisance claim?**

14. A right to commit a private nuisance may be acquired by long use (a prescriptive right) unless the activity in question is prohibited by statute or the nature of the activity is unduly changeable (as is likely to be the case with noise or smell).
15. Sometimes a claimant may have consented to a nuisance, or be, in part, to blame for its occurrence. This will provide a total or partial defence.
16. It is not a defence that the claimant “came to the nuisance”. In *Miller v Jackson*, the cricket ground had existed since 1905 and the claimant’s house had not been built until 1972. Nevertheless the Court of Appeal held that it was not a defence that the cricket ground only became a nuisance when the house was built.
17. A local authority cannot commit a nuisance merely by exercising a statutory power to provide recreational facilities. However a council must act responsibly, for example, in siting a children’s playground it is very likely that a nuisance will arise if it is placed immediately adjacent to housing. The defence of statutory authority is, at best, a last resort: councils should be wary of exercising their powers in a way, which would result in

a claim for nuisance if they were a private individual. If a nuisance can be avoided by use of reasonable care and skill, simply claiming that the activity is a statutory activity will not offer a defence.

### **What remedies are available in nuisance cases?**

18. A successful complainant will generally be entitled to damages equal to his loss. Since he will normally wish to prevent a repetition or continuance of a nuisance, he is likely also to seek an injunction.
19. The court is not obliged to grant an injunction. In *Miller v Jackson* an injunction was refused because the interests of the local inhabitants in being allowed to continue to play cricket outweighed the interest of the claimant in undisturbed enjoyment of his home; an award of damages was held to be sufficient recompense to cover past and future damage.
20. The operation of an injunction may be suspended to give the defendant time to end a nuisance.
21. In very rare cases, an injunction may be granted to restrain the commission of an anticipated nuisance but only where there are compelling grounds for believing that harm or damage is imminent and that damages will not be a sufficient remedy.
22. Anyone suffering a nuisance may abate it by direct physical action e.g. by cutting back the boughs of a tree that overhang a property (*Lemmon v Webb*). Where abatement would require entry on to someone else's property, notice of entry must normally be given. The courts do not generally favour self-help remedies and there are considerable restrictions on when it can be relied upon. Councils are advised to seek advice from NALC before considering such action.

### **What safety precautions can councils take?**

23. As stated in paragraph 17 above the mere provision of land for public purposes cannot constitute a nuisance but the manner in which it is developed or used can do so. For example, a council has the power to provide a children's play area or a football pitch and should seek to avoid potential nuisance claims (e.g. noise or damage caused by footballs being kicked into neighbouring properties) by siting them away from houses or garden boundaries. The risk is greater when the area is unsupervised or open at all times.

24. Even where substantial precautions are taken a use may be unreasonable and so constitute a nuisance. In *Miller v Jackson* the defendant erected a chain-link fence 8ft 9ins high on top of a wall 6ft high on the boundary between the cricket ground and claimant's property. This was an attempt to solve the problem but it was unsuccessful and the defendants were still held to be liable in nuisance.
25. Where all the requirements for proving a nuisance exist all reasonable steps must be taken to abate it. If this means going to extravagant lengths then it becomes necessary to ask whether the facility needs to be re-sited.
26. Where a council receives a complaint about activities on its own land which alleges a nuisance, it must consider the matter carefully and take any necessary action. It may well be appropriate to seek advice from NALC and councils should not hesitate to do so if the complainant threatens legal action. In such cases councils should notify their insurers. A council should not ignore a complaint or simply take the attitude that it can do nothing.
27. If a council is sued for committing or continuing a private nuisance it may not be covered by its public liability insurance policy. That policy only covers liability for accidental bodily injury and damage to or loss of property. The commission or continuation of a nuisance is a deliberate act or omission.

#### **What can councils do in respect of private nuisance not affecting council property?**

28. Ordinarily, a council may only take action in respect of a nuisance that affects land it owns or occupies. An exception is registered common land where no person is registered as the owner. In such cases a council may institute proceedings against any person for any offence committed in respect of the land. This could include nuisance proceedings (s.45 of the Commons Act 2006).
29. Where claims are made that a private nuisance exists in respect of any other land not owned or occupied by a council, the council has no powers to intervene. The complainant should be referred to a private solicitor or a Citizens Advice Bureau. Where a significant number of people complain about the same alleged nuisance the council should consider whether a public or statutory nuisance exists.

**Other Legal Topic Notes (LTNs) relevant to this subject:**

| <b>LTN</b> | <b>Title</b>                                   | <b>Relevance</b>   |
|------------|--|--|
| 41         | The Responsibilities of Councils as landowners | Sets out other liabilities arising from local councils' ownership of land.       |
| 42         | Occupiers' Liability                           | Sets out local councils' responsibilities as occupiers of land.                  |
| 44         | Trespass to Land                               | Explains various remedies available to local councils                            |
| 66         | Nuisance (Public and Statutory)                | Sets out the general law of public and statutory nuisance.                       |
| 68         | Negligence                                     | Sets out local councils' considerations for arranging public liability insurance |

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