TAKE THE TROUBLE

Nuisance The law may be centuries old, but it is as relevant today as ever, so, as Doug Bryden and Katie Tantum explain, you should keep up to date with your rights

The key benefit of the statutory nuisance regime is that it is a low-risk, low cost solution

Planning permission or an environmental permit does not of itself authorise a nuisance

Those suffering from a nuisance need to know that they can take action. However, the often overlapping common law rights of action (as well as the potential for criminal sanctions) make nuisance a complex area of law. This article summarises the law and considers its implementation.

A bit more detail

In private nuisance, it had been thought that a claimant must have a direct proprietary or possessory interest in the land affected by the nuisance in order to claim damages at common law.

However, since the Human Rights Act 1998 came into force and since *Dobson* v *Thames Water Utilities Ltd* [2009] EWCA Civ 28; [2009] 1 EGLR 167, parties without such a proprietary interest can claim compensation from public bodies, even where others in their home with such an interest have been compensated in damages under private nuisance. Damages will be awarded under the Act only where necessary to award "just satisfaction", having taken into account damages for nuisance and alternative remedies.

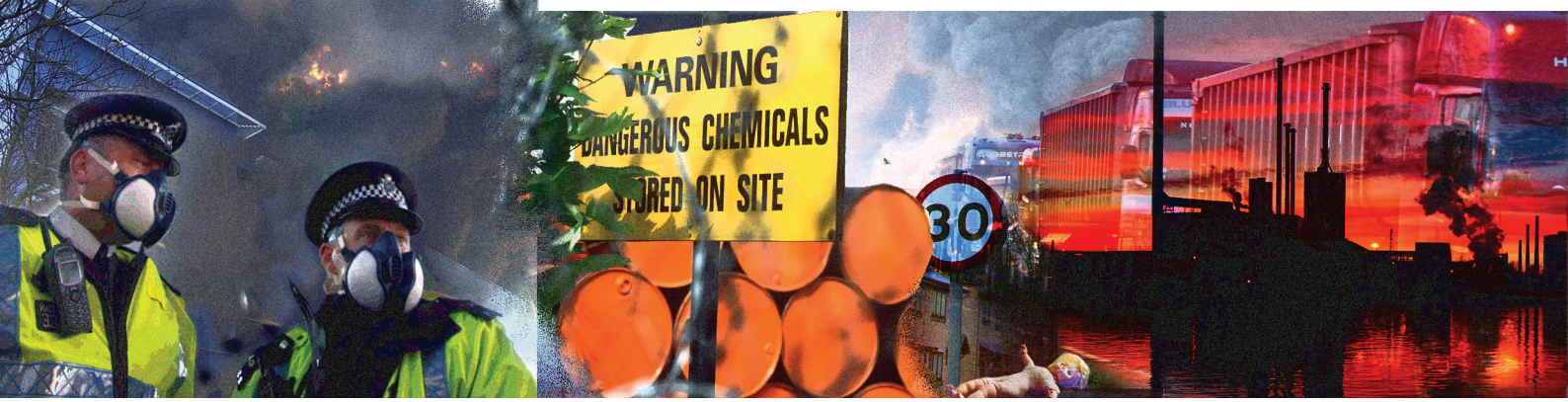
The rule in *Rylands* v *Fletcher* (1868) LR 3 HL 330 may also be relevant. It was clarified in *Cambridge Water Co Ltd* v *Eastern Counties Leather plc* [1994] 1 All ER 53: a landowner will be liable where a non-natural use of its land damages a neighbouring property. *Transco plc* v *Stockport Metropolitan Borough Council* [2003] UKHL 61; [2004] 2 AC 1 stated that liability under *Rylands* may be excluded where specific statutes cover the nuisance. It also shed light on the role of insurance: the fact that the neighbouring occupier is covered by insurance will not preclude liability under *Rylands*.

Under both private nuisance and the *Rylands* rule, it is relatively easy to identify physical damage; interference with the enjoyment of one's land is more ambiguous and requires the courts to perform a balancing act. The well-known quote "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey" may not now resonate with Bermondsey residents, but the message is clear. Location is still crucial in determining the extent of the nuisance, as are the time, frequency and duration of the nuisance and hypersensitivity on the part of the claimant and malice on the part of the defendant.

The grant of planning permission or an environmental permit does not of itself authorise a nuisance, although it may alter the nature of the locality, which could in turn lower the threshold for determining the existence of a nuisance. Unfortunately for developers, this means that even when the hurdle of planning consent is overcome, the risk of potential claims will remain.

Recourse may be available under public nuisance, but while the tort is secure the future of the criminal offence is uncertain. The Law Commission recently consulted on reform in this area. One proposal suggested a revision of the fault element, so that negligence is no longer sufficient: the defendant must be shown to have acted intentionally or recklessly. In practice, statutory nuisance may provide a more effective remedy than seeking a criminal prosecution under public nuisance.

Section 79 of the Environmental Protection Act 1990 lists categories of issues that can amount to a statutory nuisance; these include noise and smoke from premises, fumes, gases, dust and the state of premises. The key benefit of the statutory regime is that it is a low-risk, low-cost solution: the onus is on the local



authority to take steps to ensure that the nuisance is abated and, in doing so, they also bear the cost. An abatement notice, once served, is generally an effective enforcement procedure and carries a criminal sanction for non-compliance.

Recent landmark cases

● *Lambert* v *Barratt Homes Ltd (Manchester Division)* [2010] EWCA Civ 681; [2010] 33 EG 72
In this case, the Court of Appeal considered the scope of a landowner's duty of care to its neighbours. It found that it was unreasonable to expect a local authority to carry out and pay for remedial works to abate a nuisance on its land that had been caused by a neighbouring owner.

The local authority had sold part of a playing field to a developer, whose works blocked an existing drainage ditch and culvert. This led to water accumulating in the local authority's section of the playing field, which flooded, causing considerable damage to the claimants' properties.

The court initially found that the developer and the local authority were both liable to the claimants in damages: the developer for its negligence in obstructing the culvert and the local authority for neglecting its duty of care to prevent the flood. However, it considered that although the local authority owed a measured duty of care, which arose as soon as it became aware of the nuisance, the scope of this duty depended on the particular circumstances of the case. In this instance, it did not extend to paying for the works because the developer had created the problem and did not challenge its liability. Since the claimants had a right to recover the entire cost from the developer, the authority's duty of care was held to extend only to co-operating with the remedial works.

Landowners affected by nuisance caused by neighbouring occupiers should take heed: even where a duty of care to others arises, its scope may be limited.

● *Colour Quest Ltd* v *Total Downstream UK plc* [2010] EWCA Civ 180; [2011] QB 86; [2009] EWHC 540 (Comm); [2009] 2 Lloyd's Rep 1
In December 2005, several explosions at the Buncefield oil storage site resulted in extensive personal injuries and damage to commercial and residential properties. Hertfordshire Oil Storage, a joint venture between Total and Chevron, had developed the part of the Buncefield site where the incident occurred.

The civil litigation has shown that in claims based on the rule in *Rylands*, public and private nuisance can coexist and that private nuisance can arise out of a single act rather than a state of affairs. There is no requirement in public nuisance for a claimant to have a proximate proprietary interest. However, proximity may be a prerequisite to recovering special damages where the loss is sufficiently "particular, direct and substantial".

In addition, the use of the defence of consent under *Rylands* has been clarified: Total's attempt to avail itself with the defence in respect of claims by those inside the perimeter of the site failed: the claimants had not consented to the petroleum products being stored in an unsafe manner and, in any event, Total's negligence vitiated any consent.

● *Corby Group Litigation* v *Corby District Council* [2009] EWHC 1944 (TCC)
Here, it was held that children with no property interests could seek damages for personal injury under public nuisance. The children had allegedly suffered birth defects arising from the council's redevelopment of a contaminated British Steel site.

Although the court found that the evidence showed that the council was liable in public nuisance and had breached its duty of care to the claimants between 1983 and August 1997, and its statutory duty under the 1990 Act, the claimants were required individually to establish that their particular conditions had been caused by those failings. Following the initial judgment, the council settled the case for a reported £14.6m.

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WHY THIS MATTERS

The law of nuisance means that anyone who is adversely affected by, for example, noise, odours, hazardous substances or dust does not have to suffer in silence. Recent case law suggests that the courts are widening the scope of successful nuisance actions: for instance, an interest in land is not a prerequisite to bringing a claim in private nuisance against a public body and the failure of the consent defence to *Rylands* in the Buncefield litigation.

Private nuisance arises where the actions of a private landowner adversely affect neighbours. The damage caused to the neighbouring property (physical damage) or property rights (such as the right to quiet enjoyment of the land) must be substantial and unreasonable, usually involving repeated harm. It must be reasonably foreseeable and any compensation has to relate to physical harm rather than personal injury. Damages and injunctive relief may both be sought. Damages tend to be measured according to the deemed diminution in the value of the property resulting from the nuisance.

Recourse is also available under public nuisance, which may be a tort or a criminal offence. This broadly encompasses any interference with the property, life, health, morals, comfort or convenience of the public, and can arise out of a single act. Claims can be made for personal injury as well as damage to property rights, and claimants do not require a property interest.

To establish whether a statutory nuisance arises, a claimant must first show that: (i) a common law nuisance exists; or (ii) it is prejudicial to health. Establishing that it is also a common law nuisance is straightforward and the affected party does not have to have any property interests in order to claim.

By contrast, establishing that a statutory nuisance is prejudicial to health can be difficult, and often requires expert evidence. In contrast to common law public nuisance, there is no requirement that statutory nuisance puts a significant part of the community in jeopardy.

FURTHER READING

Clerk & Lindsell on Torts
Eds: Dugdale A Professor and Jones M Professor, (20th ed) Sweet & Maxwell
Environmental Law Handbook
Fogelman V, Hellawell T and Wiseman A, (6th ed) Law Society
Winfield and Jolowicz on Tort
Rogers W, (18th ed) Sweet & Maxwell

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