

Chapter 9: Nuisance and *Rylands v Fletcher*
Extra Questions

Question 1

'The requirement of a proprietary interest in land is no longer sustainable in an era of greater human rights consideration.'

In light of this statement, evaluate the function of the tort of nuisance and assess, with regard to human rights considerations, the merits of this restriction as to who may have an action.

Answer guidance

Some knowledge and discussion of human rights is necessary in your answer, given the quote.

Explain what purpose the tort of nuisance serves and the restriction on who may have an action. Nuisance offers protection to interests in land and can take two forms (*St. Helen's Smelting Co. v Tipping* (1865) HL Cas 642). Firstly, there is protection from material damage to the land. Claims for such damage are relatively straightforward and involve the defendant's act causing a form of physical damage to the claimant's land. The land itself is damaged and thus it is logical that any claim should be brought by the owner of that land. The second is nuisance producing sensible personal discomfort; the act interferes with the enjoyment of the land such as noise and smells. Therefore, it interferes with the enjoyment of all those present on the land creating an issue as to who will have an action.

The tort of nuisance offers redress for those who suffer injury to their land, however, because of the firm statements by the Law Lords in *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426 that very purpose means those who may seek the protection of the tort are restricted and so some individuals succeed while others miss out on redress yet they have suffered the same interference.

In *Khorasandjian v Bush* [1993] 3 WLR 476 the claimant succeeded in bringing a civil action against the defendant in private nuisance, despite the fact that she had no traditional proprietary interest in the family home. The CA in *Hunter* supported the view taken in *Khorasandjian*. However, *Hunter* was appealed in 1997 to the HL, who reverted back to the traditional position. A majority of the HL stated that only claimants with a right in land could sue.

This issue came to the fore in *Hunter* where a group of residents claimed nuisance from local construction work. Notably, not all of the residents were householders and included spouses, partners, children and other relations. Their claim initially failed but succeeded in the Court of Appeal where Pill LJ held that where the claimant occupied the land as a home, there would be a sufficient link to the land to provide standing.

The compatibility of this restriction with Art 8 of the ECHR was considered in *McKenna v British Aluminium* [2002] Env. L.R. 30 – 'real possibility' that a court might decide that the *Hunter* ruling was in conflict with the right to respect for private and family life.

Question 2

How far do you agree that the tort in *Rylands v Fletcher* (1868) LR 3 HL 330 no longer serves any purpose and should be abolished?

Answer guidance

The question calls for you to focus on the particular tort of *Rylands v Fletcher* rather than a more general discussion of nuisance.

The rule in *Rylands v Fletcher* is as follows: “a person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape”.

This rule overlaps with nuisance. It was once thought to be a strict liability tort, but it has been interpreted restrictively such that it is a form of nuisance for isolated escapes from land only. It was thought that it would fade into irrelevance, but was resurrected in *Transco plc v Stockport Metropolitan Borough Council* [2004] 1 All ER 187 – the rule should only offer a cause of action where the defendant’s use of land was out of the ordinary, considering the time and place e.g. very hazardous activities where negligence can’t be proved. The *Transco* decision was then followed by the High Court in *LMS International v Styrene Packaging* [2005] EWHC 2065. As with nuisance the damage claimed must relate to the interest in land and so any claim for death or personal injury cannot be made.

RvF was originally considered to impose strict liability but defences effectively introduced an element of fault-based liability and it has been interpreted restrictively ever since. Consider whether the rule has been since superseded by other areas of law or could be used to play a greater role in protecting the environment. Consider relevant cases e.g. *British Celanese Ltd v AH Hunt (Capacitors) Ltd* [1969] 2 All ER 1252, where industrial activity was held to be a natural use of land, so that problems arising from such activity could not be dealt with under *RvF*.

Question 3

Ron Burgundy, of Burgundy and Sons Ltd, operates a cement factory on the edge of Oldtown. The factory was established in the 1960s and now provides work for approximately 200 local residents, having expanded rapidly over the last 5 years when Ron managed to secure a lucrative contract to supply cement overseas. Over that period new private housing estates have been built close to the factory, as the town of Oldtown has expanded and surrounding fields have now become residential areas.

Recently local residents have been complaining about noise and dust emitting from the factory. Also the factory recently started to operate on a 24-hour basis due to increased demand. Local residents can hear the heavy machinery both day and night.

Dust has destroyed plants in Azma's garden. Her daughter, Dina, suffers a skin disease as a result of stress from the constant noise. On one particular occasion, there was an explosion in the factory and bits of cement landed on residents' homes and cars; some residents' homes had their windows shattered. Mr. McDonald, a local farmer, complained that since the explosion, his hens had stopped laying eggs.

Advise Ron as to his potential liability in tort.

Answer guidance

There is a lot to discuss here so you need to structure your answer carefully, dealing with all of the elements of nuisance in turn.

The issue here is nuisance (specifically private nuisance). Azma and Mr MacDonald's interest in the land needs balancing with the use by Ron of his land. This tort covers unlawful interference with a person's use, or enjoyment, or right over or in connection with, their land (*Malone v Lasky* [1907] 2 KB 141).

Can M and A bring actions in nuisance against R? (Do they have an interest in land i.e. are they owners/occupiers?). Can R be sued? (Is he an occupier, landlord or creator of the nuisance?). Is R causing an unreasonable interference? Assess first how serious R's interference is in light of its extent and duration. Consider then the reasonableness of R's interference, especially in light of its social utility.

Sensitivity of D - A defendant is not responsible for damage that occurs solely because the claimant, or the claimant's situation, is abnormally sensitive. *Robinson v Kilvert* [1889] 41 Ch.D 88 – the damage was due more to the sensitivity of the paper than to the defendant's activities, so there was no nuisance.

Locality and Malice (M) - Whether interference with land is reasonable may depend on the locality, and what is a nuisance in a quiet residential area may not be a nuisance in an industrial location. *Sturges v Bridgman* [1879] 11 Ch.D 852 – an interference that would be reasonable in one area may be unreasonable in another. If the defendant acts with malice or a bad motive, then this may turn seemingly reasonable conduct into unreasonable conduct and, therefore, a nuisance. *Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468 – neighbour held liable for deliberately trying to prevent foxes from breeding by firing a gun to scare them.

Defences: Usefulness – the fact that the activity is useful is probably not a defence, but it is a factor, which will be considered in reaching a conclusion on the reasonableness of the defendant's conduct. It may also be a reason for denying an injunction.

Remedies: Damages – can be recovered for damage to the claimant's land, or the enjoyment of it, and also for injury to the claimant that is associated with loss of enjoyment, such as loss of sleep, or discomfort caused by noise or smells. Injunction – aims to make the defendant stop the activity that is causing the nuisance and may be refused even though nuisance is proved, as it is a discretionary remedy – *Kennaway v Thompson* [1981] QB 88.

Question 4

Duncan purchased a large country estate last year called Byker Grove. The estate consists of a large detached mansion at its centre, surrounded by idyllic grounds, including a golf course. In order to diversify his revenue streams Duncan also decided to use part of the grounds to host weddings. Byker Grove neighbours land adjacent to that owned by PJ. PJ is a First World War enthusiast who uses his farmland to re-enact the war for the public to attend. The events are also combined with lectures on World War One to inform people about the history of the war. The re-enactments are staged Thursday through to Sunday and last for eight hours each day. These events have always been extremely popular, especially with schools from across the country. PJ has won several tourist and educational awards for the events and has significantly increased the number of employees he employs as a result.

However, the staging of the re-enactments clashes with the main days for golf players and weddings on Duncan's land. The noise from the battles soon started to cause problems for Duncan and many customers complained that they could not concentrate on their golf play. Duncan also had to give full refunds to two wedding parties who claimed that their wedding was ruined by the interference from the re-enactments, and several weddings have been cancelled. Duncan has now reached the stage where he feels his own personal enjoyment of the estate is being diminished and so he has reluctantly moved out to live in another property that he owns. As such, he has sought to put an end to PJ's use of his land. Duncan was aware of the re-enactments when he first purchased Byker Grove.

Advise PJ: (a) whether he could successfully contest an action by Duncan in nuisance; and (b) whether, if not, he could at least stop an injunction being granted.

Answer guidance

Again, this requires breaking down the question to establish the elements for a claim in nuisance, but this time you also need to consider a specific remedy.

The issue here is nuisance (specifically private nuisance) and Duncan's interest in the land needs balancing with the use by PJ of his land. This tort covers unlawful interference with a person's (i) use, or (ii) enjoyment, or (iii) right over or in connection with, their land - *Malone v Lasky* [1907] 2 KB 141.

Can Duncan bring an action in nuisance against PJ? Identify that as Duncan owns Byker Grove he has a proprietary interest in it, which confirms that he has the requisite standing - *Hunter v Canary Wharf Ltd* [1997] AC 655. Identify also that PJ can be sued as a landowner/creator of the nuisance.

Is PJ causing a substantial interference? Identify that this is a possible amenity nuisance. Assess the nature of the locality and its significance – what could constitute a nuisance in one type of area may not be in another - *Sturges v Bridgman* (1879) 11 Ch D 852. As this is the countryside it is naturally quieter than an urban setting and so the increased noise of the re-enactments may be significant.

Is it also an unreasonable interference? Assess how serious the interference is in light of its extent and duration – The noise goes on for 8 hours a day, 4 days a week and is so great that two weddings have had to be refunded and others have cancelled in light of the noise. Furthermore, Duncan has moved out, all of which suggests that not only are the noise levels substantial, but also serious. Consider the reasonableness of PJ's use, especially in light of its social utility – PJ's use of his land seems to generate a lot of public benefit in that it acts as a learning environment by educating people about the First World War, generating employment and is a popular family attraction. More likely to be considered in relation to remedies (see below) rather than as a factor outweighing unreasonableness – *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264.

Can PJ rely on any defences? Discuss the significance of Duncan purchasing the land knowing PJ's use – as Duncan has not had his proprietary interest interfered with for 20 years, PJ cannot claim the defence of prescription. Could PJ avoid an injunction and simply pay compensation? Highlight again the social utility of PJ's use. Damages in lieu of injunction may be more freely awarded, which would allow PJ to continue his activities - *Miller v Jackson* [1977] QB 966.

PJ's use of his land is likely to be considered a substantial and unreasonable interference with Duncan's use and enjoyment of his land. However, while Duncan may seek an injunction, in light of the potential social utility of the use to which PJ is using his land, an award of damages is more likely.