Chartered Institute of Environmental Health

Statutory Nuisance – still going after 160 years!

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Introduction

- The objectives for the session
  - A better understanding of how and when SN can be used
  - An understanding of SN's relationship with the common law
  - How to serve good Abatement Notices
  - How to enforce them
  - How to make and record the decisions properly
  - A better understanding of the relationship with other statutory regimes
- The commitment

Outline (1)

- The two propositions
- So you think you know what a nuisance is
- A potted history of statutory nuisance
- The current regime
- LAs duties and challenges
- “Nuisance” and “Prejudicial to health”

Outline (2)

- So you still think you know what a nuisance is
- Relationship with other regimes
- Serving a good Abatement Notice
- Enforcing the AN
- Compensation for affected owners and occupiers
- Summary
- Questions

Proposition 1

- Law is like quantum mechanics…
- Uncertainty rules - its all about probability
- What is the law on anything – the four components
  - Statutes – what Parliament etc. have said
  - Case law – what the courts think the statutes mean
  - Guidance - what the Government and others think they mean
  - Personal judgment/expert opinion - what we think it means and would like it to mean
- Many bits of many statutes not covered by case-law or guidance – and may never be!

The uncertainty principle!

- Statutory nuisance
  - PHA36
  - Betts v Penge UDC 1942*
  - Salford v McNally 1976
  - NCB v Thorne 1976
  - EPA90
  - What's the law now? What has changed?

Proposition 2

- Like battles, most legal actions are won and lost before a shot is fired
- Getting into court as the reasonable party
- Losing due to poor process is in your hands

So you think you know what a nuisance is... (1)

- Picture 2 S/D houses on their own in a quiet road. Occupier A regularly plays music in the middle of the night, which wakes up occupier B who is a light sleeper.
  - Can the LA serve a notice under S80?
  - Can occupier B take action under S82?
  - Can occupier B sue his neighbour for nuisance?

So you think you know what a nuisance is...(2)

- Picture the same 2 S/D houses in row of others. Several occupiers are complaining, but the immediate neighbour is most affected.
  - Can the LA serve a notice under S80?
  - Can the occupiers take action under S82?
  - Can the occupiers sue their neighbour for nuisance?

A potted history (1)

- Started with the temporary Act in 1846, amended in 1848 and 1849
- 1855 Act* the start of the current system
  - 4 categories nuisance or injurious to health, Orders, Fines, WID, and BPM
- Sanitary Act 1866 - smoke nuisances added
- Public Health Act 1875 – major consolidation
  - 5 categories + 2 new, overcrowding and factories. Separate measures for offensive trades. Precursor of S82, plus use of higher courts. ANs, Nuisance Orders
- 1885 – 1907** 5 new categories added

A potted history (2)

- PHA 1936 a major consolidation. PTH introduced, ability of LA to do emergency work without serving notice, much better cost recovery powers.
- Noise Abatement Act 1960 – added noise nuisance (no PTH)
- PHA 1961 – accelerated procedure for premises (BA 1984)
- PHA 1969 – recurring nuisances
- Control of Pollution Act 1974 – streamlined procedure for noise nuisance (still no PTH), basis for current system

The current regime

- 10/5/3
  - These are the extant categories of SN
  - 10 (7+3) EPA 1990 Part III as amended*
  - 5 PHA 1936 (Ss 141,259,268)
  - 3 Mines and Quarries Act 1954
- Service of Abatement Notice
  - On the person responsible
  - On the owner where defects of structural nature
  - On the owner or occupier if cannot find those responsible, or if nuisance not yet occurred
- Enforcement of the notices - Prosecution, WID, FPNs, Injunctions.

The categories of SN

- Environmental Protection Act 1990 (Original) – Section 79
  - Premises prejudicial to health or a nuisance
  - Smoke emitted from premises – PTH or a nuisance*
  - Fumes or gases emitted from premises PTH or a nuisance
  - Any dust, steam, smell, or other effluvia arising on trade, industrial or business premises being PTH or a nuisance
  - Any accumulation or deposit PTH or a nuisance
  - Any animal kept in such a place or manner PTH or a nuisance
  - Any noise emitted from premises that is PTH or a nuisance
  - Any other matter declared by any enactment to be a SN

The categories of SN

- Environmental Protection Act 1990 (Additions) – also Section 79
  - Any insects emanating from relevant ITB premises being PTH or a nuisance
  - Artificial light emitted from premises PTH so as to be PTH or a nuisance
  - Noise that is PTH or a nuisance emitted from or caused by a vehicle in a street

The categories of SN

- Public Health Act 1936
  - S141 Any well, tank, cistern, or water-butt used for domestic water supply so placed constructed or kept so as to render the water therein liable to contamination PTH
  - S259(1)(a) Any pond, pool, ditch, gutter or watercourse which is so foul or in such a state as to be PTH or a nuisance
  - S259(1)(b) Any part of a watercourse that is so choked or silted up causing a nuisance or giving rise to conditions PTH
  - S268(2) Tent, van, shed or similar structure
    - which is in such a state or so overcrowded as to be PTH to inmates
    - the use of which due to absence of proper sanitary accommodation or otherwise causes a nuisance or conditions PTH

The categories of SN

- Mines and Quarries Act 1954
  - S151(2) Shaft or outlet of an abandoned mine not so designed or constructed to prevent accidental falls or entry
    - (a) abandoned mines or mines not worked for 12 months or more which don't have proper closures to shafts and other outlets
    - (b) certain old (pre 1872) mines without such closures and which because of accessibility to highways or other place of public resort are a danger to the public
  - S151(3) Quarry (in use or not) without barriers to prevent accidental falls, and because of its accessibility to highways or other place of public resort is a danger to the public

CORE PRINCIPLE

To be a statutory nuisance the relevant matter usually has to be:

“prejudicial to health”

OR

“a nuisance”.

The three duties

- To inspect your area from time to time
- To investigate complaints of SN
- To serve AN if satisfied a nuisance exists, or will occur or recur
- How well do you comply?
  - The research
  - The evidence
- Secretary of State's default powers
  - Direction
  - Transfer of function plus resources

Public weapons (1)

- S82 gives any person aggrieved the right apply to MC for a Nuisance Order
- Magistrates must make NO if satisfied nuisance exists or will recur (not occur)
- NO similar to AN
- A fine can be imposed at this stage
- May also prohibit use of dwelling
- Offence not to comply with NO and may then direct LA to carry out works
- Can order costs if nuisance abated before hearing

Public weapons (2)

- Judicial review
  - Of a decision not to investigate
  - Of a decision not to serve AN
  - Of a failure to enforce AN
  - Not an appeal, but LA must act reasonably and in accordance with the law
  - Two stage process in the High Court started within 3 months
  - Unlikely now to be allowed if simply a failure of process

Public weapons (3)

- Complaints
  - Use the LA formal complaints machinery
  - Take to the ombudsman
  - Finding of maladministration may require action by LA and/or compensation to the complainant. Wider than JR but failure to investigate or take action still relevant
  - 261 complaints to LGO (England) in 2015 about SNs, with 73 upheld
  - Generally have 12 months to complain

Case law and the hierarchy of the courts

- Precedence
  - Only set by higher courts – High Court/Upper Tier Tribunals, Court of Appeal, Supreme Court (used to be the House of Lords) plus ECJ, and ECtHR. Corky!!
  - Binding precedence – must be followed by the lower courts
    - Only the points supporting the reasons for the decision
  - Persuasive precedence – lower courts should consider, and likely challenge if they ignore
    - Will include other points made by the higher court
  - Old cases often still valid – particularly if re-affirmed!

Prejudicial to health

- PTH is something that is “injurious, or likely to cause injury, to health”*
  - This is the approach since PHA36
  - Health is not defined in the Act
  - It includes things which are affecting health now or which may affect health in the future. Likely = balance of probabilities?
    - But over what time period?
  - WHO definition
  - Oxford dictionary definition

PTH: Key case law (1)

- Coventry v Cartwright 1975 DC
  - Waste land with accumulation of inert rubble not PTH. LCJ Widgery “threat of disease, vermin or the like”.*
- Salford v McNally 1976 HL
  - Premises that are damp and in disrepair can be PTH
- Lambeth LBC v Stubbs 1980 DC
  - Emptying a flat that was PTH did not abate the SN – the health of future occupants

PTH: Key case law (2)

- Dover 1980, GLC 1983, Birmingham 1985 – all DC
  - Condensation dampness/mould growth PTH
- LB of Southwark v Ince 1989 DC*
  - Noise could make a premises PTH
- Cunningham v Birmingham 1998 DC
  - The PTH test is an objective one, and not based on the health needs of a particular occupant.
  - Placing an unreasonable burden on LAs

PTH: Key case law (3)

- R v Bristol ex parte Everett 1999 CA
  - Risk of physical injury not sufficient. Court traced "premises" SN back to 1855 roots. No evidence of previous accidents.
- Birmingham v Oakley 2001 HL
  - 3:2 Split decision. No WHB in toilet off kitchen as built - hygiene risks insufficient. It must be the state of the premises themselves that cause the health risk. Policy issues. See Lord Clyde's dissenting judgement. Again no evidence that occupants had ever had any relevant illness.

PTH: Key case law (4)

- R v Lambeth ex parte Vella 2005 DC
  - Council refused to serve AN on converted house with poor sound insulation for statutory nuisance under S79(1)(a) due to noise from everyday living. Court held following *Oakley* that the state of the premises was not causing disease

PTH: The open questions

- What if there is evidence of disease in circumstances such as Oakley?
- Does it only apply to the original four categories of SN? (premises, accumulations, foul pools/ditches etc., animals so kept)
- And HL decided 5:0 afterwards that courts should NOT go back to the original Act, but focus on the most recent version – consistent with Lord Clyde*
- And what about noise and light pollution! And those disused mine shafts and quarries!!

Nuisance (1)

- Nuisance means nuisance at common law
  - Torts of Private and Public Nuisance
- Private Nuisance
  - Protect property rights against unreasonable interference with its use and enjoyment
  - Three types
    - Encroachment (and obstruction)
    - Damage to land
    - **Reducing the amenity value temporarily or permanently** – the category relevant to SN

Nuisance (2)

- Public Nuisance
  - Material effect on the comfort or convenience of a class of the public
  - Question of fact in each case how many make a class
  - It is a crime, and does not require a property right
  - Usually taken as a relator action via Attorney General
  - Individual can only sue for damages if they have suffered particular harm

Nuisance: Key case law (1)

- Sturges v Bridgman 1879 HC
  - For amenity nuisances, locality important
- Bishop Auckland 1882 DC
  - Smell nuisance that affected the convenience of the neighbourhood. Confirmed separate nuisance/health limbs
- Bolton v Stone 1950 HC
  - Locality, frequency, duration, timing, impact, **defendants' motives** all relevant

Nuisance: Key case law (2)

- Salford v McNally 1976 HL
  - Disapproval of Betts v Penge, confirmed previous cases that only “amenity” nuisances within scope of the SN procedure
- NCB v Thorne (Neath BC) 1976 DC
  - No nuisance if defects only affect the comfort of the occupier. Nuisance in the SN procedure means the same as at common law

Nuisance: Key case law (3)

- Cambridge Water Co 1994 HL
  - Common law action for pollution of groundwater. If the use is reasonable, no nuisance. The possible adverse effects were not known about at the time the pollution occurred
- Hunter v Canary Wharf 1997 HL
  - Common law action for disruption of TV signals, and for dust. Claimant needs exclusive possession to sue for private nuisance, with any damages relating to loss of value of that land

Nuisance: Key case law (4)

- Wandsworth v Railtrack 2002 CA
  - Confirmed Margate Pier 1869 (seaweed case) and Noble v Harrison 1926 (trees)
  - Successful claim for public nuisance caused by feral pigeons on railway bridges
  - Occupier liable if:
    - he causes the nuisance
    - allows it to arise due to neglect
    - does not take reasonable action once aware of its existence.

Nuisance: Key case law (5)

- Hounslow v Thames Water 2003 HC
  - Smells from Sewage Treatment Works covered by S79(1)(d)
  - Previous cases held that STW not premises, and sewers not premises under S79(1)(a).
  - Premises under (1)(d) means something different to (1)(a)!
  - Consolidation under EPA90 expanded the ambit of SN

Noise nuisance: key case law (1)

- Network HA v Westminster 1995 DC
  - Other tenants behaving reasonably - but HA was held to be person responsible as they had known about sound insulation problems for years.
- Toff v McDowell 1995 HC
  - Everyday user can be actionable private nuisance where the two lessees share responsibility for the dividing floor structure
- Haringey v Jowett 1999 DC
  - External traffic noise excluded from S79(1)(ga), so could not now be brought in via S79(1)(a)

Noise nuisance: key case law (2)

- Baxter v Camden 2001 HL
  - Tenants cannot sue common landlord for breach of covenant or nuisance if other tenants behaving reasonably*
- Stannard v Charles Pitcher 2003 HC
  - What is reasonable is a matter of fact in each case. Even ordinary usage by tenant above can be an actionable private nuisance.

Noise nuisance: key case law (3)

- Waltham Forest LBC v Mitoo 2017 DC
  - Once defence of “reasonable excuse” raised, prosecution has to disprove. Trying to drown out one noise with another could never be reasonable.
- Peires v Bickerton’s Aerodromes Ltd 2017 CA*
  - Statutory immunity for “flights” under the Civil Aviation Act 1982 covers actions for nuisance (and trespass) caused by helicopter training manoeuvres. (SN excluded by S79(1)(g) EPA).

Nuisance: the open questions

- Can a licensee or similar occupant be a person aggrieved for S82 purposes?
- How can we reconcile the different cases in respect of noise nuisance and sound insulation - and contrast with treatment of thermal insulation?
- What are the boundaries to nuisance under Part III?
- How far has the different pre-amble and purpose of EPA90 changed the game?

So you think you know what a nuisance is... (3)

- Picture 2 S/D houses on their own in a quiet road. Occupier A regularly plays music in the middle of the night, which wakes up occupier B who is a light sleeper.
  - Can the LA serve a notice under S80?
    - Maybe. No-Status of occupier, ownership, reasonableness. PTH?
  - Can occupier B take action under S82?
    - Maybe. No-As above. PTH? Person aggrieved?
  - Can the occupier sue his neighbour?
    - Maybe, if has exclusive possession.

So you think you know what a nuisance is...(4)

- Picture the same 2 S/D houses in row of others. Lots of occupiers are complaining, but the immediate neighbour is most affected.
  - Can the LA serve a notice under S80?
    - Yes – potentially private and public nuisance. PTH
  - Can the occupiers take action under S82?
    - Yes – status irrelevant for public nuisance
  - Can the occupiers sue their neighbour?
    - Yes if either exclusive possession for private nuisance, or especially affected for public nuisance

Authorisations and delegations

- Who is authorised to do what?
  - To enter premises and inspect
  - To serve ANs
  - To enforce ANs by prosecution and WID
  - How current is your authorisation?
- Constitution
  - Who/which post has delegated powers?
    - To serve AN, to prosecute, to do WID*
  - Do they have the power to sub-delegate?
  - Key rule *ambiguity always stops the delegation*

Recording decisions

- Since 2000 (2001 in Wales*) Executive decisions by Councillors have to be recorded and published
- All functions Executive unless in Never Executive/Local Choice lists – see Schedules
- SN in Local Choice list in both England and Wales
- Since 2012 in England, delegated Executive decisions made by officers also covered**
- Since 2014 in England similar rule applied to all licensing decisions by officers, also things which affect the individual***
- Failure to do this may make decision invalid***

Case Studies

- Mr A complains water is coming through from the flat above. He lives in flats occupied by a mixture of lessees like him and short-hold tenants. The flat above has been tenanted but he thinks it may now be empty. It is already affecting one of his ceilings and he is worried about the effects on the electrical system.
- Mr B works night shifts and is woken up during the day by music from the flat above. The lack of sleep is affecting his health. He has been upstairs and noticed that the occupier has recently replaced the carpets with wood flooring - it is a condition of their leases that living and bedrooms should be fully carpeted. There is an existing AN in respect of this tenant playing amplified music following complaints from another occupier about noise at night.

Case Studies

- Mrs C lives in the countryside, and both her and her neighbour's houses are believed to have septic tank drainage. She has noticed a pronounced smell of sewage in her garden near where she believes the septic tank is located. There are also visible effects to the adjacent lawn. In addition her neighbour's central heating oil tank appears to be leaking which may be affecting her prize roses. Her neighbour is a recluse and may have mental health problems. Would your action be different if it turned out to be a cesspit rather than a septic tank?

Relationship with Housing (1)

- Long history of overlap with SN
  - Premises (1855), overcrowding (1875), tents vans sheds (1885), defective cisterns and rainwater pipes (1907)
  - Nuisance Order could prohibit use of premises if unfit
- Current
  - Premises, tents vans sheds, and cisterns etc. (and Building Act 1984)
  - Prohibition of use of unfit premises only available under S82 actions?*

Relationship with Housing (2)

- Salford v McNally 1976 HL (5:0)
  - Practice by many LAs after 1954 to declare large Clearance Areas to deal with unfit housing, CPO, then postpone clearance and use as temporary housing for years.
  - S99 action by tenant. Defence was that LA was dealing with the problems using their Housing Act powers. It didn't work!
  - But approved Nottingham v Newton* that while an Order must be made, it should take account of the dwelling's expected life.

Relationship with Licensing

- Licensing Act 2003
  - Four statutory objectives, including “the prevention of public nuisance” S4(2)
  - Responsible authority includes HS inspector, officer for health/pollution matters S13(2)
  - Revised Statutory Guidance in 2015 under S182, paragraphs 2.14 to 2.20
  - Noise, litter, smells, light pollution, but says that “public nuisance” retains its broad common law meaning!
  - But many representations about noise nuisance may only be private nuisances...

Relationship with Part IIA

- Premises in such a state etc. S79(1)(a)
  - Premises includes land S79(7)
  - Contaminated land excluded S79 (1A)&(1B) if causing harm due to substances in/on/under
  - But IIA only usable if significant harm etc.
  - Harm defined in S78A(4), SH S78A(5) and Guidance under S78YA
  - Does this include “amenity” nuisances?
  - Does harm cover all adverse effects?
  - How apply to accumulations under S79(1)(e)?

Relationship with Environmental Permitting

- Summary proceedings cannot be started without SoS consent S79(10).
  - This applies to smoke, dust, accumulations, artificial light, and noise
  - Duty to serve AN still there*
  - Power to do WID or seek an injunction?**
  - S82 and Private Nuisance action unaffected***
- R v Carrick DC ex parte Shelley 1996 HC
  - LA cannot discharge its duty by passing to another regulator (Ombudsman decisions say the same)
- If LA issues the permits? Speed/effectiveness

Relationship with planning (1)

- NPPF (2012), NPP for Waste (2014), PPW (2016)
  - LPA should consider effects of development
  - LPA shouldn't duplicate pollution control regimes
  - LPA shouldn't carry out its own health assessments
  - LPA should assume pollution controls will be properly enforced
- Planning Act 2008
  - Nationally significant projects given complete statutory immunity to SN and most torts

Relationship with planning (2)

- Does PP give immunity to nuisance actions? Previous cases said “strategic” decisions could change the area’s character. Now conclusively rebutted.*
  - PP generally no defence to noise or other amenity nuisance – at most one factor to be taken into account
  - Assessment of the locality a question of fact in each case – existing activities only taken into account insofar as they are not a nuisance
  - Reaffirmed old principle that “coming to the nuisance” was not a defence
  - But the right to commit a nuisance might be acquired by prescription if done for 20 years without challenge**.

Relationship with ASB

- Now under the Anti-social Behaviour, Crime and Policing Act 2014
  - Injunctions (Part 1)
  - Community Protection (Part 4)
    - Community Protection Notices (Chapter 1)
    - Public Spaces Protection Orders (Chapter 2)
    - Closure Notices (Chapter 3)
  - Community Remedies (Part 6)
    - Reviews of response to complaints
  - Dangerous Dogs (Part 7)

Serving a good Abatement Notice* (1)

- Must be signed by the right person, must be served on the right person, and must contain the key elements:
  - What the SN is
  - Requiring abatement of the SN and/or**
  - Prohibit/restrict its occurrence/recurrence and/or**
  - Requiring the execution of works and/or**
  - The taking of other steps**
  - The times for compliance
  - Effects of non-compliance
  - Rights of appeal

Serving a good Abatement Notice (2)

- So simple notice (abate/restrict/prohibit) or specified works/steps?
  - Avoid a policy of only simple notices
  - If specifying works/steps – they need to be clear enough as to what has to be done or achieved
  - Be careful of side letter contents
- No need to appeal against a nullity
  - Original AN was invalid as required works and steps but no detail given. Prosecution failed despite no appeal being made*

How long do notices last?

- Potentially for as long as original circumstances exist
- Implied power to withdraw notices*
- No express or implied power to vary without an appeal
- Notices served under COPA still potentially enforceable

Enforcement – appeals*

- Recipient can appeal to MC within 21 days
- Key date is when AN served, not hearing**
- AN only suspended in certain circumstances
  - Two grounds, three exceptions
- Grounds of appeal
  - AN not justified; Informality, defect or error; Unreasonableness; insufficient time; BPM; More onerous than other consent conditions (noise); disputed service
- Court can quash notice, vary in favour of defendant, dismiss the appeal

Enforcement - prosecution

- Offence of contravening/failing to comply without reasonable excuse*
- AN must have been served on right person
- Generally D cannot raise matter that they could have raised on appeal**
- Fines – Unlimited since 2015 plus daily penalties in some cases. Sentencing guidelines!
- Obstruction offences – Level 3 for both inspection and WID
- CPS rules, Better Regulation principles, Cautions
- Enforcement policy!

Enforcement - defences

- BPM – see S79(9) EPA
  - Only applies to Industrial, Trade, Business premises
  - Only applies to certain SN categories
  - Burden of proof with defendant (BOP)
  - Have to prevent or counteract the effect
  - Key date is when alleged offence occurred*
  - Only applies to nuisance, not PTH?
- Reasonable excuse

Enforcement – WID (1)

- S81 (3) and (3A) powers to take steps/seize equipment
- Original form, costs only reclaimable by simple contract debt proceedings
- S81(A) reinserted PHA type powers to reclaim against owners
- Automatic statutory charge on premises **after** demand operative (similar to Housing Act powers)*
- Can do WID as well as prosecute
- Are all options covered in your Enforcement Policy?

Enforcement – WID (2)

- Recovering the money - debt
  - 6 years max. to start action
  - CCJ, Bailiffs, Attachment of earnings, Third Party Debt Orders, Charging Orders
- Recovering the money - Automatic Statutory Charge
  - 12 years max. to start action (NB 6 years max for interest)
  - Possession and sale, Receiver, Foreclosure
  - Payment by instalments for up to 30 years

Enforcement - Injunctions

- LA can seek injunction in the High Court – S81(5)
- Must consider other proceedings inadequate*
- AN has to be served first**
- Can be sought without first prosecuting for non-compliance, even with an appeal outstanding***
- At discretion of the court

Compensation

- On conviction a Compensation Order can be made – now potentially unlimited.
- This can be sought by LA on behalf of complainants etc. who have incurred loss
- Complainants can also seek after conviction for S82 offence
- Court have to consider fines, costs and compensation as a total against ability to pay
- Otherwise complainants have to sue for tort of nuisance. Damages can be obtained for foreseeable harm
- Action under the Human Rights Act?*

Summary

- SN has a long and successful history – and the common law is alive and kicking!
- Important to understand PTH and nuisance. PTH could be used more.
- The same words may have different meanings for different categories of SN.
- Several important open questions
- The SN duties are difficult to avoid
- Relationship with planning now clear

And don't forget

- Patel v Mehtab 1980 DC, O'Toole v Knowsley 1999 DC
  - EHPs can give expert evidence as to PTH!
- Southwark v Simpson 1998 DC
  - But a surveyor usually can't

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Questions?

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Statutory Nuisance – still going after 160 years!

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