

The Nursery School Problem

Derek buys a large house in an area with a mix of private houses, shops and restaurants. He uses the house as a nursery school for twenty-five children between the ages of two and five. During lunchtime, if the weather is fine, the children play in the back garden. The noise of the shrieking children disturbs diners on the terrace at Eli's neighbouring restaurant, and Eli notices a reduction in the number of lunchtime customers. The children have also invented a game which involves trying to throw sticks and stones from the garden over a tall hedge into Farzana's neighbouring garden. Although Derek reprimands children who he catches playing the game sticks and stones still regularly fly over the hedge at lunchtime. One stone smashes the arm off a marble statue in a fountain in Farzana's garden, and a stick becomes stuck in the fountain's pumping mechanism and causes the motor to burn out. When Derek refuses to pay for the damage Farzana cuts down most of the hedge and burns a pile of the clippings on a bonfire each lunchtime for a week. The smoke is so acrid that Derek has to keep the children indoors and several of Eli's customers complain and leave without ordering.

Advise the parties.

Model answer

Claims arising from the noise

Eli: Claim in private nuisance against the children and Derek

The noise has not caused personal injury or physical damage to Eli, but it is an emanation which has interfered with his use and enjoyment of land, that is, it has reduced the amenity value of Eli's land. Consequently, he should consider suing in private nuisance for a remedy in respect of the noise.

In order to claim for private nuisance Eli will have to show that he has a sufficient interest in the land where his restaurant is situated. If he has a fee simple in possession or a tenancy then this will be sufficient. Indeed, if Eli is in fact in possession of the land then he will be able to sue unless the defendant can establish that he (the defendant) has the right to possession, or authority from the person who has the right to possession.

The next crucial question will be whether the noise amounts to an unreasonable interference. Factors relevant in determining whether it is unreasonable include:

(a) the volume, regularity and time of the noise. The reasonableness of such volume, regularity and time is considered against the backdrop of –

(b) the nature of the locality: *St. Helen's Smelting v. Tipping*. In this area we are told that there is a mix of private houses, shops and restaurants. Consequently, the level of noise associated with shoppers, patrons of restaurants, or ordinary family life, is likely to be considered reasonable. As a minimum, E might be expected to demonstrate that the noise caused by the nursery school goes beyond this sort of level. Further, in judging the reasonableness of the noise courts will disregard –

(c) any hypersensitivity of Eli: *Robinson v. Kilvert*. The question is whether the noise would unreasonably disturb a reasonable neighbour, not whether it would unreasonably disturb a hypersensitive neighbour. Thus it would be relevant to ask

whether Eli's use of land (a dining terrace) is a use which is more sensitive to noise than ordinary uses of property in the locality.

If the noise is found to be an unreasonable disturbance then a further question is who Eli should sue for it. Two possibilities should be considered: the children and Derek.

(1) *The children*. Whilst there is no rule in English law which states that children of any age cannot be liable for torts, if Eli wants to recover damages he may have a problem if he sues the children. His problem may be that in judging whether the damage was sufficiently foreseeable the court may take into account the defendant's age. (*Mullin v. Richards* is authority for this proposition in a negligence case, and other authorities, e.g. *Wagon Mound (No. 2)* suggest that the rules on remoteness of damage are the same in the tort of private nuisance and the tort of negligence.) Thus Eli would have to show that nursery school children ought to have foreseen the type of damage that the shrieking caused in order to obtain damages. Moreover, if Eli wanted an injunction to prevent shrieking in the future obtaining injunctions against individual children might be unwise since the school might well have a high turn-over of children. It is worth noting that a further possible objection, that no individual child makes sufficient noise to amount to a private nuisance, so no individual can be held liable, would be ineffective. In *Thorpe v. Brumfitt* (1873) 8 Ch App 650 it was held that those who contribute to what is cumulatively an actionable nuisance are potentially liable even if their individual contribution would not have been actionable.

(2) *Derek*. Derek does not himself shriek. It is, however, plausible to assert that he creates the state of affairs which leads to the noisy disturbance. It is Derek who collects the children in the garden realising that they, as children, are likely to shriek whilst playing. (Below, we consider the more difficult question of whether Derek is responsible for the harm caused by the game. If it was thought that shrieking is not a wholly normal and foreseeable characteristic of playing children then the principles determining Derek's responsibility would be the same as those determining his responsibility for the harm caused by the game.)

If the noise is found to be an unreasonable disturbance and Eli can sue either the children or Derek or both in private nuisance in respect of that noise then:

(a) Eli can claim damages for the *past* interference with his enjoyment of his land. These will be calculated by considering the diminution in the amenity value of the land caused by the unreasonable noise. An important question here is whether the damages will take account of Eli's loss of profits as a result of a diminution in custom. The answer to this question is complicated. We would suggest that the answer should be that: (i) The basic measure of damages should be the loss of amenity value. This might be assessed by asking how much less rent a restaurateur would expect to pay for a restaurant exposed to such unreasonable noise as Eli was exposed to, as compared to for a restaurant exposed to reasonable noise. (ii) Further, however, Eli might also be able to claim for any further loss of profits of a foreseeable type *consequential* on this diminution in the amenity value of the land. In *Hunter v. Canary Wharf*, Lord Hoffmann certainly suggested that claims for damage that was truly *consequential* could be made. Importantly, however, the claim for diminution of amenity value and consequential loss of profits might be smaller than Eli's actual loss of profits: This is because some of Eli's original profits might have flowed from the fact that before the nursery school opened Eli's land enjoyed a *greater degree of peace and quiet* than he was entitled to insist that others preserve. To summarize, Eli

can only claim for the loss caused by *the private nuisance* and not for any loss caused by the noise rising from a very low level to a high but still reasonable level.

(b) Eli can also claim an injunction preventing *future* unreasonable noise. Importantly, such an injunction will only forbid unreasonable noise, not all noise: *Kennaway v. Thompson*. If the extent to which the noise is unreasonable is minor, and it would be harsh to restrict Derek's activities, the court might choose to award damages for *future* unreasonable noise *in lieu* of an injunction. These damages will be calculated on the basis of how much a willing seller would demand for selling his right to be free from the wrongful level of noise.

Eli's customers: claims in private nuisance against the children and Derek

Although Eli's customers may have enjoyed their meals less because of the unreasonable noise they will not be able to claim for private nuisance because they will not have sufficient interests in the land. Further, since the food they ordered will not itself have been damaged by the noise (even ignoring the awkward question of when they become owners of the food!) it seems that the harm they will have suffered will have been wholly to emotional or purely economic interests. In either case, they will be unable to claim unless they can establish *more than mere negligence on Derek's part*, for instance, that Derek intended the harm; in which case a claim under the tort in *Wilkinson v. Downton* may be available.

Claims arising from the game

Farzana: claim against the children for trespass to land

When a child throws a stick or stone over the hedge the child commits a trespass to land to Farzana. But, although this will entitle Farzana to sue the individual child, she will face problems, discussed above, if she wants to secure damages from them for the damage to the statue or fountain.

Farzana: claims against Derek

(1) Claim in private nuisance

In order to bring a claim in private nuisance against Derek for the damage to the statue and the fountain, Farzana will have to show: (1) that the series of trespasses to land resulting from the throwing of sticks and stones onto Farzana's land amounted to a private nuisance; (2) that Derek was responsible for the acts of the children even though he made it clear that he disapproved; (3) that the tort of private nuisance covers damage such as the damage done to the statue and the fountain here.

The case of *Lippiatt v. S. Glocs.CC* is relevant to both (1) and (2). In that case the Court of Appeal held that the defendant occupier of land could be liable for private nuisance if the state of affairs on its land led to a regular sequence of trespasses onto the claimants' land. The Court did not have to confront the question of how regularly the claimants' land had to be invaded for the claim to be for private nuisance. In our opinion a single emanation such as a flood is not, in principle,

incapable of amounting to a private nuisance, but that where a single emanation is relatively trivial it may only be a sequence of such emanations which establishes that there has been an unreasonable interference. In the situation we are dealing with here, however, there seems little doubt but that the game is played sufficiently often to amount to an unreasonable interference: (Compare *Bolton v. Stone* (cricket ground where balls very rarely escape onto neighbouring property - no nuisance) and *Miller v. Jackson* (cricket ground where balls regularly escape onto neighbouring property - nuisance)).

On point (2) the Court held in *Lippiatt* that if an occupier's land was being used as a 'launching pad' for such invasions, then if the occupier had 'knowledge or presumed knowledge' (test from *Sedleigh-Denfield v. O'Callaghan*) of that state of affairs *and* failed to take such steps as could reasonably be expected of him in such circumstances to obviate the state of affairs (test of reasonableness apparently more subjective than in mainstream tort of negligence: *Leakey v. National Trust*), then he might be held liable for having *continued* the nuisance. In Derek's case it seems that Farzana will be able to establish knowledge and the main issue will concern whether Derek's reprimanding of the pupils was all that could be reasonably expected of him. On the facts it is not clear what additional precautions Farzana might reasonably have expected Derek to have taken - perhaps she could have expected him to discipline pupils more severely or to have ensured that there were no loose rocks or sticks in the play area before the children were allowed out each day.

On point (3), it is difficult to tell whether the damage to the statue and pump is properly within the scope of the tort of private nuisance. In *Hunter v. Canary Wharf* the House of Lords was clear that compensation could be given for damage to the land itself, and Lord Hoffmann insisted that compensation could also be given for damage to chattels that was consequential on damage to land or its amenity value. Thus Farzana will want to argue that either, the statue and pump were fixed to the land and therefore part of *the land itself*, or, that they were damaged in consequence of a reduction in amenity value (Gardens subject to unreasonable emanations of flying debris being less valuable as gardens than gardens not so subject). In this context it is worth noting that even if the statue or fountain were unexpectedly brittle, damages could still be awarded if the interference would have been sufficient to damage even a reasonably robust garden: *McKinnon Industries v. Walker*.

(2) Claim in negligence

If the court decides that Farzana's damage is not within the scope of the tort of private nuisance then she will have to consider suing Derek for a negligent failure to control third parties within his control instead. Courts have held that schools owe duties to users of neighbouring roads to take reasonable care to control their young pupils and prevent them posing a hazard to road users: *Carmarthenshire CC v. Evans*. To succeed in the tort of negligence Farzana would have to argue that the risk posed by uncontrolled pupils to her property was sufficiently analogous, and that Derek exhibited less than reasonable care in controlling the pupils.

If Farzana establishes a claim against Derek for private nuisance she will be able to claim an injunction to order Derek not to continue continuing the nuisance. She will also be able to obtain damages based on the damage to the land itself, the loss of amenity value of the land, and for any damage to chattels that the court holds to be

consequential. If Farzana establishes a claim in negligence she will be able to claim damages for the damage to her property.

Claims arising from the acrid smoke

Derek and Eli: claims against Farzana in private nuisance

Whether Derek and Eli can each sue Farzana in private nuisance for the interference with the amenity value of their land depends on the same legal principles as those outlined above when considering if the noise was a private nuisance. Thus the claimants will have to establish that they have sufficient interests in their land and that the smoke amounted to an unreasonable interference in the context of the locality given its time, duration, and regularity.

One additional point here is that *even if* bonfire smoke is something that neighbours might be expected to occasionally put up with in such a locality as part of the ordinary give and take of communal living, this argument may not protect a defendant who has maliciously caused the interference: *Hollywood Silver Fox v. Emmett*. Although the House of Lords case of *Bradford v. Pickles* contains some dicta which are apparently opposed to this proposition, that case is best understood as dealing with the situation where there is a (malicious) obstruction, but the claimant has no right whatsoever to the thing obstructed passing free from interference. Farzana's behaviour creates an emanation, not an obstruction.

One complexity relating to this point, however, is that Farzana is apparently malicious vis-à-vis Derek, but also interferes with the amenity value of Eli's land. This raises the question whether her malice vis-à-vis Derek makes her interference unreasonable vis-à-vis Eli. There is no definitive precedent determining this question. We would argue, however, that the malice vis-à-vis Derek means that Farzana creates the interference otherwise than through the ordinary and acceptable use of her property, and that consequently Eli should not be expected to put up with the interference.

The diners and the children: claims against Farzana in private nuisance

Although the diners may have enjoyed their meals less and the children may have enjoyed their school days less because they are kept inside in order to avoid the acrid smoke, neither will be able to claim for private nuisance because they will not have sufficient interests in the land.