

## The Toy Problem

April decides to give up her previous job and to devote herself full time to making wooden toys in a large shed in the back garden of her terraced house. She installs an electric lathe in the shed. The noise from the lathe, which April uses for four hours each weekday, annoys April's neighbour, Bertram, who has retired and likes to sit in his back garden reading the Daily Telegraph. Bertram suffers a minor heart attack which his doctor advises was probably contributed to by stress caused by his irritation about the noise. Whilst Bertram is recovering in hospital his daughter, Cressida, visits Bertram's house to do some spring cleaning for him. She takes a rug into the back garden and beats the dust off it. Some of the dust drifts over into April's garden where it sticks in the varnish on a batch of toys that April had left to dry on the garden path. The toys will require sanding and re-varnishing before they can be sold and April is furious. She rushes round to remonstrate with Cressida. But in her anger she fails to notice that a spark from the lathe has fallen into a pile of sawdust in the shed and that the sawdust is now smouldering. By the time that April returns the sawdust has caught fire. April attempts to extinguish the fire using her garden hosepipe, but does not succeed in stopping it from spreading to Bertram's garden where it destroys his roses and fruit trees.

Advise the parties.

### Model answer

Taking each possible claimant in turn:

#### ***Bertram***

*Claim against April for disturbance by noise*

(1) Claim in private nuisance

B will only be able to make a claim against A for private nuisance if he has a sufficient interest in the land where he is disturbed. He will have a sufficient interest if he is an owner in occupation, or a tenant in occupation. Indeed even if he has no legal or equitable interest his actual occupation will be sufficient provided that A is not the real owner or someone with the real owner's authority.

Assuming that B has a sufficient interest the disturbance suffered by B is an interference by emanation with the amenity value of B's land. It will only amount to a private nuisance, however, if it is 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 (4 hours per day) and time (disturbance more likely to be unreasonable if during the hours when sleep or rest are normal) is considered against the backdrop of –

(b) the nature of the locality: *St. Helen's Smelting v. Tipping*. In areas where there is a mix of industrial and residential property more noise will be reasonable than in exclusively residential districts. But in judging the reasonableness of the noise courts will disregard –

(c) any hypersensitivity of B: *Robinson v. Kilvert*. The question is whether the noise would unreasonably disturb a reasonable neighbour, not whether it would unreasonably disturb a hypersensitive neighbour. The 'opposite' of hypersensitive is 'the ordinary robust inhabitant of England', so it will be relevant to determine whether B's use of his garden is such as to make him more sensitive to noise than the ordinarily robust.

If the noise is found to be an unreasonable disturbance then: (1) B can claim damages for the *past* interference with his enjoyment of his land. These will be calculated by considering the diminution in the utility value of the land caused by the unreasonable noise. (2) B 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 A's activities, the court might choose to award damages for *future* unreasonable noise *in lieu* of an injunction: *Shelfer*. 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.

## (2) Claim in public nuisance

If B has a sufficient interest in land to sue for private nuisance then there is no obvious reason why he would want to try to claim for public nuisance instead. But, as we shall see below, B may want to establish a claim in public nuisance in order to claim for the heart attack that he suffered. In order to claim for public nuisance B will have to demonstrate two things. First, that A is causing an unreasonable interference with the interests of a substantial segment of the community ("the public"). Second, that B has suffered "special damage" over and above the interference suffered by others in the community.

### *Claim against April for the heart attack*

#### (1) Claim in private nuisance

A majority of the House of Lords in *Hunter v. Canary Wharf* expressed the opinion that the tort of private nuisance did not protect claimants against personal injuries. If this is true then B might be obliged to try to demonstrate that A committed the tort of negligence or is liable for public nuisance (see above). But whichever tort B relies on he will have to overcome the suggestion that the heart attack was too remote a consequence of the wrong. It seems that the same test for remoteness applies in both negligence and nuisance (*Wagon Mound (No 2)*) and that is whether the type of damage was reasonably foreseeable as a likely consequence of the wrong. Even if the type of injury is defined reasonably broadly as "stress-induced personal injury" it might be thought that a reasonable woodworker would not anticipate the possibility of causing such injuries through noise. The 'egg-shell skull' doctrine, here in the form of 'the egg-shell heart', would not come into play unless some personal injury was reasonably foreseeable.

#### (2) Claim in public nuisance

Assuming that the remoteness of the damage is not a decisive obstacle, B may find it easier to claim for his personal injury in public nuisance rather than private nuisance. This is because there is a stronger line of precedents allowing claims for damages for personal injuries in public nuisance claims (although most involve injuries on highways). Even this line of precedents might be vulnerable, however, to a determined judicial attempt to extend the 'logic' of *Hunter v. Canary Wharf*, relying on the dogma that in modern law non-intentional personal injuries must be sued for in negligence.

As was mentioned above, to successfully make a claim for public nuisance B will have to show that a sufficiently numerous section of the community suffers from the unreasonable noise. (In *PYA Quarries* the few dozen residents living in the vicinity of a quarry was considered a sufficient number.) B will also have to show that he suffered special damage over and above that suffered by most members of the community. In this case he should have no difficulty with this point.

### (3) Claim in negligence

B's principal problem in making a negligence claim may be establishing that a reasonable person in A's position would have realised that there was a risk of causing personal injury to B by operating an electric lathe. (The point is similar to that made relating to remoteness above, except that a lack of foreseeability of personal injury will mean that there is no relevant duty in the tort of negligence.)

### *Claim against April for the fire damage*

#### (1) Claim in negligence

There are two possible ways B might be able to bring a claim in negligence against A for the fire damage.

First, he could claim that A carelessly failed to take reasonable steps to extinguish the fire after she knew that it had started on the land she occupied, in breach of the duty of care she owed him as occupier of her land: *Goldman v. Hargrave*. B's problem here is that a court might conclude that fighting the fire with the hose-pipe *was* all that could reasonably be expected of A in the circumstances. If B convinced the court that a reasonable person in the circumstances would instead have called the fire brigade he will still face the difficulty of establishing that had A done this, on the balance of probabilities, the fire brigade would have attended and taken measures sufficient to save the trees. (Following *Bolitho* it would be sufficient to show that the fire brigade *would* probably have attended and saved the trees. It would not be necessary to show that the fire brigade would have been obliged to attend and save the trees.)

Second, B could claim that A was careless in allowing the fire to start, in breach of the duty of care that she owed him as occupier of her land. It seems that if A was careless in allowing the fire to start then she will be strictly liable for the reasonably foreseeable consequences of its escape. (This proposition is the product of the strict ancient common law rule of strict liability for escaping fire, and the narrow interpretation of the Fire Prevention (Metropolis) Act 1774, s.86 which only protects occupiers from such strict liability when the fire began "accidentally".) It is possible, however, that a court might conclude that the fire did not begin because of A's

negligence but “accidentally”. Perhaps even the most skilful of craftspeople would have left sawdust round their lathes and failed to notice sparks.

(2) Claim under the rule in *Rylands v. Fletcher*

Alternatively, B could allege that the fire risk was the result of a non-natural user of land, and could consequently claim for the reasonably foreseeable consequences by analogy with the case of *Rylands v. Fletcher*. *Rylands* liability requires “a non-natural user of land” for which the defendant is responsible (generally involving the collection of a “dangerous” substance), “an escape” and “reasonably foreseeable damage”. Where large quantities of inflammable material have been stored on premises courts have treated it as sufficient if *fire* escapes from the premises, rather than insisting that the material must *itself* escape: *Mason v. Levy Auto Parts*. In the circumstances B may have difficulty in establishing that even a collection of extraordinary volumes of sawdust in a garden shed amounts to a non-natural user of land because sawdust is relatively inert and does not expose neighbours to any extraordinary risks. If however, the fire was exacerbated by the fact that, for instance, A stored large quantities of inflammable liquids in her shed for use in her toy-making, then B would stand a far greater chance on this issue.

*April*

*Claim against Cressida for dust damage to toys*

It seems that A would have to sue C in negligence for the damage to the toys rather than in private nuisance because the damage to the toys is not damage to A’s land, and it is difficult to see how a single cloud of dust in the open air could ever be considered an unreasonable interference with the amenity value of land. It would also be arguable that A’s use of her land was hyper-sensitive to the effects of dust. If A claims for negligence she faces the difficulty of showing that a reasonable person in C’s position ought to have foreseen the risk of damaging someone such as April’s property by beating the dust off a rug, and the further difficulty of showing that even assuming that property damage was reasonably foreseeable it was unreasonable in all the circumstances for C to take the risk. (It is possible, however, that such behaviour is far more unreasonable now than it would have been in the age before widespread ownership of vacuum cleaners!)