WHO IS TRESPASSER (КОЙ Е НАРУШИТЕЛ) GIVE THEM ADVICE (ДАЙТЕ ИМ СЪВЕТИ)

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Samuel v Gina

Trespass

It is uncertain, but in the last reckoning doubtful that Samuel would have the right to recover damages from Gina for trespass to land. (An action for a trespass on the case is a different question, but that is explained below.) Trespass is "a direct intrusion upon land in the possession of the claimant" (Card *et al.*, 2011, p 317). Let it be assumed that Samuel is in possession and not an absentee landlord (in which case the tenant would have the right to sue, unless Samuel proved damage lasting beyond reversion at tenancy's end); even so, for Samuel to recover in trespass, Gina would have had to cause the toxins to cross over the boundary into Samuel's property *in person*, as by accidentally spilling it while stacking the containers. On the facts of this case, the containers "leaked" at a later date, and not "were spilled" at the time, so that the immediate agency of Gina was not involved in their intrusion onto Samuel's land; therefore, an action in trespass should not lie.

Nuisance

The facts of the case resemble the facts in *Brew Bros Ltd v Snax (Ross) Ltd*,[1] in which the defendant let a crumbling wall fall on the plaintiff's land. Gina allowed the pesticide containers to deteriorate to the point where they leaked by themselves. Samuel has a better case against Gina in private nuisance; *i.e*. for so using her land as to interfere with his. By definition, "a private nuisance consists of any unlawful interference which damages [the land itself] or adversely affects the use and enjoyment of it" (Card *et al.*, 2011, p 324). Gina *both* damaged Samuel's land by polluting it with pesticides *and* interfered with his good use of it by killing his prize roses growing on it; moreover, she has continued to interfere with his quiet enjoyment by the obnoxious noise incidental to her business. Gina may have defences against some of Samuel's complaints, but not others, on the grounds that she also has a right to use her property to ply her trade so as to support herself and serve the public.

But Gina cannot use this defence against Samuel's complaint of the physical damage to his land done by the pesticides. In *St Helen's Smelting Co v Tipping* [1865] 11 HL Cas 642, Lord Westbury held that –

> when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the

[1] [1970] 1 All ER 587, CA.

> submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Samuel's claims for *discomfort* may fail if the crowing is found necessary for Gina's free exercise of her trade. But insofar as Gina has caused *material injury* to both the land and the roses, the occupational defence must fail and Gina will be liable (see also Card *et al.*, 2011, p 325).

By the bye, the roses also count as "land" in the meaning of the law of nuisance damaging to land, and Gina cannot use the defence of her trade against Samuel's complaint about his roses. As the textbook states, "nuisance protects crops and buildings as well as the land itself" (Card *et al.*, 2011, p 325, para 2), and thus presumably also roses, which he was growing not merely for his own enjoyment, but also for the village's fete. Although the authorities were not perfectly clear on this fine point, it seems the rule that whether plants growing on land have been materially injured hinges on their having tradeable value to other people, over and above the owner's sole pleasure in the case that his roses had served as an "exterior decoration" to his home.

Further to the cockerel interfering with Samuel's quiet enjoyment, the peculiar circumstances of their common situation will determine whether or not Gina's defence will succeed, according to the holding in *St Helen's Smelting Co*:

> [I]t is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the … nuisance is productive of sensible personal discomfort. With regard to the latter … the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs.

Gina could defend against Samuel's claim that her cockerel is a nuisance if her business fit well enough in with their adjoining properties' vicinity, as when hers is not the only commercial activity. The court in *Sedleigh-Denfield v O'Callaghan* [1940] 3 All ER 349 at 364, held that –

> An occupier may make in many ways a use of his land which causes damage to the neighbouring landowners and yet be free from liability … Even where he is liable for a nuisance, the redress may fall short of the damage ... A balance has to be maintained between the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with … a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or, more correctly, in a particular society.

And in *St Helen's Smelting*, too, the court put more of a point on it:

> If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and

> also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop.

This defence therefore depends on the character of the particular society of the street they live in; it would be vitiated if the locale were residential except for Gina's property (or if commercial operations like hers were sparse); especially if before she came to it, it had been entirely residential.

This is a standard so fuzzy as to blur or miss too many important distinctions. The law has thus evolved a series of contributing factors, to wit: 1. degree of interference, 2. sensitivity, 3. locality, 4. continuity, 5. utility of defendant's conduct, 6. order of events, and 7. defendant's state of mind. The rule under the first rubric was elaborated in *Walter v Selfe* [1851] 4 De G & Sm 315 at 322:

> The question then arises, whether [the plaint is of a nuisance] to the occupier of plaintiffs' house … a question which must, I think, be answered … [even] though, whether to the extent of being noxious to human health, to animal health, in any sense, or to vegetable health, I do not say nor deem it necessary to intimate an opinion; for it is with a private not a public nuisance that defendant is charged; and both on principle and authority the important point [is] thus put; ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?

Is a cock crowing a material interference with ordinary physical comfort according to sober and simple notions? The precedent most applicable to answering that is probably *Murdoch v Glacier Metal Co Ltd* [1998] Env LR 732 CA, featuring noise: how much constitutes a nuisance? In that case, "[t]he plaintiffs' subject of complaint was the noise and glare coming from the factory premises, which are close to their property. The appeal is in relation only to the [magistrate called a learned] recorder's finding that the noise from the factory did not constitute an actionable nuisance" (at 732, para 2). He concluded the factory noise was no nuisance, notwithstanding that it was louder than the upper limit set by the recommendation of the World Health Organization – 35 dB(A) – above which noise interferes with the needful quality of sleep. On appeal the court affirmed the recorder's conclusion, based partly on sound meter readings, that no case of nuisance had been made; even after accepting the plaintiffs' expert's submission that –

> [s]ubjectively, the factory noise is clearly audible … above background noise levels within the bedroom. In particular, the thumps and bangs … *though not registering on the sound level meter*, were quite noticeable and the author appreciates the adverse effect on sleep" (at 736-7)

As well as accepting the text of the WHO recommendation[2] that –

> [t]he rate of occurrence of stimuli and/or fluctuation in the sound level were also found to influence sleep. The noise of low density traffic disrupted sleep more than that of high density traffic. Similarly, steady white noise of 40 dB(A) was not found to affect sleep, although fluctuating road traffic or factory noise with the same median level caused sleep disturbance. Short duration sounds of passing aircraft and trains with peak levels up to 60 dB(A) caused a similar degree of disturbance as steady noise at 40 dB(A), even though their total duration was less than 30 minutes per night. (at 738, para 3)

Submissions which taken together imply that the most sleep-disturbing sounds are intermittent stimuli of the kind emitted by the Glacier Metal factory, which sound meters concededly did not register! The court opined anyway that, though it did –

> agree … with the submission as to the importance of sleep, [still,] it is not a proposition of law … that there is necessarily a common law nuisance if sleep in a house … is disturbed by noise. Other considerations have to be borne in mind. (at 737, para 1)

It did not matter that the WHO experts had found intermittent noises (like Gina's cock crowing) to be *more* disturbing, not less. It did not matter that the adverse report of the lower court-appointed EHO was not based on readings taken at night, when the sleep disturbances happened:

> It is submitted that there was no evidence that the readings were taken at night (and, indeed, I assume they were not) [yet] the plaintiffs' complaint is based upon the night-time conditions. Having regard to the [legal] test to be applied, the recorder was … entitled to have regard to the [EHO's] evidence that there was no statutory nuisance, even though it was different from the evidence of [plaintiffs' expert], who was himself a former environmental health officer. The evidence could be … a pointer in the direction that there was no common law nuisance. (at 737, para 2)

The plaintiff's subjective experience is apparently no basis of the common law of nuisance; the degree of interference is to be assessed by courts "objectively" in ways some might deem perversely at odds with objective criteria; as the court held against the plaintiff in the teeth of clear evidence of unhealthy sleep disturbance:

> These factors in my view support the conclusion that, having considered the evidence, the recorder did have in mind the question of fluctuation which had been addressed to him. Moreover, analysis of the noise readings submitted to him … supports the general conclusion of the recorder [against nuisance], bearing in mind the test to be applied. (at 738, para 5)

This implies that Samuel's claim of nuisance to enjoyment will probably fail, as one cockerel's crowing is hardly likely to be considered more a nuisance than the booms of a factory; plus, it interferes with amenity "throughout the day", which will likely be held less actionable than disturbed sleep.

Under the rubric of sensitivity the common law rule is to give it no weight: "A person who is abnormally sensitive … is not thereby entitled to a greater freedom from

[2] *Environmental Health Criteria 12 (1980).*

interference than anyone else" (Card *et al.*, 2011, p 327). It does not matter how acutely sensitive Samuel may be to cocks crowing, he cannot recover for that reason; although he might conceivably be able to recover *more – if* the interference has been found a nuisance on other grounds (Ibid).

Under the rubric of utility of defendant's conduct, the law *all but* supposes a (rebuttable) presumption in favour of Gina on the grounds that sustainable foods serve the public interest. On the other hand, "the courts will not allow the public interest to ride roughshod over private rights" (Card *et al.*, 2011, p 328). It may be colourable, then, that *Adams v Ursell* [1913] 1 Ch. 269 supports Samuel's claim for damages or an injunction for the crowing. The facts of that case are:

> [T]he defendant entered into possession of premises … adjoining the plaintiff's house, and commenced carrying on the business of a fried fish shop … daily between 11.30 A.M. and 1.30 P.M., and between 6.30 and 10.30 P.M. … the odour … pervaded every room of the house and affected the flavour of butter in [plaintiff's] larder; and that the vapour from the defendant's cooking stove appeared in the plaintiff's house like a fog or mist. ... It was proved that all the neighbours within a radius of sixty yards of the defendant's shop, except one, had joined in a petition to the Dursley Rural District Council to get the nuisance abated. (at 269-270)

Once again, the support of the neighbours was a pivotal factor in plaintiff's success in this case and his failure in *Glacier Metals*. If Samuel can get his neighbours to support his claim, he could win; otherwise it seems unlikely. Another consideration weighing in on the court's decision may be that Gina's use of toxic pesticides is not so "sustainable", and her claim to be acting in the public interest could be seen as noticeably inferior to a truly organic foods grower's. Although the facts were inconclusive, it cannot be excluded that Gina's leaky pesticide containers had already become a public nuisance if the fumes or runoff from the spill, even if odourless and undetectable, could be shown likeliest to have infected other parts of the vicinity, or if the situation could be officially certified as a threat to public health, if not a perfected detriment. In that case, Gina's defence of acting in the public interest must surely fail, which could affect the court's disposition of the noise complaint, from which it might no longer protect her. The defendant in *Adams v Ursell* implied that the public interest was a defence, yet the court held otherwise (even without any threat to public health):

> It was urged that an injunction would cause great hardship to the defendant and to the poor people who get food at his shop. The answer to that is that it does not follow that the defendant cannot carry on his business in another more suitable place (at 271, para 2).

Under the rubric of order of events, it is possible to maintain a case of nuisance even when the plaintiff has "come to the nuisance with his eyes wide open" as per *Sturges v Bridgman* [1879] 11 Ch D 852 CA (quoted in Card *et al.*, 2011, p 329). In our case, it was the alleged nuisance which came to the plaintiff, not the other way round, so in that respect this case is a routine one.

Under the rubric of defendant's state of mind, *e.g.* malice, "All that may safely be said is that the more unreasonable the defendant's conduct, the less likely it is that the claimant will be required to tolerate the interference" (Card *et al.*, 2011, p 329). On the

facts, malice and negligence were not involved in the cock's crowing, an act of nature that the defendant cannot control; although negligence did clearly contribute to the leakage. Evidence of malice and/or negligence may help prove nuisance, but neither is essential to its existence (Card *et al.*, 2011, p 330).

Remedies

In theory, Samuel could have damages from Gina for (a) the injury of the toxins to his land, (b) the loss of his roses, if he proves he was to get money or any kind of valuable consideration for them from the fete, (c) the loss of future benefits of rose-growing if he proves the pesticides have blighted the ground and kill off any replanting, and (d) his loss of quiet enjoyment due to the cockerel's noise.

He could also have an injunction against Gina's storage of her pesticides at the boundary fence, and/or against the presence of the cockerel on her land.

Samuel must tread carefully in undertaking abatement under modern precedents (Card et al., 2011, p 337). He certainly would have a case for entering Gina's land and removing the offending containers if they continued to leak toxins onto his land, but he must first give Gina notice; unless in the worst case a small leakage graduates to an all-out spill, when Samuel could invoke emergency. See *Jones v Williams* [1843] 11 M & W 176, at 182:

> We think that a notice or request is necessary … in the case of a nuisance continued by an alienee; and therefore the plea is bad, as it does not state that such a notice was given or request made, nor that the plaintiff was himself the wrong-doer, by having levied the nuisance, or neglected to perform some obligation, by the breach of which it was created. LORD ABINGER, C. B., observed, that it might be necessary in some cases, where there was such immediate danger to life or health as to render it unsafe to wait, to remove without notice; but then it should be so pleaded; in which the rest of the Court concurred.

Can Samuel collect damages for losing the prize in the rose fete?

Strict liability

Samuel might be able to recover from Gina in strict liability if he can prove that the pesticides escaped from her land into his (which is not disputed), and that storage against the fence was an unnatural use of her land. In *Rylands v Fletcher* [1868] LR 3 HL 330, the court's holding (at 339-340) is worth quoting at length, as it is sometimes said that an (evidently inessential) "ultra-hazardous" instrumentality must be shown:

> We think that the true rule of law is, that the person who, for his own purposes, 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 *primâ facie* answerable for all the damage which is the natural consequence of its escape. … The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has

> brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued … whether the things so brought be beasts, or water, or filth, or stenches.

Or toxic pesticides. This is precisely what Gina did: she did bring on her land and collect and keep there a thing likely to do mischief if it escaped. Having kept it in at her peril, now that it has escaped onto Samuel's land, she is answerable for the natural and anticipated consequence. Samuel can therefore maintain a case in strict liability against Gina; having the same remedies as in nuisance, as "the rule is a sub-species of private nuisance and therefore subject to the limitations [and remedies] of that tort" (Card *et al.*, 2011, p 343). It is stated in *Rylands* (at 340) that defendant –

> can excuse himself by shewing that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God [also consent of plaintiff, act of a stranger (*e.g.* "bursting" the containers open), and statutory authority].

None of these excuses are available to Gina on the facts presented, and so she is liable in full.

References

Card, Richard, John Murdoch and Sandy Murdoch. (2011). *Real Estate Management Law*, Seventh Edition. New York: Oxford University Press.

Elliott, Catherine and Frances Quinn. (2013). *Tort Law*, Ninth Edition. London: Pearson.

Rogers, W. V. H. (2010). *Winfield*

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