

STATUTORY NUISANCE: THE SANITARY PARADIGM AND JUDICIAL CONSERVATISM

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1. Introduction

Although the law pertaining to statutory nuisance has its origins in the nineteenth century, it continues to provide an effective remedy and remains a key tool for dealing with pollution at a local level in the UK. This is despite more sophisticated methods for controlling environmental degradation being introduced and the impact of the European Union as a driving force in this area. For most people beset by an environmental problem, such as smoke, smells and noise occurring in their vicinity, the route to resolution offered by the statutory nuisance procedure is the one to which they are most likely to turn.

Statutory nuisance is also seen as a useful umbrella by Parliament for dealing with localised environmental health problems.¹ The Clean Neighbourhoods and Environment Act 2005, one of the last pieces of legislation to be enacted before the 2005 General Election, provides for the first time that light pollution should be included as a statutory nuisance.² Several years ago, it was intended that the thorny problem of high hedges should be dealt with as a new type of statutory nuisance,³ but, in the event, this was included in other legislation.⁴

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¹ When he launched the Clean Neighbourhood and Environment Bill in December 2004, the Prime Minister said: 'The environment starts at our doorstep. The plan helps individuals make their own green decisions. It shows we are as committed to domestic actions to match our international effort on climate change'. *Environmental Health Journal*, May 2005.

² Section 102, Clean Neighbourhoods and Environment Act 2005. The Act also includes 'insects emanating from relevant industrial, trade or business premises' and being 'prejudicial to health or a nuisance' as a statutory nuisance (section 101). For a critical analysis of the Act see *Environmental Health Journal*, May 2005, 12–14.

³ The Statutory Nuisance (Hedgerows in Residential Areas) Bill 1999 proposed the introduction of a new paragraph section 79(1)(aa) to the Environmental Protection Act 1990: 'any hedgerow planted in such a place, or maintained in such a manner, as to be prejudicial to health or a nuisance'.

⁴ Part 8 of the Anti-Social Behaviour Act 2003, which gives district and unitary authorities, the City of London and London boroughs powers to deal with complaints about high hedges, and the High Hedges (Appeals) (England) Regulations 2005 came into operation in England on 1 June 2005.

There are two routes an individual may pursue under the umbrella of statutory nuisance. One is to seek the intervention of the local authority whose function is—where satisfied that a statutory nuisance exists, or is likely to occur or recur—to serve an abatement notice on the perpetrator.⁵ The other is for the individual acting alone to serve a letter on the perpetrator indicating his intention to apply to a magistrates' court for an abatement order. Both procedures offer the potential for speedy and cost-effective resolutions. They also exemplify the subsidiarity principle in practice. Where possible and practicable, local problems should be dealt with at a local level, by enforcement agencies and courts able to bring local knowledge to bear on decision-making.

As the introduction of two new types of nuisance (light and insects) by the Clean Neighbourhoods and Environment Act 2005 clearly demonstrates, statutory nuisance is not single sourced; neither is it modern. While its provisions are to be found primarily in Part III of the Environmental Protection Act 1990, as amended, its origins date back to legislation that is over one hundred and fifty years old.⁶ There can be few other examples of a public health measure anywhere in the world having such a long history. But statutory nuisance is beginning to creak, and the reasons for this rest primarily on its historical genesis and the current attitudes of the judiciary to its modern application.

Today statutory nuisance is concerned with a whole range of matters, including industrial atmospheric pollution and its effect on public health, as well as domestic problems, such as the noise and light pollution. But the earliest legislation passed in the late-1840s was intended as a short-term response to combat serious outbreaks of cholera then occurring in the major towns and cities.⁷ In a wider sense, enacting statutory nuisance legislation was a response to the huge changes and adverse environmental conditions brought about during the latter phases of the Industrial Revolution in Great Britain. The concept of nuisance was central to the sanitary legislation first enacted on a national scale, in England, with the Nuisances Removal Act of 1855⁸ and subsequently consolidated in the 1875 Public Health Act (PHA 1875). Statutory nuisance legislation continued in essentially the same form through to the next century with the 1936 Public Health Act (PHA 1936), being re-enacted and consolidated in legislation still in force [Part III of the Environmental Protection Act 1990 (EPA)].

Section 79(1) EPA 1990 brings together nuisances that were first enacted in their current form in the 1850s with newer forms, such as noise which first became a statutory nuisance with the Noise Abatement Act 1960, and now light and insects, further to the Clean Neighbourhoods and Environment Act 2005.⁹ It can be appreciated that these statutory provisions, which are central to local

⁵ *R v Carrick District Council, ex p Shelley* [1996] Env LR 273.

⁶ Some provisions in the Public Health Act 1936 are still extant and relate to such matters as watercourses and cess-pits.

⁷ *Birmingham City Council v Oakley* [2001] 1 All ER 385 at 395 (Lord Hoffmann).

⁸ The 1855 provisions were amended forms based on legislation passed in 1848 and 1849, which was deemed 'defective'.

⁹ The EPA 1990 has since been amended by the Noise and Statutory Nuisance Act 1993 to include certain kinds of noise from the street.

pollution control in the modern world, have a long and an interesting history over a lengthy period of extensive socioeconomic change.¹⁰

This article examines the origins of statutory nuisance and considers whether the concept has changed over the last one hundred and fifty years. It is concerned about whether a significant overhaul is needed if statutory nuisance is to continue into this century as an effective tool for protecting and promoting public health. This question has become more pertinent since statutory nuisance is a frequently used and well-understood tool employed by local authorities, yet its role has been restricted by the judiciary over the last decade. The modern concept of statutory nuisance has been considered, not always deftly, in several cases.¹¹ The net result has been to accord a narrow interpretation to the concept and scope of statutory nuisance, a position that is mirrored in decisions concerning common-law nuisance.

The highpoint of this narrow interpretation of nuisance, which has curtailed the development of an environmental jurisprudence in the common law and is drawn from the classical approach of Professor Newark,¹² is the House of Lords' decision in *Hunter v Canary Wharf*.¹³ One effect of this decision has been to ensure that common-law nuisance remains as a property tort rather than being developed as an environmental one. In the case of statutory nuisance, this narrow interpretation contrasts with the developments in the law achieved by Victorian judges in which it became

¹⁰ The 1855 Nuisances Removal Act, section 8 lists statutory nuisances as *including*:

Any Premises in such a State as to be a Nuisance or injurious to Health:

Any Pool, Ditch, Gutter, Watercourse, Privy, Urinal, Cesspool, Drain, or Ashpit so foul as to be a Nuisance or injurious to Health:

Any Animal so kept as to be a Nuisance or injurious to Health:

Any Accumulation or Deposit which is a Nuisance or injurious to Health...

Three of these types of nuisance in the 1855 Act—concerning premises, animals and accumulations or deposits—have an unbroken legislative history lasting from 1855 to the Environmental Protection Act 1990. The words used in the 1855 Act to describe these nuisances recur in successive Acts up to and including the EPA 1990.

Subsequent additions have been made to the list of statutory nuisances contained in the 1855 Act. The current list is set down in section 79(1) EPA 1990. Nuisances concerning the state of premises, the keeping of animals, and accumulations or deposits of filth use similar wording to the 1855 legislation. Others have seen changes and some types of nuisance, such as those caused by noise and fumes, are relatively new. An example of the changing category is the provision regarding the condition of watercourses etc., which was amended in section 91 Public Health Act 1875 to include the *state* of the object causing the statutory nuisance. This suggests that once the 1875 Act came into force, this form of nuisance could be caused in additional ways than arising from the dumping of human waste. Section 259(1)(a) PHA 1936 is the present-day provision regulating this type of watercourse nuisance. It is enforced under section 79(1)(h) EPA 1990 and leaves out the purely excremental sources such as privies, being concerned more widely with the state of 'any pond, pool, ditch, gutter or watercourse' and with whether these are so foul as to be a nuisance or prejudicial to health. Of these categories cited in section 259(1)(a) PHA 1936, only watercourses are of interest to us in this article.

¹¹ The significant cases have included: *Network Housing Association v Westminster CC* [1994] 93 LGR 280; 27 HLR 189; [1995] Env LR 1 76; *Sterling Homes (Midlands) Ltd v Birmingham CC* [1996] Env LR 121; *Cunningham v Birmingham CC* [1998] Env LR 1; [1997] 30 HLR 158; 96 LGR 2312; *Kirklees MBC v Field and others* [1998] Env LR 337; 30 HLR 869; *R v Bristol CC, ex p Everett* [1998] 1 WLR 92; 3 All ER 603; affd [1999] 2 All ER 193; 1 WLR 1170; Env LR 587; *Budd v Colchester BC* [1999] Env LR 739; JPL 717; *SFI Group plc (formerly Surrey Free Inns plc) v Gosport BC* [1999] Env LR 750; LGR 610; *R v Falmouth and Truro Port Health Authority, ex p South West Water Ltd* [1999] Env LR 833; affd [2000] 3 All ER 306; 3 WLR 1464; Env LR 658; *Birmingham City Council v Oakley* [2001] 1 All ER 385; [2000] 3 WLR 1836; [2001] LGR 110; [2001] Env LR 37; *Hounslow LBC v Thames Water Utilities Ltd* [2003] EWHC 1197 Admin.

¹² 'The Boundaries of Nuisance' (1949) 65 LQR at 480.

¹³ *Hunter v Canary Wharf and London Docklands Development Corporation* [1997] AC at 655; [1997] 2 All ER at 426; [1997] 2 WLR at 684.

the exemplary environmental legislation of its day. We argue that the narrow view that now prevails in respect of statutory nuisance is based on a misinterpretation of legislative intention, which we will show was a broad and expansive one during the 1850s and 1870s.¹⁴ If statutory nuisance were to be allowed to develop in the way exemplified by Victorian judges and as the present government appears to espouse, its usefulness as an effective mechanism for protecting and promoting environmental and public health would be assured.

2. Judicial Interest in Sanitary History

There are in particular three cases which have addressed the concept of statutory nuisance over the last decade, and which have failed to fulfil the intentions of the original legislators in relation to its aims. We shall refer to these as the ‘triumvirate cases’. These cases are: the Court of Appeal decisions in *R v Bristol CC, ex p Everett* and in *R v Falmouth & Truro PHA, ex p South West Water Ltd*, and *Birmingham CC v Oakley* (House of Lords).¹⁵ These all involve consideration of the Nuisances Removal Act 1855 which would normally be of interest only to social and urban historians, or to academic specialists in environmental health law, but for the attention recently given to section 8 by the triumvirate cases. Of these, the cases of *ex p Everett* and *Oakley* were concerned with the state of premises and *ex p South West Water* with watercourses.

Running through these cases is a tension over whether a broad or a narrow approach should be applied to what Parliament intended at the time of original enactment. A broad approach might have extended statutory nuisance to cover the health problems arising in a modern context on the basis that Parliament had not intended public health provisions to be narrowly confined to a precise set of situations. In the most recent triumvirate case, the House of Lords decision in *Oakley*, the narrow view prevailed in a decision split three to two so overturning the judgment of the Divisional Court. *Oakley* concerned the internal layout of a house owned by Birmingham City Council and let to the Oakleys. The problem was that it was necessary for members of the family to pass through the kitchen after using the lavatory, in order to wash their hands in a washbasin provided in the bathroom. It was not disputed by their lordships that such a practice could be unhygienic as it could lead to germs being transmitted into an area where food was being prepared. The (minority) case for the broad view was succinctly put by Lord Clyde:

It is important in the first place to take into account the purpose and intent of the legislation. One of the principal purposes of the public health legislation from the 19th century onwards has been to secure the prevention of illness and disease. As time has passed and new concerns have arisen regarding pollution and the protection of the environment the variety of the risks

¹⁴ Many of the relevant judgments are based on a somewhat whiggish view of history, as exemplified by A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (Macmillan, 1905). In such a view, enacted measures of legislation tend to be perceived as exemplifying social values in an unproblematic way. This approach is still to be found among historians of the period, for example: D.J. Olsen, *The Growth of Victorian London* (Batsford, 1976); A.S. Wohl, *The Eternal Slum: Housing and Social Policy in Victorian London* (Edward Arnold, 1977); J. Burnett, *A Social History of Housing, 1815–1985* (Routledge, 1991). For a critique see J. Foster, ‘How Imperial London Preserved its Slums’, 3, *Int. Jour. of Urban & Regional Research* (1979) 93–114.

¹⁵ *R v Bristol CC, ex p Everett* [1998] 1 WLR 92; 3 All ER 603; affd [1999] 2 All ER 193; 1 WLR 1170; Env LR 587; *R v Falmouth & Truro Port Health Authority, ex p South West Water Ltd.*, [1999] Env LR 833; affd [2000] 3 All ER 306; 3 WLR 1464; Env LR 658; and *Birmingham CC v Oakley* [2001] 1 All ER 385; [2000] 3 WLR 1836; [2001] LGR 110; [2001] Env LR 37.

has increased but the basic purpose of ensuring that people may live and work in hygienic and sanitary conditions and that the risks of disease and ill-health may be minimised has remained unchanged. The concept of the “statutory nuisance” is designed to identify the situations where the risks to health may occur and the machinery provided in the successive enactments is designed to effect a simple and swift remedy wherever such a risk may be found to exist.¹⁶

Lord Clyde was suggesting that the proper approach to statutory interpretation requires making adjustments to changing social conditions but keeping to the original purpose of the legislation: to prevent illness and disease arising from situations where poor hygiene standards and unsanitary conditions were extant. This approach is consistent with the principle that a statute is presumed to be ‘always speaking’¹⁷: it allows new concerns regarding pollution and the protection of the environment to come within the scope of the legislative purpose. In addition, the approach is outward looking rather than focussing narrowly on statutory nuisance as a particular response to specific outbreaks of diseases such as cholera.¹⁸

Lord Steyn, who also gave a minority judgment, was broadly in agreement with Lord Clyde. His lordship criticised the majority in *Oakley* for their failure to take socio-economic changes sufficiently into account:

The appeal to Victorian social history, and legislative history going back more than 150 years, is in my view not appropriate to the context. The 1990 [Environmental Protection] Act must be given a sensible interpretation in the modern world.¹⁹

Lord Steyn dismissed the argument put forward by the majority for interpreting section 79(1)(a) EPA 1990 narrowly as a ‘verbal technique’—a strained way of cutting down the generality of the statute.

The question which had been certified by the Divisional Court was whether the physical arrangements in the Oakleys’ house comprised a state of premises that was prejudicial to health, so capable of amounting to a statutory nuisance. In the Divisional Court, Simon Brown LJ²⁰ had held that:

in cases like this the way the premises are used is the direct result of their layout, and if, as it was found here, that use is predictably so unhygienic as to create a health risk, then it is the state of the premises which is injurious to health.

This view is consistent with Lord Steyn’s demand for a ‘sensible interpretation in the modern world’, and is arguably the better one. By reversing this decision, a majority of the lords decided that it was the practice itself that was unhygienic and not the state of the premises. That the premises were in such a state that a hygienic use could not reasonably be made of them was not enough. As a result of *Oakley*, the arrangement of rooms, even where it creates a risk of disease, is beyond the reach of section 79(1)(a) EPA 1990 and cannot amount to a statutory nuisance.

This is unsatisfactory. There is no question that the type of harm that could follow from the use of the premises in *Oakley* falls within the original purpose of the legislation.

¹⁶ [2001] LGR 110, 125.

¹⁷ F. Bennion, *Statutory Interpretation* (Butterworths, 2002, 4th edn).

¹⁸ F. McManus, ‘Statutory Nuisance: Success or Failure Out of a Myth?’ (2003) 24 *Statute Law* at 77.

¹⁹ [2001] LGR 110, 118.

²⁰ [2001] Env LR 37, 38.

Contamination that resulted from the transfer of faecal or urinal matter to a food preparation area would have been a public health concern fitting the purpose of the original legislators. Indeed, in a society where health effects were poorly understood, the presence of faecal matter would be the one factor clearly comprehended as being a risk to health. Such contamination may result in the spread of contagious disease, which also clearly falls within the purpose of the original legislators. It seems implausible that the original nineteenth-century legislators had intended that the state of premises which could give rise to disease for whatever reason, whether because of physical layout or practice, should not form part of the public health code.

The argument for a narrow construction of statutory nuisance was based on an earlier decision of the Court of Appeal in *R v Bristol CC, ex p Everett*.²¹ Here, the local authority had served an abatement notice on Mrs Everett's landlord requiring him to make a steep stairway safe and to reduce the risk to health of persons falling down and injuring themselves. The local authority then purported to withdraw the notice after receiving advice that the subject matter—the risk to health posed by the state of the staircase—was incapable of amounting to a statutory nuisance. Mrs Everett sought judicial review of that decision and lost because the High Court concluded—in a decision subsequently affirmed by the Court of Appeal—that a steep and dangerous stairway could not be prejudicial to health in the sense required by section 79(1)(a) of the EPA 1990. In particular, the Court of Appeal agreed with the reasoning of Richards J that the legislative intention behind the statute meant that the type of injury which might arise from tumbling down a steep and dangerous stairway was excluded. The Court of Appeal concluded that the nineteenth-century legislators were intent upon controlling disease rather than with preventing accidental physical injury and that 'prejudice to health' should be interpreted in that light.²²

Compared to *Oakley*, the grounds for adopting a narrow approach were far stronger in *ex p Everett*,²³ which had nothing to do with disease but was concerned with the risk of injury to health arising from the physical layout of premises. In defining 'health', Buxton LJ drew an analogy with section 79(1)(f) EPA 1990, which establishes that an animal which is kept in such a place or manner as to be a nuisance or prejudicial to health is a statutory nuisance. This clearly did not connote physical injury and, given the legislative history of section 79(1)(a), it 'cries out from the page' that the target of the legislators was disease not injury. His lordship added that 'changing the language, but not the concept, into twentieth-century form, the successor provisions of 1990 are about disease or ill-health, and not about physical danger'.²⁴ To be consistent with *ex p Everett*, the House of Lords in *Oakley* could have found in favour of the Oakleys precisely because their case did concern the risk of disease without physical injury.

²¹ *Supra* n 11.

²² The case could alternatively have been decided on the basis that the premises were not in such a state that they constituted a risk to health—viz. the *Oakley* approach—because the problem was due to their design and layout.

²³ Mummery LJ, giving judgment in *ex p Everett*, cites as authoritative case law *Great Western Railway Co v Bishop* [1872] LR 7 QB 550 and *Coventry City Council v Cartwright* [1975] 1 WLR 845; 2 All ER 99. But, there are significant difficulties with the judgment of Cockburn CJ in *Bishop* which are dealt with later in this article. Further, the subsequent decision in *Bishop Auckland Local Board v Bishop Auckland Iron and Steel Company* [1882] 10 QBD 138 which distinguished *Bishop*, is referred to in *ex p Everett*, but not considered to have any weight.

²⁴ [1999] 2 All ER 193, 204.

*R v Falmouth & Truro PHA, ex p South West Water*²⁵ is the final triumvirate case in which the meaning of watercourses—the subject of a statutory nuisance under section 259 of the Public Health Act 1936—was subjected to a very detailed historical analysis by the Court of Appeal. To come within this provision, the watercourse itself must be in such a state as to be a statutory nuisance, so the section is not concerned with the consequences such as flooding caused by an obstruction. The case was brought after the port health authority had served an abatement notice on the water company for discharging raw sewage into the Carrick Roads stretch of the Fal estuary. The court had to decide whether the point of discharge was into a watercourse, as interpreted under the Act, or into an open stretch of water.²⁶ No statutory definition of a watercourse is provided in the 1936 Act. The court had to decide whether the scope of ‘watercourse’ was limited by its original enactment in a public health statute—the Nuisances Removal Act 1855. This would import an extremely narrow definition, section 259(1)(a) of the 1936 Act implying only a limited body of water.²⁷ Alternatively, could ‘watercourse’ be extended to cover a much larger body of water, such as an estuary, as the provision set down in section 259(1)(b) suggested, employing words originally used in legislation in 1925?²⁸

Hale LJ provided the leading judgment on the scope of statutory nuisance. Her ladyship concluded that the tidal section of a river would not have been contemplated as coming within the scope of a watercourse when this statutory nuisance was first enacted. This is apparent from the wording of section 8 of the Nuisances Removal Act 1855: ‘Any Pool, Ditch, Gutter, Watercourse, Privy, Urinal, Cesspool, Drain, or Ashpit so foul as to be a Nuisance or injurious to Health’. Furthermore, reliance on tidal action at that time to dispose of human waste was not only acceptable but also ‘state of the art’, and generally considered as a wholesome alternative to polluting a non-tidal stretch of a river or a stream. For her ladyship, this meant that ‘by no stretch of the imagination could it (a watercourse) have included an estuary such as Carrick Roads or indeed any tidal waters’ (at 342). But imaginations can broaden with time and the court could not have left matters there, because the scope of watercourse nuisances was extended by the Public Health Act 1925 to include what is now section 259(1)(b) of the 1936 Act. This paragraph expressly brings navigable, though not generally navigated, stretches of rivers within the scope of statutory nuisance. Such stretches will often be tidal. The meaning of ‘watercourse’ had now become broad enough to include a stretch of water capable of navigation by commercial vessels, if not ordinarily used in such a way. There is no mention of a large body of water, such as a lake or the tidal stretch of a river, but a tidal element to the river is, at the very least, strongly implied.²⁹

²⁵ *Supra* n 11.

²⁶ For a consideration of the implications of this case for the drafting of abatement notices, see J. Pointing, ‘*Falmouth & Truro Port Health Authority v South West Water Ltd*: Have specific works notices finally run their course?’ [2000] 12 ELM 99; R. Malcolm, ‘Statutory nuisance: the validity of abatement notices’ [2000] JPL 894.

²⁷ Section 259(1)(a) defines as a statutory nuisance ‘any pond, pool, ditch, gutter or watercourse which is so foul or in such a state as to be prejudicial to health or a nuisance...’.

²⁸ Section 259(1)(b) adds a further statutory nuisance: ‘any part of a watercourse, not being a part ordinarily navigated by vessels employed in the carriage of goods by water, which is so choked or silted up as to obstruct or impede the proper flow of water and thereby cause a nuisance, or give rise to conditions prejudicial to health’. This type of statutory nuisance was first enacted in the Public Health Act 1925.

²⁹ L. Etherington, ‘The tide begins to turn: statutory nuisance and estuarine pollution’ [2000] 12 ELM 261.

The Court of Appeal decided in *ex p South West Water* that the legislature's intention in 1936 should prevail as to the meaning of a 'watercourse': the time the two types of nuisance had been brought together for the first time into a single section of an Act. As it stands, *ex p South West Water* produces the curious and strained result that a tidal stretch of a river with banks on both sides does not contain a watercourse—an observation that might cause alarm among sailors.³⁰ A better construction is that a watercourse is implied where there are tidal reaches having banks on both sides. So, again a limiting and cautious approach has been given by the judiciary to the interpretation of one type of statutory nuisance.

3. The Problem with Section 79 Environmental Protection Act 1990

One of the difficulties in all three of the triumvirate cases concerns the complex historical lineage of section 79(1) EPA 1990, which is subdivided into the various statutory nuisances.³¹ The preamble to the Act implies that it is a consolidating measure, and arguably an updating construction should be applied to the list of nuisances set down in section 79(1).³² The problem is 'updating according to what date?' Considered as a whole, the list presented in this section comprises a mixture of the old and the new, the only common linkage being that all statutory nuisances must be either 'a nuisance or prejudicial to health'. Thus, noise³³, which originated as a statutory nuisance in 1960,³⁴ and light with a 2005 birth date, hardly fit the disease paradigm of the Victorians (although they may have been actionable as common-law nuisances). Fumes and gases³⁵ were included for the first time as statutory nuisances in 1990; adding to smoke nuisances, which in their modern form originated in section 19 of the Sanitary Act 1866. Another recent addition—noise from vehicles, machinery and equipment in the street—was added by the Noise and Statutory Nuisance Act 1993.³⁶

The common link between all types of statutory nuisance is that they must be 'prejudicial to health or a nuisance'. In other words, there are two subtypes of statutory nuisance—those which are a nuisance and those which are prejudicial to health.³⁷ Every offending activity must constitute one or the other to be actionable as a statutory nuisance. Do the words set down for all modern statutory nuisances—the requirement for there to be a nuisance or prejudice to health—mean the same for

³⁰ Of course, other legislation protects waters and the protection of estuaries and tidal waters from health hazards could be achieved by the refusal of the Environment Agency to give its consent to the discharge of sewage and/or to prosecute for water pollution under Part III Water Resources Act 1991. One of the primary purposes of statutory nuisance is, however, to deal with accidental or unintended acts of pollution—as such, it might be described as a fire-fighting provision. Furthermore, the fact that a pollution and health hazard could also be controlled by another regulatory regime is not relevant to interpreting the scope of an altogether different statutory provision (*R v Carrick District Council, ex p Shelley* [1996] Env LR 273; JPR 912; LGR 620; JPL 857).

³¹ R. Malcolm and J. Pointing, *Statutory Nuisance Law & Practice* (OUP, 2002), Ch 3.

³² The preamble to the Act states as its purpose: 'to restate the law defining statutory nuisances and improve the summary procedures for dealing with them...' Included in this was incorporating elements of procedure from the Control of Pollution Act 1974 and noise nuisance, which the 1974 Act had incorporated from the Noise Abatement Act of 1960.

³³ EPA 1990, section 79(1)(g).

³⁴ Noise Abatement Act 1960.

³⁵ *Ibid* at section 79(1)(c).

³⁶ *Ibid* at section 79(1)(ga).

³⁷ For a discussion of the 'nuisance limb' and the 'health limb' of statutory nuisance, see Ch 4, R. Malcolm and J. Pointing, *Statutory Nuisance Law & Practice* (OUP, 2002).

all forms of statutory nuisance? Arguably they should, because section 79(1) EPA 1990 is a consolidating Act and the provisions are located within the same subsection of the Act. On the other hand, these words are used in the context of provisions originating in different legislation and at different times. This problem is not considered in the triumvirate cases, but it was raised in a recent High Court decision.

*London Borough of Hounslow v Thames Water Utilities Ltd*³⁸ was concerned about foul smells emanating from Mogden Sewage Works, in regard to which the local authority had served an abatement notice citing section 79(1)(d) EPA 1990. There has been very little case law concerning this form of statutory nuisance, so the court was invited to give the same meaning to ‘premises’ for smells arising on premises as had been decided in cases concerning the ‘state of the premises’ (i.e. section 79(1)(a) and the form of nuisance considered in *Oakley*). The court concluded that it was possible, in the absence of a statutory definition, for ‘premises’ to mean different things, even in adjacent paragraphs of a subsection of an Act; it all depended on the context. The court went further to say that it would be wrong to conclude that there was an inflexible rule of construction that where words were repeated in consolidating legislation, which had in the intervening period received judicial consideration, that the legislature is deemed to have used them in the same way.³⁹ *Thames Water Utilities* supports the view that each of the statutory nuisances listed in section 79(1) has to be considered separately. This implies that differences arising from context may be drawn because of variations in historical background as well as in subject matter.⁴⁰

In reaching this decision, the court took an enlightened and modernistic approach. It was accepted that while there was a presumption that a word had a similar meaning in different parts of a statute,⁴¹ this could be displaced.⁴² Most importantly, the court accepted that the legislative history was crucial and that it was not appropriate to try and push all statutory nuisances into the same straitjacket.

4. Legislative Intention in the 1850s and 1870s: So What Did Parliament Intend?

Until the decision in *Thames Water Utilities*, the scope of statutory nuisance has been interpreted too narrowly among today’s judiciary. *Thames Water Utilities* is the first decision which has explicitly recognised the hotchpotch of provisions which

³⁸ *London Borough of Hounslow v Thames Water Utilities* [2003] EWHC 1197 Admin. There was another decision of the magistrates’ court (*United Utilities Ltd v Liverpool City Council*, unreported, 14 May 2002) around this time which reached the same view as the district judge had in *Thames Water Utilities*. That is, that ‘premises’ had the same meaning in each paragraph of section 79 Environmental Protection Act 1990—thus having the effect of excluding sewage works from any part of the ambit of section 79 since they did not constitute ‘premises’, a point previously decided in *R v Parly and another (Justices)* [1889] 22 QB 521 and *East Riding of Yorkshire v Yorkshire Water Services* [2000] Env LR 7.

³⁹ *London Borough of Hounslow v Thames Water Utilities*, paras 37, 51.

⁴⁰ The problems of comparison are compounded by the opacity and clumsiness of early public health legislation, as a comparison between the 1848 and 1855 Nuisances Removal Acts with the Public Health Act 1875 demonstrates. Change in the structure of legislation was brought about because the increasing scope and complexity of statutes required more sophisticated drafting skills. These became available from 1869 when the Parliamentary Draftsman’s Office was established.

⁴¹ See, for example, *Courtauld v Leigh* [1869] LR 4 Ex 126 and *Beaman v A.R.T.S. Limited* [1949] 1 KB 550.

⁴² See, for example, *Cramas Properties Ltd v Connaught Fur Trimmings* [1965] 2 All ER 382 and *Maddox v Storer* [1963] 1 QB 451.

fall under section 79 and that their differing genesis is relevant to their interpretation. Some judgments in the triumvirate cases have adopted a mistaken view of legislative intention; the approach taken by a majority of the lords in the case of *Oakley*⁴³ having been highly questionable. In order to appreciate what Parliament intended by enacting the sanitary legislation of 1855 and 1875, it is necessary to analyse contemporary debates. Of particular interest is what was said by government spokesmen during committee and report stages. The policy context in which legislation was formulated, debated and enacted was complex and requires the use of historians' skills for the analysis, construction and interpretation of material. Understanding the motives, intentions and meanings of actors in their historical context is needed, difficult though this is, and there are no assurances that one's interpretation is correct. There is always the danger that present-day rationality becomes imputed when interpreting the beliefs, thinking and values of participants in past events and processes. To avoid caricaturing these, it is necessary to understand the legislative system (in the wider sense) that was in place during this mid-nineteenth-century period of profound change.

In the 1840s and 1850s the enactment of sanitary legislation occurred in the teeth of opposition from powerful vested interests. Partly, this was because once the principle of State intervention had been conceded, there seemed to be no limits to continuing, creeping intervention in the affairs of owners of private property. To some extent, this was a rhetoric of debate⁴⁴ employed by those who accorded a high value to property rights and for whom freedom of contract possessed a sacerdotal quality.⁴⁵ The policy of *laissez-faire* was entrenched during these decades with respect to social policy legislation; to breach it required some over-riding justification and the panic over cholera epidemics provided the trigger for this. The provisions in the Public Health Bill of 1848—even though they were limited to areas suffering an especially high death rate and the measure itself was to be time limited—provoked the following comment from *The Economist*:

To promote the health of towns may be made the pretext for interfering with all the pursuits and occupations of the inhabitants ... If this bill become a law, we are not aware of a single business or amusement which may not be drawn into the vortex of legislation ... Cutlers, grinders, painters, and a variety of other labourers, are notoriously short-lived; the general board and the local boards, to be consistent, must take one and all of them under protection. Gaming-houses, with the bad passions they engender, affect health and destroy life as well as factories; close theatres and cold churches as well as soap boiling and the smoke from steam-furnaces: and the same principle which justifies an interference with much of the business of life will warrant an inspection of all its amusements – of private parties and balls, as well as soap-boilers' premises and the knackers' yards.⁴⁶

⁴³ *Supra* n 11.

⁴⁴ J.I. Kitsuse and M. Spector, 'Towards a Sociology of Social Problems: Social Conditions, Value-judgements and Social Problems', 20 *Social Problems* (1973) 407–419.

⁴⁵ See A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (Macmillan, 1905). Similar ideological conflicts between 'collectivism' (state intervention) and 'individualism' (freedom of contract) occurred from the 1880s to 1914 in respect of the taxation of land, land nationalisation and leasehold reform. See A. Offer, *Property and Politics, 1870-1914: Landownership, Law, Ideology and Urban development in England* (Cambridge University Press, 1981); R. Douglas, *Land, People and Politics: a History of the Land Question in the United Kingdom, 1878-1952* (Allison & Busby, 1976); J.E. Pointing and M. Bulos, 'Some implications of failed issues of reform: the case of leasehold enfranchisement', 8 *International Journal of Urban & Regional Research* (1984) 467–480.

⁴⁶ *The Economist*, 20 May 1848, 565–566.

Granting new powers to local authorities to enable sanitary inspectors to inspect private premises and decide what action the owner was required to take to make them sanitary and free from nuisance was controversial. *The Economist*, in the above passage, had picked up on the inflationary potential of public health legislation: what might start as a measure to avoid repetition of recent outbreaks of cholera could lead to State control over other forms of business and private activity.

Great expectations were held about sanitary reform among radicals and reformers as a way of resolving problems in towns and cities. As with those opposing reform, the broad scope of what was regarded as a public health matter is evident from the language used in comment and debate. Frequent amendments to sanitary legislation to extend the boundaries of nuisance reinforce this. For example, in 1866, the Nuisances Removal Act of 1855 was amended to include 'Any House or Part of a House so overcrowded as to be dangerous or prejudicial to the Health of the Inmates'.⁴⁷ Residential overcrowding was seen as a source of ill-health and disease, just as damp and filthy conditions were. Of course, this provision has long since been repealed to be replaced by other legislation than statutory nuisance. But the point is that a range of measures, including those intended to improve the conditions in which people lived and worked in towns and cities, were drawn into a sanitary paradigm in which nuisance provided the conceptual basis. This concept was not tied down to a narrow definition of public health, but was outward looking and expansive.

In the decades that followed the original legislation, numerous examples indicate the extent to which a broad and flexible concept of statutory nuisance was uppermost in the minds of legislators. For example, the President of the Poor Law Board, James Stansfeld, in introducing the Public Health Bill in 1872 informed the House that:

The Nuisances Removal Act of 1855 was followed by similar Acts in 1860, 1863, and 1866, and under these Acts the definitions of nuisances were enlarged, powers were given for cleansing houses, for providing ambulances, for the removal of the infected to hospitals, for the disinfection of clothing, and for the establishment of mortuaries for the reception of the dead.⁴⁸

In the minds of reformers and opponents of change, both inside Parliament and in the political world outside, it is plain that the concept of statutory nuisance for the period from 1840s to 1870s was broad, flexible and expansive. There is no evidence from the words of those who presented Bills to Parliament that a narrow, restrictive definition should be adopted as regards matters that were a nuisance or injurious to health.⁴⁹

5. Sanitary Legislation and the Meaning of Nuisance

Neither in the 1840s and 1850s nor thereafter has there been any attempt to define in legislation what is meant by 'injurious to health', or to indicate how this should be

⁴⁷ Sanitary Act 1866, section 19.

⁴⁸ *HC Debs* (3rd series) vol 209, cols 596–598 (16 February 1872).

⁴⁹ Nothing significant should be read in the change from 'injurious' to 'prejudicial' to health. The 1936 Public Health Act introduced the change in wording; section 79(7) EPA 1990 defines prejudice to health as 'injurious, or likely to cause injury, to health'. There had been an intermediate position enacted for London; the Public Health (London) Act 1891 introduced the concept of dangerousness for statutory nuisances. Thus, section 2(1)(a) defines premises nuisances as those: 'in such a state as to be a nuisance or injurious or dangerous to health'.

distinguished from ‘nuisance’. Yet from the 1848 Nuisances Removal Act to the EPA 1990, most forms of statutory nuisance have had this two-limbed structure. It is possible that this duality owes more to historical contingency than to design. We have noted already that the immediate trigger to legislative action in the late 1840s was the cholera epidemic of 1848, when emergency measures were rushed through Parliament.⁵⁰ There was during this time much confusion and disagreement about the causes of disease, so combining nuisance and threats to health would not have been controversial at such a time of panic. Nuisance—a vague concept at the best of times⁵¹—was left undefined and, arguably, the legislative intention was to give it a wide meaning in this very unsettled period.

Contagious disease was certainly in the air. When the Marquess of Lansdowne opened debate on the second reading of the Nuisances and Contagious Diseases Bill 1848, the object was ‘to give more effectual powers for abating nuisances and to provide more effectual means for preventing the spread of contagious disorders’.⁵² What caused such terrible diseases could only be guessed at. Lansdowne was as well informed as could be expected at the time when he informed the House vis-à-vis the spread of cholera that this disease:

was epidemic only, and not contagious ... that its causes were atmospheric; that it was influenced by the exhalation of rivers, the currents of air, and certain meteoric changes and vicissitudes; that the disturbing causes which promoted the disorder resided principally, if not altogether, in the atmosphere.⁵³

The panic about cholera recurred when Parliament debated the 1855 Nuisances Removal Bill, the emergency legislation of 1848 having proved ineffective. Sir Benjamin Hall, President of the General Board of Health, described the 1848 measures in the first reading of the 1855 Bill as ‘wholly inoperative’.⁵⁴ This was due to the chaos of local administration not to any perceived failure of statutory nuisance. In fact, the scope of statutory nuisance was expanding as the sanitary paradigm increased its hold. So the government:

proposed to place every district in England under the local authorities, and to empower them to remove and prevent the recurrence of nuisances – to deal with those houses unfit for human habitations, and to provide for the abatement of those nuisances caused by parties carrying on offensive trades.⁵⁵

What then was the meaning of statutory nuisance at this time? It seems clear that the intention behind clause 8 of the 1855 Bill was for the two limbs originally provided for in the Nuisances Removal Act 1848—nuisance and injury to health—to have distinct meanings. In committee, in response to those who argued that injury to health was sufficient to trigger enforcement action by the authorities, Sir Benjamin Hall refused to

⁵⁰ Nuisances Removal and Diseases Prevention Act 1848; Public Health Act 1848. Of course, sanitary reformers had been pressing for legislative change over several years and eminent bodies such as the Health of Towns Commissioners had sat earlier in the 1840s.

⁵¹ As was stated by Erle CJ in *Brand v Hammersmith & City Railway Co* [1867] QB 223 at 247, in a case involving nuisance caused by the building of today’s Metropolitan and City Underground line: ‘The answer to the question: What is a nuisance? is immersed in undefined uncertainty’.

⁵² *HL Deb*s (3rd series) vol 101, col 613 (1848).

⁵³ *Ibid* col 614.

⁵⁴ *HC Deb*s, (3rd series) vol 136, col 924 (1855).

⁵⁵ *Ibid* col 926.

give way, saying that it was essential to have a clause capable of dealing with matters that were ‘offensive to the senses’ or a ‘nuisance’ in addition to those that were ‘injurious to health’.⁵⁶ This does suggest that a wide rather than a narrow interpretation was intended by contemporary legislators to be applied to the meaning of nuisances and to things injurious to health. This is at odds with the more precise meaning that would prevail today in employing such terms. It is all too easy for present-day judges and lawyers to apply their knowledge to the past to draw conclusions about legislative intention defined in terms of the mind-set of the present-day legislative draftsman.

The social conditions prevailing in towns and cities in the 1840s and 1850s constituted a particular set of circumstances that do not apply today. In particular, the concept of what could amount to a statutory nuisance was bound up by disease-based public health considerations because these were so pressing at that time; infectious and contagious diseases were very prevalent, their causes but little understood. Medical science could do little to combat disease at this time; the emphasis was on prevention. The difficulties were enormous. First, there was the prevalence and number of dangerous, life-threatening diseases; second, there was no effective system of personal medical care; and third, there was no adequate theory of disease. As late as the 1870s the ‘miasma’ theory of infection prevailed—the idea that disease was caused by the transmission of minute faecal particles suspended in droplets of breath.⁵⁷ The objectives to tackle overcrowding in housing and to separate human from animal habitations flowed from this theory. It is almost impossible today to comprehend the degree to which the Victorians feared disease and death. Sanitary reformers calculated that the average life expectancy for working class inhabitants in central Manchester in the 1840s was only seventeen years.⁵⁸

As regards housing, sanitary legislation was directed towards specific problems: overcrowding, serious disrepair, lack of a clean water supply, lack of adequate drainage, poor facilities for the removal of human and animal dung and rubbish.⁵⁹ Public concerns at times reached panic levels, not least because there was an ever-present risk that the ‘poison’ infesting the slums might find its way to where the professional and middle classes lived, or reach the town houses of the aristocracy.⁶⁰ This focus on property—particularly on insanitary housing posing a risk of disease to neighbours—is consistent with the concepts of public and private nuisance, but the scope of statutory nuisance was pushed further. For sanitary reformers, the risks were from diseases caused by smells, dampness and accumulations of filth. These were soon followed by smoke, dust and effluvia. Reformers pushed the boundaries of nuisance further to include the conditions in which factory hands worked as well as the homes

⁵⁶ *HC Debs*, (3rd series) vol 139, col 450 (1855).

⁵⁷ C. Fraser Brockington, *Public Health in the Nineteenth Century* (E & S Livingstone, 1965).

⁵⁸ A. Briggs, *Victorian Cities* (Penguin, 1968) at 101. Deaths from cholera in the summer of 1849 were estimated at 15,000 in London, including 4,000 in the City alone (G. Himmelfarb, *The Idea of Poverty* (Faber & Faber, 1984) at 314. Professor Himmelfarb notes (*ibid* at 336) a particular difficulty for the sanitary authorities arising from the widespread habit amongst the working classes (in cities as well in the countryside) of keeping manure outside their houses under their windows in the belief that the odour would protect the occupants from the effects of cholera. Scepticism about the validity of the miasma theory of disease also extended to the wealthy and middle classes, but there was no corresponding belief in the beneficent properties of excremental odours amongst the higher social classes.

⁵⁹ A.S. Wohl, *supra* n 14.

⁶⁰ J. Foster, *supra* n 14; G. Stedman Jones, *Outcast London: A Study in the Relationship between Classes in Victorian Society* (Clarendon Press, 1971).

where they lived. The aim was to encourage conditions to improve, to combat nuisances that were ‘offensive to the senses’ or ‘injurious to health’. Whether the fit between statutory and common-law nuisance was neat and elegant was not a primary concern; sanitary reformers, including legislators, were practical people who wanted to get things done and the concept of statutory nuisance was firmly rooted in the ‘here and now’. Turning to the present day, it is notable that the introduction of a statutory nuisance, where neighbours are disturbed by artificial light emitted from premises, can be described in precisely the same way. A problem has been identified which requires resolution—the practical tool of the statutory nuisance mechanism is deployed as it has been done by many previous Parliaments.

6. Relations Between Statutory and Common-law Nuisance

Legislation had established by 1848 that a statutory nuisance was comprised of specific matters that amounted to a nuisance or were injurious to health. No legislative provision then nor since has restricted the health limb to risks of infectious or contagious diseases, or to disease *per se*. A common-law nuisance, then as now, could be a crime if a public nuisance, a private nuisance if it amounted to an interference in a right to enjoy land, or it could be both. Could then *any* form of nuisance also be a statutory nuisance, or should statutory nuisance be limited to situations having a public health aspect or some other distinguishing feature?

In *Great Western Railway Co v Bishop*,⁶¹ it was decided by the Court of the Queen’s Bench that raindrops falling from a wooden railway bridge onto the public highway, though arguably a common-law nuisance, could not be a statutory nuisance. The purpose of the 1855 Nuisances Removal Act was analysed by Cockburn CJ (at 552) as follows:

The Act speaks of nuisances or things injurious to health... it was intended that the powers of this Act should apply *only* when the thing complained of was injurious to health ... this Act cannot be considered as comprehending within its provisions all things which would amount to nuisances in point of law (our emphasis).

This decision has not been overruled or suffered from cogent criticism in more recent reported cases and is authority for the proposition that the scope of statutory nuisance does not include everything that could be a common-law nuisance. However, it is apparent that the Lord Chief Justice erred in *Bishop* where he made it a requirement for all forms of statutory nuisance to be injurious to health. This is inconsistent with section 8 of the 1855 Nuisances Removal Act because the Act contains two distinct limbs, and why have two limbs when only one would suffice?

This elision of limbs in *Bishop* received critical comment from both sides of the House during the second reading of the 1875 Public Health Bill. Lyon Playfair, who had been one of the Health of Towns Commissioners in 1846, stated on behalf of the opposition:

I regret that no improved definition of a nuisance has been given in this Bill. The legislature intended [in the 1855 Act] that anything should be deemed a nuisance which was offensive

⁶¹ [1872] LR 7 QB 550.

to the community or injurious to health. But a recent decision of the Court of the Queen's Bench [i.e. *Bishop*] requires the injury to health to be established; and as this is often difficult of proof, the law is scarcely workable in its present form.⁶²

Despite an assurance from the President of the Local Government Board, Sclater-Booth, that an amendment would be introduced later in the House of Lords to ensure that the distinction between a nuisance and injury to health was maintained, the wording employed when the provision became law in section 91 PHA 1875 was similar to that used in the 1855 Act.⁶³ This error in *Bishop* was commented on seven years later in *Malton Board of Health v Malton Manure Co*, which distinguished rustic Arcadian smells from effluvia,⁶⁴ and again in *Bishop Auckland Local Board v Bishop Auckland Iron and Steel Company*⁶⁵

For a nuisance to be a statutory nuisance to Victorian legislators it had either to be 'offensive to the community' or 'obnoxious to the senses' (or both). Arguably, the first of these suggests a public nuisance and the second a category of private nuisance, which might also be a public nuisance if sufficient people were very offended. Equating the nuisance limb with public nuisance occurs in debates and features in judicial decisions. In *Bishop*, the Lord Chief Justice decided that the 1855 Act: 'was intended ... to secure the means of abating things that were either matters of public or private nuisance, of public nuisance as coming within the word "nuisance," and private nuisance as coming within the words "injurious to health"'.⁶⁶

This passage has not subsequently received adverse judicial comment in a reported case, so arguably a complaint of nuisance today, which is not prejudicial to health or does not affect a class of the public, cannot be a statutory nuisance. If so, this would mean, for example, that a majority of neighbourhood noise complaints to local authorities cannot be considered statutory nuisances because only a limited number of individuals in private premises are affected. Arguable though this is, one is reminded of Lord Clyde's objection in *Oakley* that the appeal to Victorian social history is not appropriate to the context of the present day because it fails to give 'a sensible interpretation of the modern world'.⁶⁷

The Lord Chief Justice in *Bishop* was following an established line of thinking in equating the nuisance limb of statutory nuisance with public nuisance.⁶⁸ The decision of his brother judge in that case was, perhaps, a fuller statement of the same proposition. Mr Justice Hannen thus stated that section 8 of the 1855 Nuisances Removal Act:

was intended to (apply) not merely to cases in which there would be a nuisance in the ordinary sense of the word, that is something obnoxious to the public, but also to those cases where although there is no injury to the public the thing complained of is injurious to the health of the inhabitants of a house, and therefore a private injury.⁶⁹

⁶² *HC Debs* (3rd series) vol 223, col 1248 (1875).

⁶³ *HC Debs* (3rd series) vol 224, col 1361 (1875).

⁶⁴ [1879] 4 Ex D 302.

⁶⁵ [1882] 10 QBD 138.

⁶⁶ [1872] LR 7 QB 550, 552.

⁶⁷ [2001] LGR 110, 118.

⁶⁸ See R. Cocks, 'Victorian Foundations?' in J. Lowry and R. Edmunds (eds), *Environmental Protection and the Common Law* (Hart Publishing, 2000); J.P.S. McLaren, 'Nuisance Law and the Industrial Revolution' 3 OJLS 160 (1983).

⁶⁹ [1872] LR 7 QB 550, 553.

The judgments of Stephen J in *Malton Board of Health v Malton Manure Co* and *Bishop Auckland Local Board v Bishop Auckland Iron and Steel Company*⁷⁰ helped to clarify the distinction between the two limbs. In *Malton*, Stephen J considered ‘that the word “nuisance” could not there (in *Bishop*) be taken in its fullest sense, as that would lead to some obvious absurdities’.⁷¹ He distinguished *Bishop* on the ground that the matter complained of—the raindrops falling from the bridge—went beyond the type of nuisance intended to be covered by the Act. But he expressly held that the section that spoke of effluvia which are a nuisance or injurious to health⁷² was not to be read as if it said ‘a nuisance injurious to health’. The effluvium was a statutory nuisance whether causing injury to health or not. On the facts of the case, it was held that the effluvium was injurious to health since it made ‘sick people worse’, so Stephen J’s judgment on the distinction to be drawn between the two limbs was obiter dictum.

An opportunity to develop the point arose in *Bishop Auckland Local Board v Bishop Auckland Iron and Steel Company*, a prosecution brought under section 91(4) Public Health Act 1875. Here, the nuisance concerned the production of cinders and ashes, which were deposited in heaps and were often on fire or smouldering, producing a stench. In addition, the fumes got into the sewers and polluted neighbouring dwellings via the lavatories. There was evidence that, while unpleasant, the stench was not injurious to health. In *Bishop Auckland Local Board*, Stephen J’s analysis of the decision in *Bishop* was even more forthright than it had been earlier in *Malton*. He stated (at 140):

Now in the case of *Great Western Ry. Co v Bishop*, the particular nuisance complained of was not only not injurious to health, but it was not a nuisance that in any kind of way related to health, or even to the permanent comfort, of any of the neighbours. It was a mere common-law nuisance like the non-repair of a highway.

His lordship concluded that a nuisance would be actionable if it was provided for in the sanitary legislation and could be ‘shewn to be injurious to personal comfort’. Thus, it was held that a nuisance that *either* interfered with personal comfort *or* was injurious to health was caught by the sanitary statutes.

7. The Creaking Common Law

The narrow stance adopted by the majority in the triumvirate, statutory nuisance cases has been mirrored by a conservative approach to the development of common-law nuisance. A modern line of authority, from *Cambridge Water Company v Eastern Counties Leather plc*,⁷³ to *Hunter v Canary Wharf*,⁷⁴ and to *Southwark LBC v Tanner; Baxter v Camden LBC (No 2)*,⁷⁵ has shown similar tendencies to cement the law in its Victorian property protection origins. These cases exemplify a conservative approach that has restricted the development of private nuisance, keeping it as a remedy for infringements of a property right.

⁷⁰ *Supra* n 64, 65.

⁷¹ *Supra* n 64 at 306.

⁷² Section 114 Public Health Act 1875, which dealt with nuisances caused by offensive trades.

⁷³ [1994] 2 AC 264.

⁷⁴ *Supra* n 13.

⁷⁵ [2001] 1 AC 1.

The opportunity to extend the common law as a mechanism for environmental protection was apparent in each of these cases.⁷⁶ The nature of the interference in *Cambridge Water* was the right to take water in an unpolluted state; in *Hunter*, freedom from dust and interference with television reception; in *Baxter*, freedom from noise. *Cambridge Water* might have heralded a mechanism for fixing environmental liability according to strict principles;⁷⁷ *Hunter* would have enabled a large class of claimants lacking proprietary rights to bring actions for environmental interference;⁷⁸ and *Baxter* could have enlarged the scope for protection from harm from external sources. Each of these cases illustrates judicial anxieties concerning the boundary between the common law and the regulatory system.⁷⁹ Lord Goff provided the lead in *Cambridge Water*:

It is of particular relevance that the present case is concerned with environmental pollution. The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind; and public bodies, both national and international, are taking significant steps towards the establishment of legislation which will promote the protection of the environment, and make the polluter pay for damage to the environment for which he is responsible – as can be seen from the WHO, EC and national regulations to which I have previously referred. But it does not follow from these developments that a common law principle, such as the rule in *Rylands v Fletcher*, should be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so.⁸⁰

8. Statutory Nuisance in the Twenty-first Century?

One result following from judicial decisions to adopt a narrow concept of statutory nuisance has been to prevent it from expanding to meet the needs for public health protection in the twenty-first century. For various reasons, different Parliaments spanning three centuries have seen fit to use the statutory nuisance framework to deal with environmental health problems. When Parliament adopts a pragmatic approach, then it is beholden on the judiciary to follow suit in their interpretation of the application of these provisions and to adopt a flexible and purposive approach as was no doubt intended by Parliament. It is regrettable that the judiciary have eschewed this opportunity, since the statutory nuisance regime affords an effective means for local government to deal with problems as well as providing an accessible remedy for private individuals aggrieved by the nuisances of their neighbours.⁸¹ With

⁷⁶ K. Morrow, 'Nuisance and Environmental Protection' in J. Lowry and R. Edmunds (eds), *supra* n 68.

⁷⁷ Now to be found in European proposals for civil liability for environmental damage. See the European Commission's *White Paper on Environmental Liability*, Commission of the European Communities, 9 February 2000, COM (2000) 66, available from the Commission's website at http://www.eu.int/comm/off/white/index_en.htm.

⁷⁸ For an analysis of this decision, see R. Malcolm, 'Suing in Private Nuisance: The Rights of the Property Owner' in P. Jackson and D. Wilde (eds), *Contemporary Property Law* (Ashgate, 1999) 254–282.

⁷⁹ J. Murphy, 'Noxious Emissions and Common Law Liability: Tort in the Shadow of Regulation' in J. Lowry and R. Edmunds (eds), *supra* n 68.

⁸⁰ *Supra* n 73 at 265.

⁸¹ Section 82 Environmental Protection Act 1990 permits a 'person aggrieved' to apply to the magistrates' court for an abatement order in respect of a nuisance falling within the list in section 79.

regard to local authority enforcement, service of the abatement notice—despite problems in drafting these notices⁸²—provides a simple and well-understood procedure, which in most cases is effective and fair and perceived to be so. The local authority is a local and familiar administrative body to residents; accessibility and accountability at the local level are important mechanisms for promoting effective environmental rights.

Aspects of the triumvirate decisions seem flawed when a careful historical analysis of the statutory nuisance provisions is undertaken. Victorian legislators and judges readily accepted that a wide variety of activities could constitute actionable nuisances under the sanitary legislation. These actors were attuned to taking a broad approach to the scope of statutory nuisance. Freedom from nuisance and adverse health effects are not, and have never been, fixed entities. Health aspirations in modern industrialised societies go beyond preventing the spread of infectious and contagious diseases. The rights to clean air and water, for example, stand today alongside such expectations as protection from excessive noise⁸³ or unpleasant smells. The Clean Neighbourhoods and Environment Act 2005 includes provisions defining cigarette butts and chewing gum as litter—hardly health threats but clearly a matter of aesthetic concern. Today, freedom from disease together with promotion of the quality of life might be considered to fall within a human rights framework, which places quality of life issues centre stage and has raised expectations about environmental protection.⁸⁴ A modern, updating interpretation of statutory nuisance would go some way towards meeting these expectations. The concept of statutory nuisance needs updating to meet the needs of a modern public health paradigm. With the higher judiciary having spurned the opportunity to adapt it to the needs of the present, the time is ripe for Parliament to reform Part III EPA 1990, to produce a ‘fresh, comprehensive and rational system for protecting public welfare’.⁸⁵ It is a tragedy that Parliament has simply adopted the approach of its predecessors and added to the list of statutory nuisances in the Clean Neighbourhood and Environment Act 2005, without undertaking a root and branch reform. It is clear that the judiciary will not fill this gap.

⁸² See *supra* n 26, for references on drafting issues.

⁸³ F. McManus, ‘Noise Law in the United Kingdom: A Very British Solution’ 20 *Legal Studies* (2000) at 264.

⁸⁴ P. Birnie and A. Boyle, *International Law & the Environment* (OUP, 2002, 2nd edn) 252–266.

⁸⁵ Per Mummery LJ in *R v Bristol CC, ex p Everett* [1999] 2 All ER 193, 199.