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Public nuisance: beyond Highway 61 revisited?

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Abstract: Recent decisions - including environmental disasters, such as the Buncefield refinery explosion - have suggested that the orthodox position on public nuisance is no longer sustainable. In this paper it is argued that conceptualising public nuisance as a property tort operating on a larger scale than private nuisance is mistaken. Public nuisance ought not to be seen as based on interferences with proprietorial rights, but as a separate tort from private nuisance. It is also questioned whether public nuisance should be seen as based on a precise and rational principle, as the House of Lords found in the case of *Rimmington and Goldstein*, or whether it can only be truly justified on the ground of pragmatism. The flexibility of public nuisance - both as a tort and as a crime - has been apparent over several centuries. The vague and 'slippery' quality of public nuisance raises the possibility of unfairness if used in preference to more focused statutory offences. It is argued, nevertheless, that it remains a useful cause in a civil action involving threats to the life, health, comfort and safety of the public, as well as an offence for egregious environmental crimes.

INTRODUCTION

Since time immemorial the boundaries of nuisance have disturbed tidy-minded lawyers and jurists. Confusion often results from the assumption that a public nuisance is but a larger-scale form of private nuisance affecting a large (but unquantified) section of the public. On the other hand, public nuisance can be seen as an environmental tort (and offence), as the last ditch which protects the right not to be adversely affected by unlawful conduct endangering 'the life, health, property, or comfort of the public'.¹ This conceptualisation posits a quite separate tort from unlawful interference with a proprietorial right, germane to private nuisance, and firmly entrenched in English law since the House of Lords' decision in *Hunter v Canary Wharf*.²

The tension between 'property-based' and 'rights-based' formulations of public nuisance has been brought into focus by a number of important cases, culminating in the Court of Appeal decision in respect of the failure of Corby District Council to remediate properly the site of the old Corby steelworks.³ This decision strengthens the position of public nuisance as a separate, rights-based tort, distinct from private nuisance: one that does not depend on the victim having a proprietorial interest in land. Dyson LJ quoted with approval the position in the United States, where: 'Unlike a private nuisance, a public ***Env. L. Rev. 26** nuisance does not necessarily involve interference with use and enjoyment of land'.⁴ But his Lordship went further, adding:

it does not follow that the right which is interfered with in a public nuisance case is properly to be regarded as a right to enjoy property. The essence of the right that is protected by the tort of private nuisance is the right to enjoy one's property ... The essence of the right that is protected by the crime and tort of public nuisance is the right not to be adversely affected by an unlawful act or omission whose effect is to endanger the life, safety, health etc of the public.⁵

This bifurcated approach - property-based versus rights-based - conceptualising nuisance marks a significant shift from the orthodox position. For a very long time the seminal work on the boundaries of nuisance has been Professor Newark's piece published over 60 years ago in the *Law Quarterly Review*.⁶ This article is very appealing to traditional property lawyers, who prefer their hedges neat and their boundaries tightly drawn. Professor Newark's position is simple: the proper place for

nuisance is that it is a tort tied to land, or, more specifically, one directed against the plaintiff's enjoyment of rights over land, including interference with an easement or profit.⁷ He took the view that any deviation from this position creates uncertainty and conceptual turmoil amounting to heresy.

The situation of the tort (and crime) of public nuisance has become complicated; the intention of this article is to see whether any principles can be distilled to provide clarity and consistency. The following problems will be examined:

1. The lack of precision in the meaning of public nuisance; this follows from the 'slippery' nature of concepts based on an ancient, common law formulation.
2. The implications for public nuisance as a tort and crime where there are overlaps with statutory provisions.
3. What implications now arise for environmental, as distinct from behavioural, forms of public nuisance resulting from the House of Lords' decision in *Rimmington and Goldstein*.⁸
4. The extent to which public nuisance is a separate tort from private nuisance.
5. The implications for public policy of any lack of precision in public nuisance.

LACK OF PRECISION

The law of nuisance is imprecise because it is ancient and complex and part of the common law. It is also unusual in that the offence of public nuisance is established whenever the tort of public nuisance exists.⁹ One of the earliest recorded cases was heard in London, in February 1301. The court found that the nuisance caused by the cesspit of William de Gartone to his neighbour meant that his privy had to be relocated to a position away from the party wall, and that it was no defence for de Gartone to say that the plaintiff had to suffer the nuisance because of long usage by the defendant and his predecessors in title.¹⁰ The longevity of public nuisance has not meant that its place in common law jurisdictions has remained secure. Indeed, one leading commentator, in examining the development **Env. L. Rev. 27* of the law of nuisance in England from the twelfth century, has questioned whether, in the present day, public nuisance should exist at all, given its incredible breadth and lack of precision, thus making it at odds with the requirements of a modern legal system. Professor Spencer goes on to add that public nuisance could be seen as an 'archaic monster which should be painlessly destroyed' by Act of Parliament.¹¹ Neither have jurists in the USA always been more sanguine, Dean Prosser having once described public nuisance as 'a sort of legal garbage can'.¹²

But can such an ancient and venerable part of our English common law heritage really have turned into such a monster? Or is public nuisance more like a thoroughfare that once seemed broad and busy, but now, like Highway 61, is little used?¹³ To be sure, the definition of public nuisance given in *Archbold* is very wide-ranging:

A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.¹⁴

The source of this definition is impeccable, being based on Sir James Stephen's *Digest of Criminal Law*, published in 1900. This is also the source for the public nuisance provisions of most other common law jurisdictions, including jurisdictions where there has been some codification.¹⁵ So the question arises as to whether such a widely drawn provision is redundant and should be abolished, or whether there remains in the common law a residual purpose that is not fully engaged by statutes intended to regulate the same mischief. There are also related questions about whether new legislation is needed to reduce the scope of the common law offence and whether it is desirable to replace the crime of public nuisance entirely with statutory offences. The Law Commission is proposing to explore alternative definitions to that provided in *Archbold*. It is also proposing to replace the negligence requirement for the common law offence with one requiring the prosecutor to prove that the accused had acted intentionally or recklessly.¹⁶ The likelihood is, therefore, that the common law offence will remain for some time to come rather than be replaced by an array of new statutory offences.

Although complex this is not an arcane, academic issue. Public nuisance has become more prominent in certain respects since Professor Spencer's article was published in 1989. After the

Licensing Act 2003 came into force, public nuisance has played a leading role in determining the form that licensing conditions should take in controlling the operations of public houses and premises running entertainment events.¹⁷ Secondly, public nuisance has become important in the litigation of environmental nuisances, notably those caused by the Buncefield gas explosion¹⁸ and from the failure of the local council to properly remediate the contaminated site of the old Corby steelworks.¹⁹ Before these *Env. L. Rev. 28 developments are considered in more detail, some conceptual problems raised by public nuisance need to be discussed.

The above definition of public nuisance given in *Archbold* is described by Lord Bingham in *Rimmington* as 'clear, precise, adequately defined and based on a discernible rational principle', a definition which applies as much to the tort of public nuisance as to the crime.²⁰ With respect, this statement goes too far, though it is recognised that *Rimmington* has helped to place public nuisance on a firmer footing by clearing up uncertainties concerning the 'common element' requirement. It has also clarified the principles that should be applied when the common law offence overlaps with a related statutory provision. The view taken in this article is that environmental forms of public nuisance have been conceptually patched up post-*Rimmington*, with the *Archbold* definition amounting to a useful and pragmatic conceptual fudge rather than serving as an instrument of clarity. It is as if Humpty Dumpty has been cleverly, but only partially, put back together again. It is, of course, appreciated that Lord Bingham's speech in *Rimmington* is based on a comprehensive analysis of the law of public nuisance and that his words on the rationality of the principle possess great authority. Perhaps his Lordship, in adding the qualifier of 'discernible' to his speech,²¹ meant that the rationality of the principle is only just about perceptible - more a glimmer than a shaft of light.

The width of the *ratio of Rimmington* is not clear and this is not surprising given the age and 'slippery' quality of the concept of nuisance. The exploration by the Law Commission of alternatives to the *Archbold* definition is an indication that it lacks clarity and precision.²² The factual background to that case concerned behavioural forms of public nuisance, which are at the greatest risk of being superseded by statutory provisions. But environmental forms of public nuisance have enjoyed a revival post-*Rimmington*.²³ The rationality identified by Lord Bingham was subsequently taken up in judgments in the *Buncefield*²⁴ and the *Corby*²⁵ cases. But the really interesting question is how Lord Bingham - who, for many lawyers, is seen as the outstanding judicial figure of his generation - came to such a different conclusion about the rationality of public nuisance than Professor Spencer? Spencer, after all, is regarded by many as the leading academic criminal lawyer of today. This is also a question taken up by the Law Commissioners, who resolutely see a future for public nuisance while taking Professor Spencer's criticisms very seriously indeed.²⁶

JUDGES WHO STRAY BEYOND THE PROPER BOUNDARIES BROUGHT TO ORDER

The tortious aspects of public nuisance present a fresh set of problems. The monistic paradigm so eloquently propounded by Professor Newark becomes adulterated once the idea is admitted that personal injuries can be compensated for in an action for public nuisance. The monistic view sees nothing fundamentally different between public and private nuisance: they should be perceived as the same tort, with public nuisance being seen as merely a larger form of private nuisance. The basic proposition placed by the *Env. L. Rev. 29 defendant local authority before the Court of Appeal, as a preliminary issue to the main trial in the *Corby* litigation, was that compensation for personal injuries should not be available to the victims of a public nuisance because such damages would not be awarded in a private nuisance case.²⁷ The Court of Appeal was asked to decide whether the import of the House of Lords' decisions in *Canary Wharf*²⁸ and *Transco*²⁹ was such that earlier cases awarding compensation for personal injuries in public nuisance had been wrongly decided.

The Court of Appeal rejected a monistic view of public nuisance. Subsequently, in the final action heard in the High Court, Corby District Council was found liable in negligence, for breach of statutory duty, and also for public nuisance.³⁰ The local authority was held responsible for birth defects caused from the exposure of 18 mothers to toxic chemicals released because of the inadequate remediation of the old Corby steelworks. The local authority was at fault because it had supervised the contractors who had carried out the remediation using inadequate and unsuitable methods. The council's supervision had been lackadaisical and negligent; had it been otherwise, the health of the public would not have been placed in jeopardy. The overarching authority cited by the local authority at the Court of Appeal hearing in *Corby* was none other than Professor Newark, or rather his venerable text.³¹ The Court of Appeal rejected the argument for public nuisance being merely a large-scale form of private nuisance and did not find Professor Newark's approach persuasive. So what persuaded the Court of Appeal in *Corby* to reject the orthodox position propounded by Professor Newark, which ten

years earlier had found so much favour with the majority in *Canary Wharf*?³²

To answer this question we need to consider Newark's argument a little further. Professor Newark placed the blame for setting 'the law of nuisance on the wrong track' firmly and squarely on Mr Justice Fitzherbert, for it was he who 'sent subsequent generations wrong in their law' in deciding that an action could be maintained for damages for personal injuries caused by an obstruction to the highway.³³ Thus, it was Fitzherbert who, in 1535 during the reign of Henry VIII, uttered the words unlinking nuisance as an exclusive tort to land and allowing the possibility of claiming an award for what would eventually be termed 'special damages' for the consequences of a harmful obstruction to the highway.³⁴ No doubt Fitzherbert was doing what all good common law judges do when trying to find a justification for providing a remedy to a meritorious claim: he strained the law. His Lordship opined as follows:

As if a man make a trench across the highway, and I come riding that way by night, and I and my horse together fall in the trench so that I have great damage and inconvenience in that, I shall have an action against him who made the trench across the road because I am more damaged than any other man.³⁵

For Lord Cooke, giving his minority judgment in *Canary Wharf*, 'if this was indeed an indiscretion on Fitzherbert's part, to rue it now might seem a little late'.³⁶ Quite so. But for *Env. L. Rev. 30 the majority, Professor Newark provided the justification for chaining the law of nuisance to its traditional mooring, as a property-based tort and one that restricted the award of damages to breaches of proprietorial rights, thereby excluding damages for personal injury.³⁷

THE FIT BETWEEN COMMON LAW AND STATUTE

Some of the problems caused by lack of codification of the common law have attracted the attention of the legislature and some types of public nuisance have been abolished in the last few decades. The essential reason for this is because of obsolescence rather than infringement of any legal principle. Thus section 13 of the Criminal Law Act 1967 abolished some common law offences that had become tinged with antiquity - namely eavesdropping or being a common barrator, a common scold, or a common night walker. More generally, behavioural forms of public nuisance where there is a corresponding statutory offence may no longer be viable as part of the common law and 'morals' are no longer included in the *Archbold* definition. The exclusion of morals followed the decision of the House of Lords in allowing the conjoint appeals of *Rimmington* and *Goldstein*.³⁸ Outrageous morals no longer attract the obloquy that they once did. Therefore excluding them from the scope of a serious offence like public nuisance is a recognition of changes in social norms. Codification of the common law is also an issue with other jurisdictions. Statutes have been enacted in Canada, New Zealand, Australia and in several states across the USA to narrow the scope of public nuisance by enacting fairer, more relevant and precisely drafted legislation.³⁹ However, aspects of the common law formulation remain and have been used, for example, to control the activities of street gangs in California.⁴⁰

The House of Lords in *Rimmington* and *Goldstein* was concerned about the appropriateness of grounding a charge in public nuisance where a statute covers a similar mischief. Both cases arose from unusual facts. *Rimmington* concerned a person who was engaged in a campaign of sending racially abusive hate mail to a large number of individuals. It was held that since each letter comprised an individual act, these actions did not fall within the scope of public nuisance, which only addresses acts or omissions that injure the public collectively. Lord Rodger found that 'a core element of the issue of public nuisance is that the defendant's act should affect the community, a section of the public, rather than simply individuals'.⁴¹ *Goldstein* concerned a Jewish tradesman who placed a small amount of salt, as a private joke in recognition of the age of his debt, along with his cheque into his letter posted to his supplier. Unbeknown to him, this triggered an anthrax scare, which seriously disrupted the postal sorting office after the salt had leaked from its envelope. It was held that the actions of the defendant did not satisfy the negligence- *Env. L. Rev. 31 based fault element of the offence,⁴² which required that he should (on the basis of information available to him at the time) have foreseen the consequences of his actions.⁴³

Many of the wrongs and behaviours that have historically been punishable by a prosecution for public nuisance, or resulted in an injunction against the tortfeasor, are the subject of specific statutory measures.⁴⁴ These include public order and criminal matters, and statutes to control the activities of prostitutes, terrorists, drug-dealers and other undesirables. There is a powerful argument that it would be improper to charge for a common law offence where there is a relevant and more precisely defined

offence available on the statute book. In *Chief Constable of Leicestershire v M*, Hoffmann J (as he then was) refused an application for an injunction in relation to a mortgage fraud on the ground that: 'The recent and detailed interventions of Parliament in this field suggest that the court should not indulge in parallel creativity by the extension of general common law principles'.⁴⁵ To prefer the common law charge where there is a kindred statutory charge available could also amount to a breach of human rights protected by the European Convention.⁴⁶

Despite public nuisance enduring a battering from academic commentators,⁴⁷ prosecutors have continued to find it a useful charge for offences where the maximum sentence for a kindred statutory offence is seen as too low or where the offending behaviour does not quite match with the statutory offence.⁴⁸ This is despite the human rights concerns of the Law Commission which, as early as 1976, argued the need for greater certainty of definition in criminal offences and found that it was for Parliament to create new offences and not the job of the courts to extend the scope of the common law offence in order to punish emerging forms of misbehaviour.⁴⁹

A prosecution grounded in public nuisance may be appropriate for very serious environmental crimes, as an alternative to a charge based on a statutory offence. In the major oil pollution incident caused by the grounding of the *Sea Empress*, the Milford Haven Port Authority pleaded guilty in the Crown Court to a strict liability offence under section 85(1) of the Water Resources Act 1991. It received a fine of £4 million, reduced on appeal to the Court of Appeal to £750,000. The conviction was the result of a plea bargain in which the Environment Agency dropped the public nuisance charge on the indictment in exchange for a guilty plea for the lesser charge. The late Michael Hill QC, who prosecuted the Port Authority on behalf of the Environment Agency, conceded several years later (during a conference held by the United Kingdom Environmental Law Association) that *Env. L. Rev. 32 dropping the more serious charge may have been a mistake, because the full measure of culpability could not be matched by the statutory offence.⁵⁰

Preferment of the common law charge was the approach taken by prosecutors in the case of *Bourgass*. This was one of the most serious public nuisances in modern times and the sentence handed down of 17 years' imprisonment was later upheld by the Court of Appeal.⁵¹ The convict had been the prime mover in a conspiracy to commit acts of terrorism - but charged as a conspiracy to cause a public nuisance - involving the use of poisons and explosives intended to destabilise the community by causing disruption, fear and injury. (The charge of public nuisance had been brought before *Rimmington* was decided by the House of Lords.) However, the Court of Appeal did not accept that a charge based on section 113 of the Anti-Terrorism Crime and Security Act 2001, involving the use of a noxious substance or thing to cause harm or to intimidate, would have been sufficient to cover the full extent of culpability and so upheld the sentence of the Crown Court.⁵² *Bourgass* is consistent with the view that the common law offence is still needed because it can cover aspects of culpability lacking in the scope of the statute. However, recourse to the common law charge arguably deprives the suspected person of clarity regarding the definition of the offence and of certainty about where the boundary of illegality lies.

The potential for a breach of Article 7 of the European Convention remains in a public nuisance prosecution, or in an application for a civil injunction, where a kindred statutory provision is available.⁵³ This argument was considered by the House of Lords in *Rimmington*, but the common law offence was held still to exist.⁵⁴

DO RIMMINGTON AND GOLDSTEIN APPLY TO ENVIRONMENTAL FORMS OF PUBLIC NUISANCE?

One of the concerns of this paper is to explore the extent to which the reasoning employed in *Rimmington* and *Goldstein*⁵⁵ applies to environmental forms of public nuisance. Such nuisances are largely regulated in the UK by the statutory nuisance provisions in Part III of the Environmental Protection Act 1990. This is essentially a consolidating statute that brought the noise nuisance provisions of the Control of Pollution Act 1974 into the framework for statutory nuisances established in public health legislation enacted from the 1840s to the 1930s. Some statutory nuisance provisions in the 1990 Act originated in the Nuisances Removal and Diseases Prevention Acts of 1848, 1849 and 1855, and those provisions are creaking with age,⁵⁶ albeit that more recent ones, such as those involving artificial light and insects, were added in 2005.⁵⁷

*Env. L. Rev. 33 Public nuisance, along with private nuisance, forms one of the two limbs of statutory nuisance set down in section 79(1) of the Environmental Protection Act 1990: the common law nuisance limb.⁵⁸ The second limb covers prejudice to health, so this could include a public nuisance⁵⁹

where the health of the public is endangered.⁶⁰ Not all forms of common law nuisance will be statutory nuisances. Private nuisance is concerned with interference with proprietorial rights in land.⁶¹ To be a statutory nuisance the nuisance must interfere in a material or substantial way with personal comfort and come within the scope of section 79(1) of the Environmental Protection Act 1990.⁶² In the context of a statutory nuisance, the personal comfort of any person who is sufficiently affected triggers action from the local authority and not just those having property rights in the affected land.⁶³ Where there is thought to be a public nuisance, the local authority can face a choice of whether to bring a charge at common law or use the statutory nuisance procedure. The latter requires service of an abatement notice on the person responsible for a public nuisance that comes within the scope of section 79(1) of the 1990 Act.

It would be extremely rare for a local authority to prosecute a public nuisance under the common law provision in preference to employing the statutory nuisance procedure. On the rare occasions when a local authority seeks an injunction to control or prevent a nuisance, it will generally utilise its right to apply to the High Court under section 81(5) of the Environmental Protection Act 1990 rather than approach the county court (or High Court) for a public nuisance injunction. The statutory route to regulating a public nuisance is preferred because it is simpler, well established and quite effective from a regulator's point of view.⁶⁴ A possible reason for choosing to prosecute under the common law for public nuisance would be because of the greater sentencing powers of the court: a maximum sentence of life imprisonment being available in the Crown Court. This contrasts with the statutory offence, which is summary only and does not attract a prison sentence. But this tends not to be a consideration for local authority prosecutors and there is no reported case of a local authority choosing to prosecute under the common law because of the greater sentencing powers available to the convicting court.

In *Wandsworth LBC v Railtrack plc*⁶⁵ the local authority sought an injunction, damages, and a declaration that the company should be held responsible for the costs of cleaning the pavement sullied by the faecal deposits of pigeons roosting in the girders underneath the bridge of a south London railway station. The council succeeded, and the Court of Appeal agreed with the decision of the High Court to make a declaration that the company was liable in public nuisance and affirmed its award of damages. There is little analysis in the reports of whether existing statutory provisions might have curtailed an action in public nuisance. In the High Court proceedings, Gibbs J decided that there was no statutory power available to, or duty placed upon, the local authority that would have been equivalent to a civil action in public nuisance. The relevant statutes are the Environmental Protection Act 1990 and the Public Health Act 1961.⁶⁶ Section 74 of the Public Health Act 1961 is a widely drawn power enabling 'a local authority ... to take any steps for the purpose of abating or mitigating any nuisance, annoyance or damage caused by the congregation in any built-up area of house doves or pigeons or of starlings or sparrows'. His Lordship saw 'nothing inconsistent between this and similar legislation on the one hand, and a claim such as the present one on the other', so consistency with the statutes provided a justification for, and not a limitation of, the use of the common law provision.⁶⁷ Of course, the remedies are different from the common law action; the purpose of the Public Health Act provision is to enable the local authority to take steps itself to resolve the problem and not to oblige another person to do so. The Court of Appeal found that the existence of a power under section 74 of the 1961 Act to enable the local authority to abate the nuisance did not imply a duty to do so, nor 'did it absolve the defendants from their clear legal duty to address the matter'.⁶⁸

It should be mentioned that regulation of the public nuisance in *Wandsworth LBC v Railtrack plc*⁶⁹ by using the procedure under the Environmental Protection Act 1990 would anyway have been problematic. Section 79(1)(f) of the Act provides that a statutory nuisance is constituted from the place or manner in which 'any animal [is] ... kept'. The pigeons were feral not domesticated, and therefore were not kept. Secondly, 'any accumulation or deposit' can amount to a statutory nuisance under section 79(1)(e) and this provision could be interpreted as widely drawn. There is no binding authority on the type of faeces that could amount to a statutory nuisance resulting from an accumulation or deposit. However, for the purposes of the Environmental Protection Act 1990, it is likely that the court would find the scope of the subsection to be limited to kept animals and to human beings, so the excrement of pigeons would probably not be covered. Arguably, a narrow scope would have been the intention of Parliament when the words employed in the current statute were first enacted in section 8 of the Nuisances Removal and Diseases Prevention Acts 1855.⁷⁰

The House of Lords decision in *Rimmington*⁷¹ has clarified the position with behavioural forms of public nuisance where there is a tension between the common law and more specific, more human rights-compliant statutory provisions. But the same cannot be said with environmental forms. The

statutory nuisance regime originating in the 1840s is based on codification of some forms of common law nuisance. Use of the common law action and prosecution in public nuisance is reserved, in practice, to situations where the particular type of nuisance is either different from, or not adequately covered by, the categories set down in section 79(1) of the Environmental Protection Act 1990. Additionally, the common law action and prosecution are available where the nuisance is particularly serious, such as in the *Buncefield*⁷² and *Corby*⁷³ cases. With environmental nuisances, the *Env. L. Rev. 35 rights of the public need to have been breached sufficiently 'to endanger the life, health, property, or comfort of the public'⁷⁴ for recourse to the common law to be justified.

THE BOUNDARY BETWEEN PUBLIC AND PRIVATE NUISANCE

Over the centuries, the principal focus of nuisance cases has been on incompatible uses of land between neighbours. These cases have primarily been to do with private nuisance: with interference in the use and enjoyment of land. Some have been concerned with physical damage to the land; relatively few cases have dealt with public nuisance.⁷⁵ The House of Lords in *Canary Wharf* had little to say about public nuisance, either in relation to interference with television signals or to dust nuisance. In respect of the interference of television signals, Lord Cooke found 'no material difference ... between public and private nuisance'.⁷⁶ This may seem surprising given the proportion of Her Majesty's subjects who had been materially affected by interference in their reception of television signals and by the dust nuisance resulting from the construction of the Canary Wharf tower. But the position of the majority of the House of Lords in *Canary Wharf* represents the high point of monistic orthodoxy, in which public nuisance was eschewed as an independent tort and private nuisance firmly and squarely put in its place as a property-based tort.⁷⁷

Environmental forms of public nuisance include those caused by smells, noise, waste deposits and water pollution, but there is no exhaustive list. Examples include quarry blasting,⁷⁸ emission of noxious smells from a chicken-processing factory,⁷⁹ storage of large amounts of inflammable material,⁸⁰ allowing refuse and filth to be deposited on vacant land in a densely populated part of London,⁸¹ holding an all-night 'rave' in a field,⁸² and holding noisy events, such as motocross.⁸³ Indeed, there appears to be few limits to its scope.

The dividing line between public and private nuisance is sometimes ambiguous or unclear in environmental cases. The Buncefield oil storage explosion was avowedly the largest explosion in Great Britain since World War II. Perhaps because of its extent the High Court found no difficulty in deciding where such a line should be drawn.

It is accordingly difficult to discern any difficulty in categorizing the incident at Buncefield as a public nuisance ... A very large number of people were affected. Those who had an interest in land suffered private nuisance. The explosion endangered the health and comfort of the public *Env. L. Rev. 36 at large. Subject to establishing a loss which was particular, substantial and direct ... there is a claim in public nuisance.⁸⁴

The sheer scale of the Buncefield explosion made it exceptional and guaranteed that a large section of the public would be seriously affected. But categorising nuisance has long caused difficulties and continues to do so.⁸⁵ The background to *Brand v Hammersmith & City Railway Co*, at the start of a boom in Victorian railway development, was that the operations of the Great Western Railway Company caused excessive amounts of smoke, noise and vibrations soon after the line had been completed and its trains started to work the line. No doubt a fair number of residents found these effects inconvenient, injurious and more than sufficient to interfere with their enjoyment of their property. Mr and Mrs Brand claimed compensation on the basis that the operation of the trains diminished the value of their house, located 12 feet from the tracks, to a greater extent than had been allowed for under the land compensation scheme. The Exchequer Chamber found for the railway company in a successful appeal against the first instance decision of the Court of Queen's Bench. Despite the thundering of the trains, balancing the claims of the developers against residents proved extremely difficult. Hearing his last case as Chief Justice of the Queen's Bench, Erle CJ found that 'the word nuisance introduces an equivocation which is fatal to any hope of a clear settlement', adding the words that guaranteed him perpetual fame: 'this cause of action is immersed in undefined uncertainty'.⁸⁶

Mr and Mrs Brand's nuisance was egregious. It was pleaded both in private nuisance as well as for injurious affection: a legally troublesome cause based on the Lands Clauses Consolidation Act 1845 and the Railway Clauses Consolidation Act 1845.⁸⁷ They did eventually receive compensation under these Acts for the financial loss to the value of their property caused by the vibrations (but not the

smoke and noise) resulting from the ordinary operation of steam trains, when a seven-man tribunal of the House of Lords (in a split decision) reversed the decision of the Exchequer Chamber.⁸⁸

The boundary between public and private nuisance seemed clearer nearly 90 years after *Brand* had finally been decided. In the civil action of *Attorney-General v PYA Quarries Ltd*, Denning LJ (as he then was) decided that the basic requirement for a public nuisance is for it to be so:

widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.⁸⁹

So, if a class of people or a neighbourhood suffers sufficiently from an unreasonable interference in their use of land or from physical damage to their property, a public *Env. L. Rev. 37 nuisance action could be brought by the local authority. Since 1972, a local authority may bring such an action in its own name where it considers this 'expedient for the promotion or protection of the interests of the inhabitants of their area'.⁹⁰ Furthermore, an individual can seek an injunction against those responsible⁹¹ in a 'relator action' brought in the name of the Attorney-General. If he can prove that he suffered special damage over and above that of the community at large, he may sue in his own name and claim damages for his injury, loss or damage.⁹² Where a claimant has succeeded in claiming special damage in public nuisance, he may also obtain an injunction without invoking the assistance of the Attorney-General.⁹³ Establishing what comprises special damage is problematic: the requirement that 'the damage must be particular, direct, and substantial' sets a high threshold.⁹⁴ In the Delphic words of Mr Justice More-Bick, in *Jan De Nul (UK) Ltd v Royale Belge SA*: 'In the end the question whether the plaintiff's injury is sufficiently "special" and "direct" must depend very much on the facts of the case.'⁹⁵

The scale of a nuisance is not the only factor in considering whether it is a private nuisance or a public nuisance, or both. A common element is necessary for a public nuisance to be proven. Arguably, a common element may be present where there is a sufficiently large number of individual private nuisances and where the offence affects individual victims simultaneously. In *PYA Quarries* Romer LJ, in delivering the leading judgment, opined:

Some public nuisances (for example, the pollution of rivers) can often be established without the necessity of calling a number of individual complainants as witnesses. In general, however, a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, *a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances* [my emphasis].⁹⁶

The courts have given no precise guidance as to what might constitute a sufficient number of individuals affected for a public nuisance to be established. The Court of Appeal in *PYA Quarries*, somewhat quaintly, referred to 'a class of Her Majesty's subjects', but did not place a number on the persons needing to be affected by the quarrying activity to bring it within the scope of a public nuisance.⁹⁷ Romer LJ did say that it was not necessary to prove that every person in the locality of the nuisance needed to be affected - adding that, for a public nuisance injunction to be granted, a 'representative cross-section of the class' would need to be affected.⁹⁸ The use of the word 'representative' in this context is curious since it implies a sample; perhaps his Lordship meant it to mean a significant proportion of the total number that could be expected to have been affected by the nuisance. In a more recent case it was held that a nuisance affecting the public at large might only affect a small number of individuals, but this should not prevent it from amounting to a public nuisance where breach of a public right was involved.⁹⁹

A series of separate instances affecting a large group of individuals would not possess the necessary common element for a public nuisance to be established. In the words of *Env. L. Rev. 38 Lord Rodger in *Rimmington*, the 'core element' is an offence against 'the community, a section of the public, rather than simply individuals'.¹⁰⁰ The separate physical nature of each morsel of hate enveloped by the letters posted by the defendant in *Rimmington* can be contrasted with the pervasiveness of offensive spillages, odours, noise or dust which is to be found with environmental forms of public nuisance. With the latter it is often difficult, and sometimes impossible, to distinguish between something affecting the public at large (or a significant group or class of the public) as distinct from something that affects a large group of individuals in varying degrees. Typically, an environmental nuisance will be both a public and a private nuisance, and often a statutory nuisance as well.

It is submitted that the import of the House of Lords' decision in the conjoint cases of *Rimmington* and

Goldstein ¹⁰¹ is that the words of Romer LJ in the above passage should no longer be regarded as good law. Proving a public nuisance through recourse to 'a sufficiently large collection of private nuisances' ¹⁰² lacks the common element required in *Rimmington*. It is not enough to point to a collection of private nuisances and to conclude that the point has been reached when they amount to a public nuisance. ¹⁰³ What is essential is to identify the breach of rights affecting the public at large - or at least a sufficient section of the public. It is the breach of those rights that constitutes the public nuisance where there is also a common element amounting to an injury to the community.

The Court of Appeal in *Corby* ¹⁰⁴ rejected the monistic formulation of public nuisance as a larger-scale form of private nuisance based on breach of a proprietorial right. A subsequent case in which the relationship between public and private nuisance is analysed in some detail is the High Court decision in *Colour Quest*. ¹⁰⁵ Although this case concerned some preliminary issues raised in the *Buncefield* litigation, public nuisance is given a very full analysis. Some of these points went to appeal, but not the decision on public nuisance. ¹⁰⁶ In the High Court below, David Steel J came to the following conclusions:

No suggestion emerges from the authorities that, where a sufficient body of the public has been subjected to the nuisance, the only claim lies in public nuisance and any claim in private nuisance is barred or vice versa:

- a) Private nuisance involves interference with someone's private right to enjoy his own land. Public nuisance involves the endangering of the health, comfort or property of the public.
- b) It follows that a collection of private nuisances can constitute a public nuisance: but it does not follow either that in consequence the claim in private nuisance is subsumed or that a public nuisance involving interference with health or comfort cannot be freestanding. ¹⁰⁷

***Env. L. Rev. 39** This decision moves on the argument that public and private nuisances should be seen as separate torts protecting different categories of rights. Included in this argument is the proviso that a public nuisance may result from a collection of private nuisances, but for this to be correct it would be necessary to satisfy the 'common element' requirement. From the above passage it is clear that David Steele J had in mind that public and private nuisances can be seen as freestanding torts, though circumstances may be such that there can be an overlap between them. Just before the above-quoted passage, his Lordship had found that:

A private owner's right to the enjoyment of his own land is not a right enjoyed by him in common with other members of the public, nonetheless any illegitimate interference, being the very same interference contemporaneously suffered by other members of the public, constitutes a common injury satisfying the public nature of a public nuisance. ¹⁰⁸

In the wake of these important decisions in *Corby* and *Colour Quest*, it would appear that a collection of private nuisances can amount to a public nuisance where all of the following conditions are met:

- there is a serious breach of rights endangering the life, health, safety, comfort or property of the public;
- a sufficient group or class of the public is sufficiently affected by the nuisance; and
- there is a sufficient common element to make the link between the individual private nuisances.

Whilst this may be a correct formulation of the common law, some will find this position unsatisfactory and over-complicated. At the very least, the principles enshrined in these conditions are complex and are not clear-cut.

NOISE AND CROWDS AND THE LICENSING ACT 2003

Public nuisances can result from the misbehaviour of crowds. Even before the Industrial Revolution, the owner of premises attracting a motley crowd drawn from the 'ragged, criminal and dangerous classes' could be liable in nuisance. ¹⁰⁹ In *Betterton*, Holt CJ found that 'playhouses are not in their own nature nuisances; but only as they draw together great numbers of people and coaches, and sharpers ¹¹⁰ thither, which prove generally inconvenient to the places adjacent'. ¹¹¹ In *R v Moore*, ¹¹² the defendant used his premises for the lawful activity of pigeon-shooting. Shooting - especially of birds of clay - remains a favoured, if pointless (to some), activity of city-slickers carried out nowadays on the land of otherwise impoverished farmers. ¹¹³ In Moore's case great crowds were attracted, finding no favour with Lord Tenterden who opined:

***Env. L. Rev. 40** The defendant asks us to allow him to make a profit to the annoyance of all his neighbours; if not, it is said we shall strain the law against him. If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. And this is an old principle.¹¹⁴

Such cases illustrate the existence of an established line of authority in which public nuisance succeeded as a cause of action to control noise and the associated problems of crowds where the problem existed outside the defendant's premises. It was not a requirement that the offending activity be confined to what took place within the premises as the problem was compounded on the surrounding land. This line of authority fell into abeyance by the end of the nineteenth century, but it is relevant to the noise implications of crowds in and around public houses as this comes within the scope of the Licensing Act 2003.

Public noise nuisances of this type have elements of both behavioural and environmental forms of nuisance. The Licensing Act 2003 requires licensing authorities to form a judgment as what constitutes public nuisance and then to decide what is necessary to avoid it by attaching conditions to premises licences and club premises certificates.¹¹⁵ Avoidance of public nuisances - such as from noise, light pollution, noxious smells and litter - is therefore one of the licensing objectives. Licensing and responsible authorities are required to assess the impact of the licensable activity on persons living and working in the vicinity and to follow government guidance in their decision making.¹¹⁶

The Department for Culture, Media and Sport (DCMS) has tried to smooth the implementation of the Licensing Act 2003. This has proved to be a most challenging task, so much so that in July 2010 responsibility for most forms of licensing was transferred to the Home Office.¹¹⁷ Buried within the copious DCMS guidance for local authorities is the following advice:

It is important to remember that the prevention of public nuisance *could include low-level nuisance perhaps affecting a few people living locally* as well as major disturbance affecting the whole community [my emphasis].¹¹⁸

The authors of the guidance fail to show how their advice might be reconciled with *A-G v PYA Quarries*,¹¹⁹ and it would appear to be advice given without consideration of any kind of authority. The guidance implies that noise amounting to no more than a private nuisance suffered by a few residents would be enough to trigger a licensing review or result in the closure of premises, or even that a low-level interference not amounting to a nuisance in law could do so. This guidance reflects policy objectives that are seemingly drawn from a retrospective attempt by the executive to try and make the Licensing Act 2003 more effective than Parliament had originally intended. It is, of course, for the courts to interpret legislation and not the executive. Such guidance may be taken by the courts as persuasive authority on the meaning of a statutory provision, but it is not ***Env. L. Rev. 41** binding.¹²⁰ The error committed by the executive is in holding that a nuisance that affects the public equates with a public nuisance in law.

CONCLUDING COMMENTS

Perhaps all formulations of public nuisance are doomed to be vague and tarnished through being 'immersed in undefined uncertainty',¹²¹ and Professor Newark's disciplined approach may be a necessary corrective to such failure.¹²² Uncertainty, perhaps even 'slipperiness', may be unavoidable for such a complex concept as public nuisance, particularly given its ancient lineage, its multifarious forms, its identity both as a tort and crime, and its complex relations with statutory provisions. On the other hand, perhaps other considerations are more relevant and the flexibility of the common law for finding a remedy in a just cause is more important. Lord Cooke, in the course of his speech in *Hunter v Canary Wharf*, commented on the central principle of 'give and take' in a proprietorial formulation of nuisance as follows:

The principle may not always conduce to tidiness, but tidiness has not had a high priority in the history of the common law. What has made the law of nuisance a potent instrument of justice throughout the common law world has been largely its flexibility and versatility.¹²³

For serious environmental public nuisances the common law provides for effective remedies: injunctions, declarations, and damages for personal injuries (albeit limited to those who have suffered 'special damage'). There is also the possibility of prosecution for particularly serious public nuisances. Individual directors and employees of companies (where their negligence is proven) can be subjected to custodial sentences up to a maximum of life imprisonment. This contrasts with the low-level

penalties generally available to sentencers for environmental crimes.¹²⁴

Neither is the tension between a property-based and a rights-based conceptualisation of public nuisance tidy. Perhaps this tension cannot be entirely resolved without recourse to a 'shapely code'.¹²⁵ The Law Commission may eventually produce such a code. But there are no indications in the consultation document to suggest that major legislative reform is likely, and the focus of the Commissioners is on the crime of public nuisance and not the tort.¹²⁶ At the present time, common law public nuisance plays a minor role in behavioural forms of nuisance, except with respect to licensing conditions under the Licensing Act 2003.¹²⁷ By contrast, in the USA, public nuisance has had a new lease of life as a control measure. The civil courts, starting in California in the early 1980s but spreading to other states, have used public nuisance injunctions to control the activities, movements and behaviour of street gangs, including unnamed individuals supposedly associated with gangs.¹²⁸

It would be unusual for environmental forms of public nuisance to be so serious and so out of the ordinary that the statutory scheme provided under Part III of the Environmental Protection Act 1990 proves to be inadequate. Nevertheless, the common law action provides a useful, last ditch defence to egregious nuisances - that is, those events 'whose effect is to endanger the life, safety, health etc of the public'.¹²⁹ But the justification is not for the reasons given by Lord Bingham, who maintained in *Rimmington* that the law of public nuisance is 'clear, precise, adequately defined and based on a discernible rational principle'.¹³⁰ It is rather that exceptional situations demand effective and proportional remedies, and the common law is flexible enough to provide them. The justification for retaining public nuisance as part of the common law is pragmatic not principled; retention enables justice to be done when the circumstances are unusual or where the harm is egregious.

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^{1.} Archbold, *Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, London, 2010) at paras 31-40.

^{2.} [1997] AC 655.

^{3.} *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463.

^{4.} American Law Institute, *Restatement of the Law, Second, Torts 2d* (1979), Ch. 40, para. 821B(h).

^{5.} *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463 at para. 29.

^{6.} F.H. Newark, 'The Boundaries of Nuisance' (1949) 65 LQR 480.

^{7.} Ibid. at 482.

^{8.} *R v Rimmington; R v Goldstein* [2006] 1 AC 459; [2005] UKHL 63.

^{9.} Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*, Consultation Paper No. 193 (2010) para. 2.47.

^{10.} H.M. Chew and W. Kellaway (eds), *London Assize of Nuisance, 1301-1431: A Calendar* (London Record Society, London, 1973).

^{11.} J.R. Spencer, 'Public Nuisance - A Critical Examination' (1989) 48 CLJ 55, 56. The medieval origins and subsequent development of public and private forms of nuisance are analysed carefully in this article.

12. Cited in R. Allen, 'People *ex rel. Gallo v Acuna*: (Ab)using California's Nuisance Law to Control Gangs' (1998) 25 *Western State University Law Review* 257.
13. B. Dylan, *Highway 61 Revisited* (Columbia Records, 1967).
14. *Archbold*, above n. 1.
15. *R v Rimmington; R v Goldstein* [2005] UKHL 63 at paras 36 and 45.
16. Law Commission, above n. 9 at paras 7.2 and 7.3.
17. The general duties of licensing authorities include the promotion of the licensing objectives, as set down by s. 4 Licensing Act 2003, namely: (a) the prevention of crime and disorder; (b) public safety; (c) the prevention of public nuisance; and (d) the protection of children from harm.
18. *Colour Quest Ltd and Others v Total Downstream UK Plc and Others (Rev 1)* [2009] EWHC 540 (Comm).
19. *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463.
20. *R v Rimmington; R v Goldstein* [2005] UKHL 63 at paras 7 and 36.
21. Ibid.
22. Law Commission, above n. 9 at para. 7.3.
23. N. Parpworth, 'Public Nuisance in the Environmental Context' (2008) JPL 1526.
24. *Colour Quest Ltd and Others v Total Downstream UK Plc and Others (Rev 1)* [2009] EWHC 540 (Comm).
25. *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463.
26. Law Commission, above n. 9.
27. *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463 at para. 10.
28. *Hunter v Canary Wharf* [1997] AC 655.
29. *Transco plc v Stockport MBC* [2003] UKHL 61; [2004] 2 AC 1.
30. *Corby Group Litigation v Corby District Council* [2009] EWHC 1944 (TCC).
31. F.H. Newark, 'The Boundaries of Nuisance' (1949) 65 LQR 480.
32. *Hunter v Canary Wharf* [1997] AC 655.
33. Newark, above n. 31 at 483-484.
34. Spencer, above n. 11 at 74.
35. Y.B. 27 Hen. 8, Mich. pl. 10.
36. *Hunter v Canary Wharf* [1997] AC 655, 718.
37. R. Malcolm and J. Pointing, 'Statutory Nuisance: The Sanitary Paradigm and Judicial Conservatism' (2006) 18 J Env L 37, 52.

38. [2005] UKHL 63.
39. Law Commission, above n. 9 at paras 2.61-2.68.
40. *People ex rel. Gallo v Acuna* (1997) 14 Cal. 4th 1090, 60 Cal. Rptr. 2d 277; 929 P 2d 596. The state of California pioneered the use of very widely drawn injunctions to restrict the activities of street gangs from the early-1980s. In the California Civil Code, paragraph 3479, a public nuisance is: '[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction of the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any ... public park, square, street, or highway ...', cited from S.E. Atkinson, 'The Outer Limits of Gang Injunctions' (2006) 59 *Vanderbilt Law Review* 1693.
41. [2005] UKHL 63 at para. 47.
42. For a useful discussion of the negligence requirements in public nuisance, see J. Murphy, *The Law of Nuisance* (Oxford University Press, Oxford, 2010), 152-156.
43. [2005] UKHL 63 at paras. 40 and 57.
44. The presumption that a relevant statutory provision should ordinarily prevail over the common law also applies to private nuisance, cf. *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42.
45. [1989] 1 WLR 20 at 23.
46. T. Rees and A.J. Ashworth, 'Public Nuisance: European Convention on Human Rights Arts. 7, 8 and 10', Case Comment (2004) CrimLR 303.
47. English sources include: Newark, above n. 31; J.P.S. McLaren, 'Nuisance Law and the Industrial Revolution - Some Lessons from Social History' (1983) 3 OJLS 155; G. Kodlinye, 'Public Nuisance and Particular Damage in the Modern Law' (1986) 6 LS 182; Spencer, above n. 11; C. Gearty, 'The Place of Private Nuisance in a Modern Law of Torts' (1989) 48 CLJ 214; J. Wightman, 'Nuisance - The Environmental Tort? *Hunter v Canary Wharf* in the House of Lords' (1998) 61 MLR 870; J.E. Penner, 'Nuisance, the Morality of Neighbourliness, and Environmental Protection', in J. Lowry and R. Edmunds (eds), *Environmental Protection and the Common Law* (Hart Publishing, Oxford, 2000) 27-50; Parpworth, above n. 23.
48. Rees and Ashworth, above n. 46.
49. Law Commission, *Conspiracy and Criminal Law Reform*, No. 76 (1976) Ch 1.
50. The Crown Court prosecution is reported in *Environment Agency v Milford Haven Port Authority and Andrews (The 'Sea Empress')* [1999] 1 Lloyd's Rep 673.
51. *R v Bourgass* [2007] 2 Cr App R (S) 40.
52. The prosecutors would have been mindful when drafting the indictment that the maximum sentence for public nuisance is life imprisonment as compared to 14 years for the section 113 offence.
53. Art. 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 provides that: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'
54. [2005] UKHL 63.
55. Ibid.
56. Malcolm and Pointing, above n. 37.
57. Clean Neighbourhoods and Environment Act 2005, ss. 101-103.
58. *R v Carrick DC, ex p Shelley* [1996] Env LR 273, per Carnwath J at 278.

59. In early case law, such as *Great Western Railway Co v Bishop* (1872) LR 7 QB 550, the nuisance limb was equated with public nuisance and the health limb with private injury (*per* Hannen J at 553).
60. Arguably, endangering public health is more serious than acting, or failing to act, to the prejudice of the public health.
61. *Hunter v Canary Wharf* [1997] AC 655.
62. *Salford CC v McNally* [1976] AC 379.
63. Environmental Protection Act 1990, s. 82, enables any 'person aggrieved' by a statutory nuisance to apply to the magistrates' court for an abatement order, breach of which being a criminal offence.
64. The statutory nuisance procedure is set down in R. Malcolm and J. Pointing, *Statutory Nuisance: Law and Practice*, 2nd edn. (Oxford University Press, Oxford, 2011), Chapters 14-18.
65. [2001] EWCA Civ 1236; [2002] QB 756.
66. *Wandsworth LBC v Railtrack plc* [2001] 1 WLR 368, 384.
67. [2001] 1 WLR 368, 385.
68. *Wandsworth LBC v Railtrack plc* [2001] EWCA Civ 1236.
69. [2001] EWCA Civ 1236.
70. A narrow approach was taken by the majority of the House of Lords in *Birmingham CC v Oakley* [2000] UKHL 59. This case concerned a statutory nuisance caused by the state of premises, a provision which had also originated in s. 8 of the Nuisances Removal and Diseases Prevention Acts 1855. Cf. Malcolm and Pointing, above n. 56 at 45-50, for a critique of this decision.
71. [2005] UKHL 63.
72. *Colour Quest Ltd and Others v Total Downstream UK Plc and Others* (Rev 1) [2009] EWHC 540 (Comm).
73. *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463.
74. *Archbold*, above n. 1. 'Safety' should be added to this list in view of the comments of Dyson LJ in *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463, at para. 29.
75. See Murphy, above n. 42, for a comprehensive analysis of private nuisance.
76. *Hunter v Canary Wharf* [1997] AC 655, 722.
77. R. Kidner, 'Nuisance and Rights of Property' (1998) Conv & Prop Lawyer 267; Wightman, above n. 47.
78. *A-G v PYA Quarries Ltd* [1957] 2 QB 169.
79. *Shoreham-by-Sea UDC v Dolphin Canadian Proteins* (1972) 71 Local Gov Rep 261.
80. *R v Lister and Biggs* (1857) 26 LJMC 196.
81. *A-G v Tod Heatley* [1897] 1 Ch 560.
82. *R v Shorrock* [1993] 3 All ER 917. In this case the defendant farmer was found guilty of public nuisance for a 'rave' organised by another person but taking place on the farmer's land whilst he was elsewhere. Farmer Shorrock was found guilty on the basis that he knew or ought to have known that there was a real risk of the event causing a public nuisance.

83. *East Dorset DC v Eaglebeam Ltd* [2006] EWHC 2378 (QB).
84. *Colour Quest Ltd and Others v Total Downstream UK Plc and Others (Rev 1)* [2009] EWHC 540 (Comm) at para. 434, *per* David Steel J; reversed in part (but not on the public nuisance parts) by *Colour Quest Ltd v Total Downstream UK Plc* [2010] EWCA Civ 180.
85. Gearty, above n. 47.
86. *Brand v Hammersmith & City Railway Co* (1867) QB 223, 247.
87. For an analysis of this legislation and its relationship to public nuisance, see *Colour Quest Ltd and Others v Total Downstream UK Plc and Others (Rev 1)* [2009] EWHC 540 (Comm) at paras 441-459, *per* David Steel J.
88. *Hammersmith & City Railway Co v Brand* (1869-70) LR 4 HL 171. A claim for certain nuisances listed in the Land Compensation Act 1973 (such as noise, dust, fumes etc.) would now be recoverable if caused by the use of public works. But there are strict time limits.
89. *Per Denning LJ in A-G v PYA Quarries Ltd* [1957] 2 QB 169, 190-191. The applicability of this passage to criminal proceedings in public nuisance was doubted by Lord Rodger in *R v Rimmington; R v Goldstein* [2005] UKHL 63 at para. 44.
90. Local Government Act 1972, s. 222.
91. The person responsible could be a local authority, as in the case of *Corby Group Litigation v Corby DC* [2009] EWHC 1944 (TCC), where the council was found liable for public nuisance in causing, allowing or permitting the dispersal of dangerous or noxious contaminants that resulted in birth defects.
92. *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509.
93. *Spencer v London and Birmingham Railway Co* (1836) 8 Sim 193.
94. *Benjamin v Storr* (1874) LR 9 CP 400, *per* Brett J at 407.
95. [2000] 2 Lloyd's Rep 700, 715.
96. *A-G v PYA Quarries Ltd* [1957] 2 QB 169, 187.
97. Ibid. at 184.
98. Ibid.
99. *Jan De Nul (UK) Ltd v Royale Belge SA* [2000] 2 Lloyd's Rep 700, 713.
100. [2005] UKHL 63 at para. 47. After *Hunter v Canary Wharf* [1997] AC 655, in which the House of Lords overruled the Court of Appeal decision in *Khorasandjian v Bush* [1993] QB 727, it would not be arguable to claim that the sending of race hate letters could constitute a private nuisance, since this act would not be a tort against a property right.
101. [2005] UKHL 63.
102. *A-G v PYA Quarries Ltd* [1957] 2 QB 169, 187.
103. *R v Rimmington; R v Goldstein* [2005] UKHL 63, *per* Baroness Hale at para. 58.
104. *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463. That decision leaves unanswered the question of whether a small number of claimants (18) out of Corby's population of about 53,000 souls is sufficient to satisfy the common element requirement in public nuisance. Why the proportion of persons harmed by the contaminated dust from the clear-up of the site was so low is legally troubling, given both the large scale of the clear-up itself and the number of years it took to complete it.
105. *Colour Quest Ltd and Others v Total Downstream UK Plc and Others (Rev 1)* [2009] EWHC 540 (Comm).
- 106.

Colour Quest Ltd v Total Downstream UK Plc [2010] EWCA Civ 180.

107. *Colour Quest Ltd and Others v Total Downstream UK Plc and Others (Rev 1)* [2009] EWHC 540 (Comm) at para. 432.

108. *Ibid.*, at para. 430.

109. G. Himmelfarb, *The Idea of Poverty* (Faber, London, 1984) Ch. 15.

110. The *Oxford English Dictionary* defines a 'sharper' as 'a cheat, swindler, rogue; one who lives by his wits and by taking advantage of others; esp. a fraudulent gamester'. Today's equivalent might be a merchant banker or a market trader.

111. *Betterton's Case* (1680) Holt 538.

112. *R v Moore* (1832) 3 B & Ad 184; 110 ER 68.

113. To gauge how complicated clay-pigeon shooting nuisances can be, see Farmer Butland's appeal against the abatement notice served under the statutory nuisance provisions of the Environmental Protection Act 1990 by the local authority in *Butland v Powys County Council* [2009] EWHC 151 (Admin).

114. *R v Moore* (1832) 3 B & Ad 184; 110 ER 68.

115. Licensing Act 2003, s. 4. Licensable activities include the provision of regulated entertainment as well as the provision of alcohol. Schedule 1 to the Licensing Act 2003 sets out types of regulated entertainment.

116. Department for Culture, Media and Sport, 'Amended Guidance issued under section 182 of the Licensing Act 2003' (March 2010).

117. In July 2010, the transfer of responsibility to the Home Office for licensing by the new coalition government coincided with issuing a portentous consultation exercise on the licensing system: 'Rebalancing the Licensing Act: A consultation on empowering individuals, families and local communities to shape and determine local licensing' (Home Office, July 2010).

118. DCMS, above n. 116 at para. 2.33.

119. [1957] 2 QB 169.

120. *Chief Constable of Cumbria Constabulary v Wright and Wood* [2006] EWHC 3574 (Admin) at para. 17.

121. *Per Erle CJ in Brand v Hammersmith & City Railway Co* (1867) QB 223, 247.

122. Newark, above n. 31.

123. *Hunter v Canary Wharf* [1997] AC 655, 711.

124. R. Macrory, 'Regulatory Justice: Making Sanctions Effective' (Cabinet Office, 2006).

125. Sir Leon Radzinowicz, *Codification of the Criminal Law, a Report to the Law Commission* (1985) Law Commission 143 at para. 6.

126. Law Commission, above n. 9.

127. Above n. 17.

128. Atkinson, above n. 40.

129. *Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463, *per* Dyson LJ at para. 29. This passage introduces 'safety' into the list of protected rights.

130. *R v Rimmington; R v Goldstein* [2005] UKHL 63, para. 36.

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