THE LAW OF TORTS

INTRODUCTION

Torts law is the collective term for the following areas of tort law:

- The law of nuisance;
- The law of negligence (including clinical negligence and personal injury);
- Product liability;
- Trespass to land;
- Title to Goods: Torts against Goods.
- Conspiracy;
- Intentional Economic Torts;
- Bribery;
- The Rule in Rylands v Fletcher.

THE LAW OF NUISANCE

Private nuisance

Nuisance is a tort to land (Hunter v Canary Wharf Ltd [1997] A.C. 655 at 695A-695B, per Lord Lloyd of Berwick), and an interference with rights over land (ibid. at 688E, per Lord Goff) arising from a non-reasonable use of land. As a tort, the cause of action is concerned with remedies. The cause of action is not a commodity to be bought and sold – Thornhill v Sita Metal Recycling Cambridge Ltd [2009] All E.R. (D) 162 (April). Although private nuisance is applicable for identifying a nuisance under statute such as the Environmental Protection Act 1990 s.79 – see Southwark LBC v Tanner [2001] 1 A.C. 1.

However, in some instances, the essence of a claim in nuisance for interference with what is in essence the enjoyment of one’s home might be of such a gravity that the ECHR art. 8(1) right to respect for one’s home may be alleged to be infringed. Interference may be so great as to engage right to quite enjoyment under Protocol 1, Article 1. (See, for summary and review of relevant “environmental” human rights cases in Strasbourg, Giacomelli v Italy (App. 59909/00) (2007) 45 E.H.R.R. 38; and App. 30499/03 Dubetska v Ukraine, judgment of February 10, 2011). In such cases the right sought to be protected, and the standing to sue is not to be restricted by the “proprietary” or “occupational” test of Hunter v Canary Wharf Ltd – see Harrow LBC v Qazi [2004] 1 A.C. 983 (Jul),
private nuisance is a branch of tort concerning activities which interfere with the use and enjoyment of neighbouring land. obvious examples include drifting smoke, smells and noise. as a tort to land only those with a sufficient legal interest in real property are in a position to bring a claim. moreover, it must be differentiated from public nuisance which concerns activities which interfere with the comfort and convenience of a group of unrelated persons.

private nuisance is an ancient tort the origins of which can be traced back to the medieval forms of action. it is concerned with activities which have an indirect impact on the use and enjoyment of land, such as smoke and smells, rather than direct incursions by solid entities such as people, objects or animals; the latter may give rise to liability under trespass to land.

the tort is distinct from public nuisance which concerns harm caused to a class of persons and is not always concerned with the injurious affection of the use and enjoyment of property.

it seems that the tort is primarily concerned with activities conducted on neighbouring property. this means that only the occupiers, or in some cases the landlords, of neighbouring property can be liable under the tort.

the concept of "reasonable user" is at the heart of the tort. this means that the defendant will only be liable if his land use is unreasonable taking into account the following factors:

- whether the harm is tangible or intangible;
- the nature of the locality;
- whether the defendant's conduct was motivated by malice;
- the duration of the nuisance.
The burden is on the claimant to establish *causation* between the activity and the harm. It is rare for this to be a contentious issue in private nuisance although it may arise in complex cases of environmental pollution.

A number of specific common law defences have emerged over the years including:

Prescription;

The hypersensitivity of the claimant;

Statutory authority.

However, "coming to the nuisance" is no defence and it is doubtful whether "public benefit" is a defence.

Due to the fact that private nuisance is concerned with the protection of certain interests in land, only those with a sufficient interest in the land have sufficient *locus standi* to pursue an action under the tort.

It is necessary to show that the harm was *foreseeable*.

The principle remedies include damages (especially where the claimant can point to tangible harm) or injunctive relief in cases where the harm is continuing or specific reinstatement measures are necessary. The self-help remedy of abatement is rare in this context and is generally frowned upon due to its inflammatory nature.

In recent years, the issue of the extent to which the common law of private nuisance should be interpreted so as to mirror developments in human rights law has been at issue; especially in the context of who should be in a position to seek a remedy under the tort.

Who can be liable in private nuisance? Private nuisance protects certain interests in land from interference by neighbouring land use activities. Accordingly, the orthodox view is that a person can only be liable where the nuisance stems form his use of neighbouring property; see Hussain v Lancaster City Council [2000] Q.B. 1. Although, as is discussed below, this narrow view has been heavily criticized. Thus, an occupier of land may be liable in respect of harm caused by his use of the property.

Liability may also be extended to other persons lawfully on the premises such as the servants of the occupier. So, for example, a gardener could be liable in respect of smoke nuisance caused through the burning of leaves. However, in this scenario it is more likely that the occupier would
be sued on the basis of vicarious liability. Generally speaking, the occupier would not be liable for nuisances caused by independent contractors, such as builders. However, certain types of building work may fall within the range of non-delegable duties in respect of which there is no escape from vicarious liability. For example, construction work which risks undermining neighbouring property as in Bower v Peate (1876) 1 Q.B.D. 321.

Generally speaking the person in actual occupation of the premises will be liable rather than others with an interest in the property such as the landlord. However, the latter may be liable if he let the premises in the full knowledge that the tenant intended to conduct activities there which would cause a nuisance to neighbours. For example, a farmer who knowingly lets his field to a club which organizes noisy motorbike scrambling events. Clear case law examples of this point include Tetley v Chitty [1986] 1 All E.R. 663 and Lippiatt v South Gloucestershire Council [2000] Q.B. 51. However, in Coventry v Lawrence [2014] UKSC 46; [2014] 3 W.L.R. 555 the Supreme Court emphasised that the landlord would only be liable where it was inevitable that the activity for which the land was being let would cause a nuisance. In this case a motorcycle speedway racing team could have organised its activities in such a way that the claimant would not have suffered the nuisance; thus the landlord could not be held liable in this case. Alternatively, it would be necessary to show that the landlord had actively participated in the nuisance. In Coventry v Lawrence (No 2) this argument was also rejected by the majority on the facts. It is also important to note that a firm distinction has been drawn between landlords and licensors. In Cocking v Eacott [2016] EWCA Civ 140; [2016] H.L.R. 15, concerning a nuisance caused by barking dogs, the Court of Appeal held that the position of a landlord had to be distinguished from a licensor in that a licensor maintains possession and control of the premises. In this respect the licensor is more akin to an occupier than a landlord, who has more limited control over the activities conducted on the premises. Thus, in this case, a mother who had allowed her daughter to live at a property under a bare licence was held liable for the nuisance caused by the barking dogs in that she had been in a position to abate the nuisance by taking possession but had failed to do so.

Who can bring a claim in private nuisance? Private nuisance is inextricably intertwined with the protection of certain interests in land. This means that only a person with a sufficient legal interest in the affected property, such as the freeholder or leaseholder, enjoys sufficient locus standi: see Malone v Laskey [1907] 2 K.B. 141. Attempts to broaden out the range of potential claimants so as to include other persons who occupy the premises as mere licensees, such as
family members and lodgers, were rejected by the House of Lords in Hunter v Canary Wharf Ltd [1997] A.C. 655:

"The tort of nuisance is an invasion of the plaintiff's interest in the possession and enjoyment of land. It is closely linked to the law of property .... so where it is the tort of nuisance which is being relied on to provide the remedy .... the plaintiff must show that he has an interest in the land that has been affected by the nuisance of which he complains. More presence on the land will not do. He must have a right to the land, for example as owner or reversioner, or be in exclusive possession or occupation of it as tenant or under a licence to occupy."

It has also been argued that, the fact that the tort has its origins in the protection of property rights, precludes it from being used as a cause of action in respect of personal injuries. Lord Goff stated:

"At the heart of this question lies a more fundamental question, which relates to the scope of the law of private nuisance. Here I wish to draw attention to the fact that although, in the past, damages for personal injury have been recovered at least in actions of public nuisance, there is now developing a school of thought that the appropriate remedy for such claims as these should lie in our now fully developed law of negligence, and that personal injury claims should be altogether excluded from the domain of nuisance."

Tangible and intangible harm: The common law draws a distinction between private nuisances which cause physical damage to property, such as the poisoning of crops or livestock by pollutants, and those activities which merely inconvenience the claimant or cause a level of discomfort. Examples of the latter type of harm could include odours and noise. In the leading House of Lords judgment in St Helens Smelting Co v Tipping 11 E.R. 1483, Lord Westbury L.C. outlined the distinction in the following terms:

"My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the
consequences of those operations of trade which may be carried on in his immediate locality ..... But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of either neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property. " (per Lord Westbury L.C. at 1486).

The practical upshot of this is that only tangible damage is actionable per se. Where the harm is tangible it will only be actionable if a range of other criteria can be met pertaining to the reasonableness of the defendant's land use. At the forefront of these is the character of the neighbourhood or locality doctrine.

Character of the neighbourhood (locality doctrine): In cases involving intangible damage, such as smoke, smells or noise which has no impact on the fabric of property, the defendant's activity must be shown to be out of keeping with the character of the neighbourhood. This means that whether or not an activity constitutes a nuisance may depend upon the time and place where it is carried on. The most famous enunciation of this concept can be found in the judgment of Thesiger L.J. in Sturges v Bridgman (1879) 11 Ch. D. 852:

" whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturer in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong."

There are numerous examples of this principle in action in the case law although the following are particularly clear examples. In Halsey v Esso Petroleum Co Ltd [1961] 1 W.L.R. 683, noise and fumes from an oil storage depot were regarded as unacceptable, notwithstanding the mixed residential and commercial nature of the locality. In Murdoch v Glacier Metal Co Ltd [1998] Env. L.R. 732, concerning the noise from the defendant's works, the noise was not found to be out of keeping with the character of the neighbourhood given the levels of traffic noise on a bypass in the vicinity of the parties.
In recent years, most case law on this issue has focused on the effect of planning permission on the character of the neighbourhood. In Gillingham BC v Medway (Chatham Docks) Co Ltd [1993] Q.B. 343, it was found that a planning consent could alter the character of the neighbourhood in an instant. However, in Wheeler v JJ Saunders Ltd [1996] Ch. 19, it was held that only strategic planning decisions could alter the character of the neighbourhood in this way. For example, a planning consent to build an industrial estate in a hitherto rural area would no doubt change the character of the neighbourhood. Individual planning consents are less likely to change the character of the neighbourhood. In Watson v Croft Promo-Sport Ltd [2009] EWCA Civ 15; [2009] 3 All E.R. 249, a planning consent authorizing the use of a former airfield for motor racing was found not to alter the character of the neighbourhood. This approach has recently been endorsed by the Supreme Court in Coventry (t/a RDC Promotions) v Lawrence [2014] UKSC 13; [2014] 2 W.L.R. 433 in which the court doubted the ability of an individual planning consent to change the character of the neighbourhood in this manner; notwithstanding the fact that the planning consent may have been in operation for many years.

Malice: On occasion, this issue of malice has been found to be a relevant consideration in determining the reasonableness or otherwise of the defendant’s activity. See, for example, Christie v Davey [1893] 1 Ch. 316 and Hollywood Silver Fox Farm Ltd v Emmett [1936] 2 K.B. 468 in which the intention of the defendants to vex the claimants was found to render the activities nuisances.

However, in Bradford Corp v Pickles [1895] A.C. 587, Lord Halsbury L.C. dismissed the relevance of malice as a criterion for establishing the reasonableness of an activity:

"If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it."

Indeed, there appear to have been no recent examples of the criterion being used which casts doubt on its contemporary relevance.

Duration of nuisance: As a general rule nuisances constitute a state of affairs which occur over a prolonged period of time. However, the case law does not set any minimum duration and it is possible to find examples of one-off events which have nevertheless given rise to a cause of action in private nuisance. A notable recent example is provided by Colour Quest Ltd v Total Downstream UK Plc [2009] EWHC 540 (Comm); [2009] 2 Lloyd’s Rep. 1 arising from the explosion at the Buncefield petroleum depot. Private nuisance claims were entertained notwithstanding the sudden and isolated nature of the explosion.
This creates an overlap with the common law rule of strict liability under Rylands v Fletcher which is, by its very nature, concerned with escapes of this nature.

**Causation:** The claimant bears the evidential burden of establishing a causal link between the harm and the defendant’s activities. This does not normally present difficulties in private nuisance although it may be a more complex matter in cases of environmental pollution. However, the courts tend to adopt a robust and common sense approach. Thus, in Clifton v Powergen, concerning crop damage caused by emissions from a power station, a causation argument to the effect that the harm was just as consistent with the naturally occurring blackspot was rejected. There was considerable circumstantial evidence pointing to the power station as the source of the harm. Not least of which was the fact that the harm exactly coincided with times when emissions from the plant had been excessive.

In Anslow v Norton Aluminium Ltd [2012] EWHC 2610 (QB), concerning emissions from a foundry, certain claims relating to dust and smoke and noise were rejected. These claims were largely based on eye witness evidence in which there were a number of inconsistencies. Moreover, there were other industrial activities in the area equally capable of causing such emissions. However, claims in respect of phenolic and sulphurous odours caused were successful on the basis that there were no viable alternative sources in the area.

**Defences:** Coming to the nuisance is no-defence. Thus, the defendant may be liable notwithstanding the fact that he has been in the locality for many years and his activities did not constitute a nuisance until the claimant moved into the neighbourhood. The Supreme Court held that this principle is still good law in the case of Coventry (t/a RDC Promotions) v Lawrence [2014] UKSC 13; [2014] 2 W.L.R. 433 although it was also held that it might not apply where the claimant has changed his land use so as to render the defendant’s activity a nuisance when it had not hitherto caused any inconvenience.

In certain cases a defence of prescription may be available provided that the defendant can show that he has conducted his activities for at least 20 years without interruption or complaint. However, the prescription period does not commence until the claimant moves into the locality and any complaint made by the claimant made within 20 years will break the prescription period. See Sturges v Bridgman (1879) 11 Ch. D. 852 and Miller v Jackson [1977] Q.B. 966. In Coventry (t/a RDC Promotions) v Lawrence [2014] UKSC 13; [2014] 2 W.L.R. 433 the Supreme Court held that the defence of prescription still applies in the 21st Century but underscored the fact that the activity must have continued for 20 years without interruption.
On occasion a defendant has argued that his activity should not be regarded as a nuisance because the public benefits outweigh the individual harm to the defendant. The courts have usually resisted this argument on the basis that it is unjust to expect the defendant to shoulder all the unwanted side-effects of an activity notwithstanding the wider benefits accruing to the public as a whole. Thus, in Adams v Ursell [1913] 1 Ch. 269 the court was unsympathetic to arguments that the closure of a fried fish shop "would cause great hardship to the defendant and to the poor people who get food at his shop". Nevertheless, public benefit may form one of the considerations which the court takes into account when determining the reasonableness of an activity.

The older cases establish a defence where the claimant suffers harm by virtue of the fact that he pursues a very delicate trade which is easily upset by otherwise reasonable activities. The classic exposition of the hypersensitivity defence, as it is known, was set out by Lopes L.J. in Robinson v Kilvert (1889) 41 Ch. D. 88:

"A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade."

However, in Network Rail Infrastructure Ltd v Morris (t/a Soundstar Studio) [2004] EWCA Civ 172; [2004] Env. L.R. 41 the Court of Appeal argued that the defence is now superfluous. Since Cambridge Water Co Ltd v Eastern Counties Leather Plc [1994] 2 A.C. 264, (see below) it has been necessary to show that the harm was unforeseeable. It could be argued that the hypersensitivity of the claimant rendered the harm unforeseeable.

Where certain activities have been authorized under statute the defendant may enjoy the defence of statutory authority. This means that the defendant is immune from liability in nuisance in respect of those harms which are the necessary consequence of pursuing the authorized activity. The defence arises in two types of situation. Firstly, where the defendant has a statutory duty to conduct a certain activity as in Smeaton v Ilford Corp [1954] Ch. 450. And secondly, where the defendant is granted statutory powers to build and operate a major piece of infrastructure such as a railway or power station. Thus, the wording of the statute conferring the powers is crucial in determining whether the defence exists in a particular case. In Allen v Gulf Oil Refining Ltd [1981] A.C. 1001, concerning the construction and operation of a new oil refinery, the House of Lords held that, although the enabling Act did not expressly authorize nuisances, some form of statutory authority to cause nuisances must be a necessary implication
of the magnitude of the powers granted. It should also be noted that statutory authority only provides a defence in respect of those harms which are the *inevitable* consequence of the activity. A harm will not be regarded as inevitable if the defendant's plant or equipment could have been better designed or configured: see Manchester Corp v Farnworth [1930] A.C. 171.

In Barr v Biffa Waste Services Ltd [2012] EWCA Civ 490, the Court of Appeal held that an environmental permit could not give rise to a defence of statutory authority. A permit, which merely authorizes the holder to pursue an activity, cannot be equated with an Act of Parliament which equips the promoter with specific powers.

Nuisance and fault: Nuisance is essentially a tort of strict liability which means that the court does not generally need to concern itself with whether the defendant was at fault. However, there are circumstances in which liability turns on whether the defendant pursued an activity in full knowledge of the fact that he was causing a nuisance.

The "continuing the nuisance" cases concern instances where the nuisance was instigated by someone or something other than the defendant. However, once the defendant gains control of the nuisance (for example through the acquisition of property), if he fails to take steps to abate the nuisance he can be liable on the basis that he "continued the nuisance". This appears to introduce in a fault requirement in cases of this nature. Key case law examples include Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions) [1940] A.C. 880, concerning nuisances instigated by third parties, and Goldman v Hargrave [1967] 1 A.C. 645 and Leakey v National Trust for Places of Historic Interest or Natural Beauty [1980] Q.B. 485, concerning nuisances instigated by an act of nature such as fire and flood.

In Cambridge Water Co Ltd v Eastern Counties Leather Plc [1994] 2 A.C. 264, it was held that in certain cases it is necessary to show that the defendant could have foreseen that his activities could cause a nuisance to his neighbours. This case concerned the contamination of subterranean drinking water by chemicals which leaked from a leather tannery as a result of minor spillages over many years. It was held that the harm was not foreseeable because, at the time the spillages occurred, no-one could have foreseen that minor spillages of this nature could permeate the concrete floor and bedrock and contaminate the underground watercourse. Moreover, even if the contamination had been known about, it would not have been regarded as significant in that the low concentrations would not have rendered the water unfit for human consumption. It was only the introduction of new EU quality standards some years later which rendered the water unfit.
As regards more recent examples of the application of the foreseeability requirement see Anthony v Coal Authority [2005] EWHC 1654 (QB); [2006] Env. L.R. 17, in which it was held that the risks of spontaneous combustion of were well known when a slag heap at a former colliery was levelled and landscaped. In Northumbrian Water Ltd v Sir Robert McAlpine Ltd [2014] EWCA Civ 685; [2014] B.L.R. 605, it was held that a nuisance caused by the leakage of cement from foundation works was not foreseeable because an inspection of reasonably available plans would not have revealed the pipe through which the cement leaked. Note that the alternative tort of the related rule in Rylands v Fletcher was considered in this case.

It is important to note that the foreseeability requirement is confined to cases where the damage has already occurred and the issue is whether the defendant should pay for its remediation. Where the harm is ongoing it would clearly be ludicrous to argue that it was not foreseeable. As Lord Goff stated in the Cambridge Water case:

"It is, of course, axiomatic that in this field we must be on our guard, when considering liability for damages in nuisance, not to draw inapposite conclusions from cases concerned only with a claim for an injunction. This is because, where an injunction is claimed, its purpose is to restrain further action by the defendant which may interfere with the plaintiff’s enjoyment of his land, and ex hypothesi the defendant must be aware, if and when an injunction is granted, that such interference may be caused by the act which he is restrained from committing. It follows that these cases provide no guidance on the question whether foreseeability of harm of the relevant type is a prerequisite of the recovery of damages for causing such harm to the plaintiff."

Remedies: Where tangible damage has been suffered, such as the destruction of crops by poisonous emissions or damage to the paintwork of a car, damages are recoverable reflecting the cost of replacement or repair. Impairment of the use and enjoyment of property (or the amenity value) may be calculated on the basis of its reduction in market value. For example, in Marquis of Granby v Bakewell UDC (1923) 87 JP 105 damages of £500 were awarded in respect of the loss of fish killed by discharges of poisonous matter from the defendant’s gas works. For detailed discussion of how damages should be assessed in respect of loss of amenity (e.g. loss of capital value or reduction in rental income) see Dobson v Thames Water Utilities Ltd [2011] EWHC 3253 (TCC); 140 Con. L.R. 135.

In most cases of on-going nuisances, the claimant will seek an injunction requiring the defendant to abate the nuisance. It is rare for an injunction to require the complete cessation of the offending activity as this could prove to be a draconian remedy which deprives the defendant of
his livelihood. In most cases an injunction will be granted on terms which allow the activity to continue subject to conditions designed to minimise disruption to the claimant. Thus in Watson v Croft Promo-Sport Ltd [2009] EWCA Civ 15; [2009] 3 All E.R. 249, which concerned noise from a motor racing circuit, the terms of the injunction limited the defendant to holding race meetings on 40 days in the year. It should also be noted that the court has the discretion to suspend the operation of the injunction so as to afford the defendant the opportunity to investigate means of abating the nuisance. Such an approach is especially appropriate where industrial emissions are concerned and time is needed to find a technological solution: see Manchester Corp v Farnworth [1930] A.C. 171 concerning emissions from a coal-fired power station.

Under s.50 of the Senior Courts Act 1981 (the discretion was originally established under Lord Cairns' Act 1858), the courts has a discretion to award damages in lieu of an injunction. In such circumstances the claimant is required to accept a once and for all financial settlement even though the harm may still be continuing. In Shelfer v City of London Electric Lighting Co (No.1) [1895] 1 Ch. 287, the Court of Appeal imposed very strict criteria for determining when the discretion should be used:

"(1) If the injury to the plaintiff's legal rights is small, 
(2) And is one which is capable of being estimated in money, 
(3) And is one which can be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction: then damages in substitution for an injunction may be given."

In more recent times the criteria have been endorsed by the Court of Appeal in Watson v Croft Promo-Sport Ltd [2009] EWCA Civ 15; [2009] 3 All E.R. 249. However, in Coventry (t/a RDC Promotions) v Lawrence [2014] UKSC 13; [2014] 2 W.L.R. 433 the Supreme Court called for a more flexible approach to be adopted which would, for example, enable the court to consider public interest issues such as the effect of an injunction on the viability of a business. Nevertheless, it held that the Shelfer criteria should remain as the starting point unless there were good public interest reasons for departing from them.

The final remedy which is worthy of note in the context of private nuisance is abatement, which is a self-help remedy. In certain circumstances a person has a right to abate the nuisance himself without recourse to the courts. However, the remedy is usually confined to circumstances where the claimant's property is at imminent risk of serious damage or where the nuisance can be abated without encroaching upon the defendant's land. In all cases the steps taken must be

Claims in nuisance plead one or other of three types of interference: (1) nuisance by encroachment on the claimant’s land; (2) nuisance by direct physical injury to the claimant’s land; and (3) nuisance by interference with the claimant’s right of quiet enjoyment of rights in relation to the claimant’s land. (Note the difference in what can be claimed under nuisance as a breach of rights in relation to land at common law, and what can be claimed as “injurious affection” under the Compulsory Purchase Act 1965 s.10 – *Wildtree Hotels Ltd v Harrow LBC* [1998] 3 W.L.R. 1318 CA).

**Reasonable user and ordinary user.** By virtue of the House of Lords ruling in *Transco Plc v Stockport MBC* [2004] 2 A.C. 1 (although a case address to *Rylands v Fletcher*, given the commonality of the origin of that cause of action with nuisance, the doubts expressed by the House of Lords there as to the applicability of a test of “reasonable user” are very likely to carry substantial weight with a court in a nuisance case) the relevant test of “ordinary user” rather than “natural user”.

It is a defence to nuisance claims that the use in question was reasonable (*Arscott v Coal Authority* [2005] EWCA Civ 892. The ordinary use of residential premises is not capable of constituting a nuisance, unless it was unusual or unreasonable having regard to the purpose for which the premises were constructed (*Baxter v Camden LBC* [1999] 1 All E.R. 237 CA, affirmed on appeal to the House of Lords [1999] 3 W.L.R. 939 though see the comment in *Hirose Electrical UK Ltd v Peak Ingredients Ltd* [2011] EWCA Civ 987 at [17]. Note that in cases for breach of covenant for quiet enjoyment in leases there is no “abstract standard of quietness” irrespective of the circumstances in which the lease was executed and the location of the property (*Southwark LBC v Mills* [1999] 2 W.L.R. 409 CA, affirmed by the House of Lords ([1999] 3 W.L.R. 939 (also at [2001] 1 A.C. 1). Covenants for quiet enjoyment in leases are prospective only, and amount to a covenant that the landlord would not substantially interfere with the tenant’s possession of the land (ibid. at 11, per Lord Hoffmann). See also *Long v Southwark LBC* [2002] EWCA Civ 403 at [61]. Use of land as a landfill site in a mixed character neighbourhood was not, of itself, in the specific case an unreasonable use of land: *Barr v Biffa Waste Services Ltd* [2011] EWHC 1003 (TCC).

It is helpful and good practice for a claimant, if in any doubt on the matter, to assert that the use of the land complained of was not reasonable. A reasonable use of land may become unreasonable if the extent of that use becomes excessive or abnormal (*Bland v Yates* (1914) 58 S.J. 612). Use of land
is not reasonable merely because employment might result (Cambridge Water Co v Eastern Counties Leather [1994] 2 A.C. 264). In Ellison v Ministry of Defence (81 Build. L.R. 101), Judge Bowsher QC held that construction of Bulk Fuel Installations to hold aviation fuel at Greenham Common was for the benefit of the community, taking the community as the “national community as a whole”. This case was not cited in Dennis v Ministry of Defence (2003) 19 E.G. 118 (C.S.). and its applicability outside its own facts may be doubted in the light of subsequent case law – see Dennis v Ministry of Defence (2003) 19 E.G. 118 (C.S.); McKenna v British Aluminium [2002] Env. L.R. 30 and Douglas v Hello! Ltd [2001] 2 All E.R. 289.

Consent. Consent may prevent a claim for nuisance (or Rylands v Fletcher) so that a defendant has a good defence if the claimant consented to the acts giving rise to the alleged nuisance provided that the acts/omissions come within the scope of the consent and the defendant has acted without negligence – see Colour Quest Ltd v Total Downstream UK Plc [2009] EWHC 823 (Comm), and cases cited therein at para. 395ff.

Character of neighbourhood. In nuisances of the first two types the character of the neighbourhood has no relevance (St Helen’s Smelting Co v Tipping (1865) 11 H.L. Cas. 642; Halsey v Esso Petroleum Co Ltd [1961] 1 W.L.R. 683). This principle also applies to interference with easements (Horton’s Estate Ltd v James Beattie Ltd 1927] 1 Ch. 75) and also to restrictive covenants – see Hughes v Riley [2005] All E.R. (D) 40 (Jul). After the House of Lords' decision in Hunter v Canary Wharf Ltd aligning the third type of interference with the previous two as being an interference with property-related rights, it is unclear whether in the third type of nuisance the character of the neighbourhood retains any role. However, this point was not expressly addressed in Hunter v Canary Wharf Ltd, and the better practice is to assume that it is a relevant consideration until expressly disavowed by the courts.

The locality, practice and traditions in the area may thus affect whether a nuisance of the third type has been committed (Sturges v Bridgman (1879) 11 Ch. D. 852; Bosworth-Smith v Gwynnes (1920) 89 L.J. Ch. 368), and it is good practice to state the nature of the location affected in the statement of case. If the nature of the neighbourhood is relevant to the defence, this must be specifically pleaded.

Where it is part of the defence that a statute has authorised that the character of a neighbourhood be changed, for example, from that of a village atmosphere to one of an industrial environment (see
Allen v Gulf Oil Refining Ltd [1981] A.C. 1001 for the defence of statutory authorisation) that change should be specifically pleaded. A change in the character of the neighbourhood following a development permitted by a planning permission should also be specifically pleaded, but note that it is the implementation of the planning permission which may give rise to the relevant change in the type of neighbourhood (Gillingham BC v Medway (Chatham) Dock Co [1993] Q.B. 343); and Watson v Croft-Promo Sport Ltd [2009] EWCA Civ 15. Note, however that the Court of Appeal said that neither tortuous activity nor intensification of a particular use can change the character of a locality planning permission in itself does not permit a nuisance (Wheeler v JJ Saunders Ltd [1995] 2 Al E.R. 697). A local planning authority has no authority to authorise a nuisance by grant of a planning permission. Watson v Croft Promo Sport Ltd (supra). See, too, Mid-Suffolk DC v Clarke [2006] L.L.R. 284 – an environmental authorisation no defence per se to public nuisance cases. However, see Bar v Biffa Waste Services Ltd [2011] EWHC 1003 (TCC) where, in the absence of claims of negligence, no claim in nuisance will lie against an operator (there of a landfill site) which had complied with the terms of its environmental permit. In Hunter v Canary Wharf Ltd [1997] A.C. 655 it was said that it would “be wrong to allow the private rights of third parties to be taken away by a permission granted by the planning authority to the developer”, per Lord Hoffmann and Lord Cooke). However, in that case the House of Lords held that there was no case made out there in nuisance arising from the mere fact that a building was in place in accordance with planning provisions.

Standard of comfort. A nuisance of the third type may arise when the level of interference is such that the comfort enjoyed by the average person is affected. The test is objective: Hirose Electrical UK Ltd v Peak Ingredients Ltd [2011] EWCA Civ 987 at [1]. Harm to abnormal sensitivities is not in principle a nuisance (Robinson v Kilvert (1889) 41 Ch. D. 88; Bridlington Relay td v Yorkshire Electricity Board [1965] Ch. 436).

It is increasingly likely that compliance with, or only minimal breach of, limits set for the protection of public health (especially if set on a precautionary basis, as to which the relevant underlying purpose should be investigated (e.g. any EC Directives or World Health Organisation Guidelines being implemented by national regulation)), will mean that there has been no actionable nuisance, cf. Murdoch v Glacier Metal Co Ltd [1998] Env. L.R. 732, CA – noise levels only just above World Health Organisation levels for identifying disturbance to sleep). Similar reasoning has been adopted in “environmental” judicial review cases – see R. (on the application of Vetterlein) v Hampshire CC [2002] J.P.L. 289. It is good practice to obtain expert evidence on levels and degrees of noise,
obnoxious fumes and smells encountered and plead any levels which have been recorded and said to give rise to the instances of nuisance alleged.

Reasonable care. Reasonable care is relevant in cases where liability is said to arise as a result of the escape of things which are naturally on the land (Leakey v National Trust [1980] Q.B. 485; Russell v Barnet LBC (1984) 271 E.G. 699; Goldman v Hargrave [1967] 1 A.C. 645, PC; although see Bruce v Caulfield (1918) 34 T.L.R. 204 in which no liability attached to the defendant for the fall of a poplar tree in an exceptional gale). The test of knowledge of the danger posed by the nuisance is “knowledge or presumed knowledge”. The fact that damage is greater than that foreseen, where of the relevant type, will not afford a defence (Holbeck Hall Hotel Ltd v Scarborough BC [2000] Q.B. 836 CA). However, where a liability may arise for a defendant along the lines of Holbeck Hall Hotel Ltd v Scarborough BC [2000] Q.B. 836 and Bybrook Barn Centre Ltd v Kent CC [2000] E.G. 158, it has been emphasised that that liability is a measured duty of care, with a lower potential to impose on a landowner than under nuisance or Rylands v Fletcher. Even so, no such duty should be imposed before the defendant is put on notice of what he is required to do (see Stockport Metropolitan BC v British Gas Plc [2001] Env. L.R. 763 at [53]).

Reasonable care is relevant generally to cases of adopting or continuing a nuisance – see Transco Plc v Stockport MBC [2004] 2 A.C. 1 at [96], per Lord Walker.

It appears that a danger due to lack of support is to be dealt with along the Leakey v National Trust principles (Holbeck Hall Hotel Ltd v Scarborough BC [2000] Q.B. 836 CA. But where the lack of support is alleged to arise from non-feasance, as opposed from misfeasance, the degree of damage that is foreseeable in the circumstances is relevant (ibid).

The Court of Appeal has upheld application of the principles in Leakey v National Trust to cases where support has been withdrawn, where an easement of support had been established. There may now be said to be, in some circumstances, a duty on the owner of the supporting land or building to take positive steps to maintain and continue support (including to protect against physical damage likely to result from wind effects) – Rees v Skerrett [2001] 40 E.G. 163 CA at [31]. Such positive steps may be required at the time of, or consequential on, his act of, for example, demolishing his own property (ibid. at [33]). (Note that this case is able to be cited under the Practice Direction (Citation of Authorities) [2001] W.L.R. 1001, although only one party attended, as the ruling is intended to extend the present law (ibid. at [39]).
The measure of reasonableness will be assessed against the particulars of the defendant, including, it appears, their financial resources (Goldman v Hargrave [1976] 1 A.C. 645 PC). This test applies where the source of a nuisance was created at a time when it was not reasonably foreseeable that the relevant type of harm would be created, and where, when such type of damage so arising subsequently becomes reasonably foreseeable, the source of the damage suffered from the nuisance is “out of control” of the defendant (Cambridge Water Co v Eastern Counties Leather [1994] 2 A.C. 264).

In Marcic v Thames Water Utilities Ltd [2004] 1 All E.R. 135; [2004] B.L.R. 1; 91 Con. L.R. 1, the House of Lords upheld arguments, rejected by the Court of Appeal, that there could be no claim in nuisance where a sewerage undertaker was charged by statute to provide a service, necessarily limited as to extent and degree by statute-based financing rules applicable to the undertaker. Due to the fact that the pricing scheme was devised by statute and that there was nothing to indicate that Parliament had required the defendant to bear an excessive burden as compared with the interests of the community, there could in such circumstances be no claim under art. 8 ECHR either.

This ruling should be read in the light of the extensive ruling in Dobson v Thames Water Utilities Ltd [2007] EWHC 2021 (TCC) where nuisance arising from operation of infrastructure assets of a sewerage undertaker may not be precluded if the action does not conflict with the statutory provision in question.

Isolated act or state of affairs. A single negligent act does not necessarily constitute a private nuisance (SCM United Kingdom Ltd v WJ Whittall & Son Ltd [1971] 1 Q.B. 337); but a nuisance may be caused by an isolated incident of damage resulting from a course of conduct (see British Celanese Ltd v AH Hunt (Capacitors) Ltd (1969) 1 W.L.R. 959). See also Spicer v Smee [1946] 1 All E.R. 489 (defective electric wiring causing fire); Bolton v Stone [1951] A.C. 859 (cricket ball); and Caste v St Augustine Links Ltd (1922) 38 T.L.R. 615 (golf ball); Crown River Cruises Ltd v Kimbolton Fireworks Ltd [1996] 2 Lloyd’s Rep. 533 (one-off firework display); and Colour Quest Ltd v Total Downstream UK Plc [2009] EWHC 823 (Comm) (one-off petroleum explosion).

The “negligent” interruption of a supply of gas by a third party has been held not to actionable as a private nuisance, on the grounds that it does not involve an invasion of any substance or form of
energy into a person’s property – Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd [2011] 1 B.L.R. 173, per Stanley Burnton J.

Relevant type of damage. An actionable nuisance arises where a reasonably foreseeable (relevant) type of damage is caused (Cambridge Water Co v Eastern Counties Leather Plc [1994] 2 A.C. 264) or impending. The concept of reasonable foreseeability of damage really “concerns ... not that of foreseeability alone, but of foreseeability as an aspect of reasonableness” – see Network Rail Infrastructure Ltd (t/a Railtrack Plc) v CJ Morris (t/a Soundstar Studio) [2004] EWCA Civ 172 – and thus encompasses also aspects of remoteness (at [33], per Buxton L.J.). The fact that damage is greater than that foreseen, but still of the relevant type, will not afford a defence (Holbeck Hall hotel Ltd v Scarborough BC); nor will the fact of the precise manner in which the relevant type of damage is caused (cf. In a negligence case, Jolley v Sutton LBC [2000] 1 W.L.R. 1082 HL). Reasonable foreseeability must imply some understanding of the chain of events which is putatively foreseen (Arscott v Coal Authority [2004] EWCA Civ 892 CA at [58]). Furthermore, damage is foreseeable only when there is a real risk of damage, that is, one that would occur to the mind of a reasonable person in the position of the defendant, and one that he would not brush aside as far fetched (Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (Wagon Mound No.2) [1967] 1 A.C. 617 at 643). This dictum was applied to the detriment of a claimant in Hamilton v Papakura DC [2002] UKPC 9, February 28, 2002, where the Privy Council said further, in the context of that case, “The mere fact that certain herbicides may kill or damage certain plants at certain concentrations does not itself establish such a risk” (at [39]). See, also Coleman v British Gas Services Ltd, February 27, 2002, Lawtel HC, where the Court rejected a claim for psychological injury arising from a fear of carbon monoxide poisoning induced after a period of potential actual harm with no physical harm resulting.

For the third type of nuisance no actual financial loss need be suffered. In such cases, if diminution of capital value cannot be established because there is no permanent loss, diminution in letting value may be used. If that is not feasible by reason of reasonableness or practicality, general loss of amenity may be used. Physical inconvenience and distress is not the appropriate basis. See generally Dobson v Thames Water Utilities Ltd and OFWAT [2007] EWHC 2121 (TCC) and at [2009] EWCA Civ 28. ECHR art. 8 damages would not normally be recoverable to “top up” private nuisance damages under English law, as the latter would be likely to satisfy the ECHR requirements for “just satisfaction”.

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Where damage has been suffered but that damage can only be said to have become reasonably foreseeable at a date later than the initial acts/omissions giving rise to the state of nuisance, no liability attaches in respect of those earlier acts/omissions, save where the consequences of those earlier acts still pose a threat of damage or are causing damage in which case liability will arise if the source of the damage is not “out of control” of the defendant (see *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 A.C. 264; and *Anthony v Coal Authority* [200] EWHC 1654 (Q8), and the comments under *Reasonable care*). Such avoidance of liability should be pleaded specifically by the defendant.

Causal effect. The acts of the defendant asserted must be an effective and substantial cause of the damage alleged (*Patterson v Humberside CC* (1996) 12 Const. L.J. 64). Thus they must have “materially contributed” to the damage alleged to have been suffered – see *Loftus-Brigham v Ealing LBC* [2003] EWCA Civ 1490 (citing the *Paterson* ruling with approval); applied in *Berent v Family Mosaic housing* [2011] EWHC 1353 (TCC).

**Instances of private nuisance.** The specific instance(s) of nuisance include:

1. Trees overhanging a neighbour’s land (*Lemmon v Webb* [1859] A.C. 1). It is submitted that the cases where nuisance was held to arise from trees overhanging a highway causing damage in some way may, following *Hunter v Canary Wharf Ltd* (above), needs to be revisited in this respect (such a revisit would be in line with the approach promoted by *Cambridge Waters Ltd v Eastern Counties Plc* (above) to align the applicable principles in all claims based in nuisance regardless of factual circumstances – see, too, a similar approach proposed with regard to claims of nuisance by water, *Home Brewery Plc v Davis & Co* [1987] Q.B. 339. The same alignment might be proposed to apply to the “highway” cases – see, by way of example, *Dymond v Pearce* [1972] 1 Q.B. 496, which result might thus need to be revised) – see, as example pre-*Hunter*, *Nobel v Harrison* [1926] 2 K.B. 332; and post-*Hunter*, *Hurst v Hampshire CC* [1997] 44 E.G. 206 CA, in so far as the judgment suggested a claim could lie at the suit of a highway user. It has been held that by adoption of a highway sufficient property vests in the local authority with regard to pre- and post-adoption trees so as to ground a claim in nuisance, and that absence of a claim for breach of statutory duty did not prevent a claim in nuisance: *Chapman v Barking and Dagenham LBC*, Transcript, July 13, 1998, CA.

3. Causing physical damage to a neighbour’s land, such as by causing water to overflow (Sedleigh-Denfield v O’Callaghan [1940] A.C. 880; and Lambert v Barratt Homes Ltd (Manchester Division) [2009] All E.R. (D) 275 (Mar), upheld in part on appeal [2010] EWCA Civ 681). See also blue Circle Industries Ltd v Ministry of Defence [1999] Ch. 289 or damage by radioactive materials.

4. Causing physical damage to a neighbour’s land by vibrations (Grosvenor Hotel v Hamilton [1894] 2 Q.B. 836).


6. Damage to interest in property be interference with amenity rights (St Helens Smelting Co v Tipping (1865) 11 H.L.C. 62 – smell and noise) including by such diminution of a right to light as to cause a nuisance – see Midtown Ltd v City of London Real Property Co Ltd, Joseph v City of London Real Property Co Ltd [2005] All E.R. (D) 164 (Jan); and Regan v Paul Properties DPF (No. 1) Ltd [2007] Ch. 135.

7. Glare from mirror-clad buildings (Bank of New Zealand v Greenwood (1984) N.Z.L.R. 525). (Whether this case remains good law after Hunter v Canary Wharf Ltd [1997] A.C. 655 is questionable on the grounds that the House of Lords considered that for a nuisance there had to be something emanating (generally) (but in fact not necessarily, see Hubbard v Pitt [1976] Q.B. 142) from the defendant’s land affecting the interest in land of the claimant. See Lord Goff, at 686, considering this case as an example of these that were “relatively rare” but in terms that suggest, it is submitted, rejection as valid cases of nuisance; and Lord Lloyd of Berwick, at p.700, suggested that the case might not be easy to reconcile with the approach requiring such emanation See also Birmingham Development Co Ltd v Tyler [2008] EWCA Civ 859 at [51], supporting (without substantive discussion) Lord Goff’s position).
8. Barking dogs (Phillips v Crawford (1973) 72 L.G.R. 199 Clemons v Stewart (1969) 113 S.J. 427; and howling dogs – Manley v New Forest DC [2007] All ER (D) 76 (Nov.).) (The Noise Act 1996 provides a degree of protection against noise at night by creating a criminal offence against this, subject, however, to the local authority adopting the relevant powers provided. This Act does not create any cause of action for breach of a statutory duty (Issa v Hackney LBC [1997] 1 All E.R. 999). Note that inadequate sound insulation does not appear to constitute a statutory nuisance under s.70 of the Environmental Protection Act 1990) Vella v Lambeth LBC [2005] EWCA 2473 (Admin) CA).


Acts intending to annoy. It has been held that an act which is done intending to annoy and actually annoying may be actionable even in circumstances that if done without the intention they would not be actionable as nuisance (Hollywood Silver Fox Farm v Emmett [1936] 2 K.B. 468). In Hunter v Canary Wharf Ltd, it was suggested obiter that doing a malicious act for a purpose of interfering with (there, television reception) should be actionable in nuisance when without the malice it would not be actionable (per Lord Cooke of Thompson, at 721). It has been said, in the context of economic torts, that an act otherwise lawful although harmful does not become actionable because done simply with an intent to annoy – OBG Ltd v Allan [2007] I.R.L.R. 608 at [144]. See, too, to like effect C v D [2006] EWHC 166 (QB) at [46]. It is unclear whether an intentional act designed to cause distress would allow for damages for distress, which damages are otherwise irrecoverable. Such a cause of action and damages recoverable may be actionable for breach of privacy, and it is unclear whether the analogous case would also apply to nuisance – see Wainwright v Home Office [2004] 2 A.C. 406; [2003] 4 All E.R. 969.

Who may sue (private nuisance): The claimant should, generally, indicate that s/he is the person with a proprietary right in the land and/or the person with an exclusive right to possession or
occupation of the land affected (see Newcastle under Lyme Corp v Wolstanton Ltd [1974] Ch. 427; Hunter v Canary Wharf Ltd, above, and Delaware Mansions Ltd v City of Westminster (1998) 61 Con. L.R. 10), or has a sufficient interest, such as a “tolerated” trespasser. Note Harrow LBC v Qazi [2004] 1 A.C. 983, where a person holding over after termination of a tenancy was held to be allowed to sue to protect ECHR art. 8 rights as regards protection of rights to his “home”. It is unclear what effect this case will have as regards nuisance actions as the court held that art. 8 did not secure proprietary rights or contractual rights to possession. It would seem from this case though that no action will attach where there is no proprietary interest, but art. 8 may still protect from the effects of an alleged nuisance provided the effects are such as to reach the high threshold for engagement of art. 8 rights in this regard (see also Khatun v United Kingdom (above) and also Dobson v Thames Water Utilities Ltd and OFWAT [2007] EWHC 2121 (TCC)). In Delaware Mansions Ltd v City of Westminster [2001] 4 All E.R. 737; [2001] 3 W.L.R. 1007 HL, a subsequent purchaser of land was able to sue for damages on the basis that there was a continuing nuisance and even though the major part of the physical damage had been suffered before purchase. If a claimant cannot prove title but can prove exclusive possession rights as against the defendant (even though possession would be wrongful against the true owner) the claimant can still bring a claim in nuisance. A claimant may therefore be a person who is in the process of acquiring title under the Limitation Act 1980. A reversioner is entitled to sue also in the event that there is damage to his rights in reversion, even in the case of a temporary nuisance; John Smith & Co (Edinburgh) Ltd v Hill [2010] EWHC 1016 (Ch). A person may sue for continuance of a nuisance, although it was begun before he became the occupier (see Masters v Brent [1978] Q.B. 841).

Mere licensees and trespassers, however, have no right to sue in nuisance, although a “tolerated” trespasser (the utility of such a term was doubted (in context of Housing Acts and Rent Acts in Knowsly Housing Trust v White [2008] UKHL 70 at [79]-[93]), per Lord Neuberger) might – see Pemberton v Southwark LBC [2001] 1 W.L.R. 1672 CA. In Cheung v Southwark LBC [2008] LLR 34 the high Court held that a person suing as sole director and shareholder of a company which was the legal owner of the land in question and do not have sufficient interest to have standing to sue in nuisance. The requirement that there be an interference with the claimant’s land appears wide enough to encompass a nuisance to a barge which was permanently attached to a mooring on the river-bed, the site of which was occupied under a licence – see Crown River Cruises Ltd v Kimbolton Fireworks Ltd [1996] 2 Lloyd’s Rep. 533.

Who may be sued (private nuisance) Defendants may include one or other of the following:
1. The actual creator. This person will be liable, whether or not in occupation of the land from where the nuisance emanates (Hall v Beckenham [1949] 1 K.B. 716), and he remains liable for the acts of nuisance occasioned prior to any on-sale or leasing of any relevant land. The wrong-doer may create the nuisance either personally or by his servants or agents or indeed others (see, by way of example, Page Motors v Epsom & Ewell BC (1981) 125 S.J. 590);

2. The person who authorised the nuisance, as where a local authority gave permission for go-kart racing on its land causing a noise nuisance – see Tetley v Chitty [1986] 1 All E.R. 663; see also Winch v Mid Bedfordshire DC [2002] All E.R. (D.) 380, where the local authority was held liable in nuisance as occupier entitled to possession and with the means to abate the nuisance emanating therefrom by licensees, and failing to do so within a reasonable time; and see, too, on similar lines as to defendants able to be those with power to abate and failing to take steps to prevent or abate Octavia Hill Housing Trust v Terri Brumby [2010] EWHC 1793 (Q8). See, too, Southwark BC v Mills [2001] 1 A.C. 1.

3. A person whose independent contractor creates a private nuisance if it was foreseeable that the work might create it (see Spicer v Sme (1946] 1 All E.R. 489, and Salsbury v Woodland [1970] 1 Q.B. 324). The general principle is that an employer is not liable for the torts of independent contractor except where the activities were ultra-hazardous only applied to activities that were exceptionally dangerous whatever precautions were taken: Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH [2008] EWCA Civ 1257; and Tinseltime Ltd v Roberts [2011] EWHC 1199 (TCC).

4. The occupier of land, even if he has not created the nuisance, if he has continued it during the period of his occupancy (see White v Jameson (1874) L.R. 18 E.Q. 303; and Sedleigh-Denfield v O’Callaghan [1904] A.C. 880; “an occupier of land ‘continues’ a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take reasonable means to bring it to an end though with ample time to do so”, and he “adopts it if he makes any use of the ... artificial contrivance which constitutes the nuisance”; and see also Potter v Mole Valley (1982) C.L.Y. 2266).

5. An assignee of a reversion of a building so constructed as to cause a noise nuisance to the tenant is liable for continuing it with knowledge (see Sampson v Hodson-Pressinger [1981] 3 All E.R. 710).
6. The occupier who knows or ought to know that a nuisance has been created by a trespasser (see Sedleigh-Denfield v O’Callaghan above). However, a defendant from whose premises trespassers burgled the plaintiff’s adjoining premises was held no liable in Perl (Exporters) Ltd v Camden LBC [1984] Q.B. 342; and defendants were held not liable for trespassers who set fire to their premises, so causing damage to the plaintiff’s adjoining premises in Maloco v Littlewoods Organisation Ltd [1987] 2 W.L.R. 480; and see also on this point Anthony v Coal Authority [2005] EWHC 1654 (QB).

7. A person who fails to repair his property resulting in damage to the claimant’s adjacent property (see Bradburn v Lindsay [1983] 2 All E.R. 408); see also Rees v Skerrett [2001] 40 E.G. 163.

8. A landlord who, at the date of letting, knows or ought to know of a condition giving rise to nuisance (see St Anne’s Well Brewery Co v Roberts (1928) 140 L.T. 1) (but simply being a landlord of premises (not themselves a nuisance) will not make the landlord liable for the tenant’s nuisance: Lawrence v Fen Tigers Ltd [2011] EWHC 360 (QB); a landlord who has an insufficient degree of control over the premises in question to be able to prevent a nuisance arising will not be liable – Habinteg Housing Association v James (1995) 27 H.L.R. 299, but see Ribee v Norrie [2011] L & T.R. 23 CA where the landlord had power to exercise some control over tenants by regulations or notices; nor will a landlord whose tenants commit acts of nuisance not involving use of the premises let – Hussain v Lancaster CC [2000] Q.B. 1; [1999] 2 W.L.R. 1142. This position is not altered since the Human Rights Act 1998 (Mowan v Wandsworth LBC [2001] B.L.G.R. 228) but a landlord who covenants to repair, or reserves the right to repair, will be liable if a nuisance arises from want of repair during the tenancy (Wilchick v Marks [1934] 2 K.B. 56; Heap v Ind Coope and Allsopp Ltd [1940] K.B. 476 and Spicer v Smee [1946] 1 all E.R. 489), or if the landlord has an implied right to enter and repair (see Mint v Good [1951] 1 K.B. 517), but only in so far as the lease so provides for the positive obligation to act (see Baxter v Camden LBC [1999] 3 W.L.R. 939 HL, and Defective Premises Act 1972 s.4).

9. Harassment by telephone calls was considered as capable of amounting to a nuisance by the Court of Appeal in Perharic v Hennessey Transcript, June 9, 1997, CA, and in Khorasandjian v Bush [1993] Q.B. 727 (Note, however, that in Hunter v Canary Wharf Ltd [1997] A.C. 655 the
HC disapproved of the use in that case of private nuisance in the absence of a tort causing distress by harassment).

**Damages.** The general rule is that the measure of damage is the diminution in value caused to the interest affected. If diminution in capital value does not raise, diminution in letting value may apply, unless not reasonable or practicable in which case diminution in amenity value may apply – see *Dobson v Thames Water Utilities and OFWAT* [2007] EWHC 2021 (TCC); and in the Court of Appeal [2009] EWCA Civ 28. Damages are generally assessed as the date of breach, but this may be subject to exceptions, including due to the claimant’s impecuniosity – *Alcoa Minerals of Jamaica Inc v Broderick* [2002] 1 A.C. 371. The cost of repair is not therefore generally recoverable, but may be awarded if it constitutes a reasonable yardstick by which to assess diminution in value (see *Heath v Keys* [1984] C.L.Y. 3568; and *Perry v Sidney Phillips & Son* [1982] 1 W.L.R. 1297 where the claimant intended to do the work and make good the damage). Where the cost of repair is accepted as the correct basis for the case, the damages may be assessed by reference to the cost of repair at a time later than the time when damages was inflicted (see *Dodd Properties Ltd v Canterbury CC* [1980] 1 W.L.R. 433, and *Ward v Cannock Chase DC* [1986] Ch. 546).

As a result, a defendant is liable to compensate for the restoration of land to the state it was in prior to the damage caused by the nuisance complained of. If the claimant goes further than this in carrying out, as mitigation, restoration works, he can only recover to the extent that those further steps were, in the circumstances, reasonable – *Skandia Property (UK) v Thames Water Utilities Ltd* [1999] B.L.R. 338. (This was a claim under s.6(1) of the Water Act 1981, “Where an escape of water, howsoever caused, from a pipe vested in any statutory undertake causes loss or damage, the undertaker shall be liable for the loss or damage”).

Where the damage alleged is to the amenity value damages are not assessed on the basis that a person has suffered, for example smells, and so been disturbed in their quiet enjoyment, but on the basis of an interference with the interest in land. Note, however, that if a claimant has not actually suffered the nuisance (for example, because not at the property in question) any damages will be only nominal – *Dobson v Thames Water Utilities Ltd and OFWAT* [2009] EWCA Civ 28. It is not clear on what basis damages are assessed in the latter case, but see *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344, as recommended by the House of Lords in *Hunter v Canary Wharf*. In the latter case, Lord Hoffmann expressly disavowed a comparator with personal injury cases, and so rejected the approach in *Bone v Seale* [1975] 1 W.L.R. 797. See also *Dobson v Thames Water Utilities*

Any losses claimed must result as a natural consequence of the nuisance alleged (see *Grosvenor Hotel Co v Hamilton* [1894] 2 Q.B. 836). An essential quality of economic loss claimed is that it had to be closely associated with the physical damage and the work one to repair or replace the damaged property: *Network Rail Infrastructure Ltd v Conarken Group Ltd* [2010] EWHC 1852 (TCC). (Upheld on appeal: [2001] EWCA Civ 644). The latter is further authority for claiming loss of use and loss of profit damages in physical damage negligence (capable also of equating to trespass).

Consequential losses may be claimed such as losses of a profit-making nature, including rental income – see *Hunter v Canary Wharf*. These must be pleaded as special damages. The House of Lords case *Transco Plc v Stockport MBC* [2004] 2 A.C. 1 suggests further that there is a necessary link as to recoverability of given damages to the proprietary interest in issue, and as suggestion in *Hunter v Canary Wharf*, not all “damages” which are reasonably foreseeable may be recoverable if not linked to the proprietary interest at stake.


**Claimant’s conduct.** It is in general no defence that the claimant came to the nuisance by occupying land adjoining the source of the nuisance (*Bliss v Hall* (1834) 4 Bing. N.C. 183; *Miller v Jackson* [1977] Q.B. 966), save in a particular case. In *Baxter v Camden LBC*, above it was held that this principle had no application in cases of alleged nuisance between landlord and tenant, where the principle of *caveat lessee* should apply, and the fiction that the tenant is deemed to take the premises as they were.

**Act of trespasser.** There is no liability for a nuisance caused by a trespasser, at least not generally until after the occupier has knowledge, actual or constructive, of the existence of the nuisance, and is in a position to take effective steps to prevent it (see *Sedleigh-Denfield v O’Callaghan* [1940] A.C. 880; *Page Motors v Epsom & Ewell BC* (1982) 80 L.G.R. 337; and *King v Liverpool City Council* [1986] 1 W.L.R. 890).
Public & Private nuisance. Private nuisance and public nuisance actions are not mutually exclusive on any given set of circumstances – Colour Quest Ltd v Total Downstream UK Plc [2009] EWHC 540 (Comm). In a 2002 ruling on the nature of public nuisance (Wandsworth LBC v Railtrack Plc [2002] 2 W.L.R. 512), the Court of Appeal held that the liability of the landowner did not depend on whether the nuisance was created by his own or a third party’s activities or by natural causes; that if the owner was aware of the existence of the nuisance, had the means and opportunity to abate it and had failed to do so, then he was liable; that a claim in public nuisance could, unlike a case of private nuisance or negligence, be established without proving the existence and breach of a duty of care; and that, since interference with the right of the public in general to enjoy the use of the highway in reasonable comfort and convenience could amount to a public nuisance. Note that in Mid-Suffolk DC v Clarke [2006] L.L.R. 284, it was held that public nuisance and statutory nuisance regimes are “quite distinct,” and an authorisation provided no defence per se to public nuisance actions.

Public nuisance

Public nuisance is a long-established common law tort and a crime. It is still relevant in England and Wales and in other common law jurisdictions notwithstanding the growth of statute law. The scope of public nuisance has narrowed somewhat following the decision of the House of Lords in the conjoint appeals of R. v Rimmington (Anthony) [2005] UKHL 63; [2006] 1 A.C. 459; cases involving morals or outraging public decency are no longer covered. Public nuisance remains applicable to serious behavioural and environmental forms of nuisance breaching the rights of the public in common. It applies to a wide range of both these forms and there may be an overlap with a number of statutory provisions as well as with private nuisance.

The crime and tort of public nuisance is defined in Archbold (Ch.31 para.31-40) as resulting either from an act not warranted by law or an omission 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"

This definition is complex. It applies to a very wide range of circumstances, including both behavioural and environmental forms of nuisance. Examples where civil actions in tort have succeeded include:

- allowing droppings from pigeons roosting under a railway bridge to accumulate on the highway below (Wandsworth LBC v Railtrack Plc [2001] EWCA Civ 1236; [2002] Q.B. 756);
- quarry-blasting near a built-up area (Attorney General v PYA Quarries Ltd (No.1) [1957] 2 Q.B. 169);
- emission of noxious smells from a chicken-processing factory (Shoreham by Sea Urban DC v Dolphin Canadian Proteins 71 L.G.R. 261);
- allowing refuse and filth to be deposited on vacant land in a densely populated part of London (Attorney General v Tod Heatley [1897] 1 Ch. 560);
- holding noisy events, such as motocross (East Dorset DC v Eaglebeam Ltd [2006] EWHC 2378 (QB); [2007] Env. L.R. D9);

A civil action in public nuisance can be pursued by a private individual if he can show special damage over and above that suffered by the community at large. A case may be taken over by the Attorney-General acting on behalf of the claimant as a relator action. Local authorities can bring civil or criminal proceedings in their own name for public nuisance under s.222 of the Local Government Act 1972, where this is necessary to protect the rights or interests of the community.

Usually the remedy being sought in a civil action is an injunction; proceedings take place either in the High Court or the county courts. The civil courts can also make declarations and award special damages. In Corby, 18 claimants received compensation as special damages, as they were able to prove that serious birth defects had been caused by the failure of the local authority to supervise properly the remediation of land in which a disused steel works was located.

In Scotland there is no distinction between public and private nuisances; nuisances affecting public places are usually dealt with under negligence principles. Public nuisance is not a criminal offence under Scots law. The pursuer of a civil action does not need to show that he suffered special damage and relator proceedings are not available in Scotland.

Prosecutions for public nuisance in England and Wales have succeeded in a wide range of circumstances, including:
- allowing a field to be used for holding an all-night "rave" (R. v Shorrock (Peter Coar) [1994] Q.B. 279;
- conspiring to commit acts of terrorism (R. v Bourgass (Kamel) [2006] EWCA Crim 3397; [2007] 2 Cr. App. R. (S.) 40);
- conspiring to switch off the floodlights at a football match so as to cause it to be abandoned (R. v Chee Kew Ong [2001] 1 Cr. App. R. (S.) 117);

Public nuisance is a common law offence, triable either way. Offences tried in the Crown Court attract a maximum penalty of an unlimited fine and/or a sentence of life imprisonment. Maximum penalties in the magistrates' courts are an unlimited fine and/or 6 months' imprisonment.

- Many of the wrongs that were historically punishable by prosecution or resulted in the grant of an injunction under the common law of public nuisance are nowadays the subject of specific legislation. Statutes intended to control the activities of prostitutes, terrorists, drug-dealers and other undesirables are generally preferred to public nuisance. Arguably it would be improper to charge for a common law offence where there is a relevant and more precisely defined statutory offence available. Prosecutors have continued to use public nuisance where the maximum sentence for a kindred statutory offence is seen as too low or where the offending behaviour does not quite match the statutory offence.

- Bourgass had been the prime mover in a conspiracy to commit acts of terrorism and was sentenced to 17 years' imprisonment by the Crown Court. The defendant was charged with conspiracy to cause a public nuisance, involving the use of poisons, intended to destabilise the community by causing disruption, fear and injury. The Court of Appeal did not accept that a charge based on s.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 his culpability and so upheld the sentence of the Crown Court. Bourgass confirms that the common law offence remains available where the extent of criminality is greater than that envisaged by the statute applying to a similar area.

- The appeals of Rimmington and Goldstein provided an opportunity for the House of Lords to examine public nuisance in depth and is the leading case. Rimmington concerned a person who was engaged in a campaign over several years of sending racially abusive hate mail to a large number of individuals. It was found 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 which injure the public collectively. Lord Rodger opined: "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" (Rimmington [2005] UKHL 63 at 47).

The common injury requirement is fundamental to the tort of public nuisance just as it is to the crime. Rimmington was followed by a rigorous examination in Colour Quest Ltd v Total Downstream UK Plc [2009] EWHC 540 (Comm); [2009] 2 Lloyd's Rep. 1 of the common injury requirement. This was a civil case of environmental public nuisance: the result of a massive explosion of gas at the Buncefield oil storage depot in December 2005. The High Court in Colour Quest also examined the relationship between the separate torts of public and private nuisance. This decision affirms that a series of private nuisances, comprising similar but separate breaches of the rights of individuals, cannot amount to a public nuisance where there is absent a common element of public injury. A breach of the rights of the public is a fundamental requirement of public nuisance, though only a cross-section of the community may be affected.

The House of Lords in Goldstein confirmed that a fault element is required to establish the offence of public nuisance: the prosecutor has to prove that the person responsible knew, or ought to have known, of the harmful effects on the public. Some older public nuisance cases have found that property adjoining the highway in a dangerous state were offences of strict liability, but these are doubtful given the decision in Goldstein.

Goldstein concerned a 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 a 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 fault element required for a public nuisance offence; he had not foreseen the consequences of his actions and could not reasonably have been expected so to do.

The definition of public nuisance given in Archbold (Ch.31 para 31-40) includes circumstances where the life, health, property or comfort of the public is "endangered". The concept of endangerment has not been scrutinized by the courts in relation to public nuisance. Whether it amounts to a higher standard than "unreasonable in the circumstances" is a moot point on which there is no decided authority.

An unreasonable or unlawful interference in proprietorial rights, or with comfort or amenity comprises the threshold in private nuisance. Such an interference that engages the rights of the public in common could also be a public nuisance. The threshold for both private and public
nuisance is quite a high one, and trivial interferences with amenity fall below the nuisance threshold.

Environmental forms of public nuisance can be prosecuted as common law offences by local authorities where the harm is particularly serious or where statutory provisions do not adequately cover the type of harm. Most public and private nuisances affecting amenity fall within the scope of Pt III of the Environmental Protection Act 1990 and will be regulated as statutory nuisances. Specific types of nuisance and circumstances that can amount to a statutory nuisance are set down in s.79(1) of the Act. Section 79(1) is divided into two limbs: the nuisance limb includes some types of private and public nuisances, the second limb applies to circumstances that are "prejudicial to health" and may not be a nuisance. The Act applies to England and Wales and with some modifications to Scotland; the equivalent legislation in force in Northern Ireland is the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011.

Statutory nuisances are regulated by local authorities. Section 80 of the Environmental Protection Act 1990 sets down their powers and duties, including: the service of abatement notices on persons responsible, prosecuting the summary-only offence of breaching an abatement notice, applying for High Court injunctions. "Persons aggrieved" by statutory nuisances can take their own criminal proceedings in the magistrates' courts against their neighbours (or landlords) under s.82 of the Act.

Public nuisance provides the basis for controlling some forms of anti-social behaviour. The Licensing Act 2003 includes the prevention of public nuisance as one of four licensing objectives. Noise nuisance, light pollution, noxious smells and litter are the main issues affecting people living and working in the neighbourhood of the licensed premises which the public nuisance objective is intended to address. Licensing authorities can attached conditions to licences concerning the prevention of public nuisance with regard to premises selling or supplying alcohol and those providing regulated entertainment.

As public nuisance is not qualified or narrowed down in the Licensing Act 2003 its broad common law meaning is retained. Although there is no restriction as to the type of public nuisance (it could include obstruction to the highway, for example) it would have to be relevant to the purpose of the Licensing Act.

Public nuisance actions are indictable offences, such as obstructions to highways (Lyons v Gulliver [1914] 1 Ch. 631) or motile sexually explicit telephone calls – R v Kavanagh [2008] EWCA Crim 855.
In *DPP v Barrington Fearon* [2010] EWHC 340 (Admin) it was held that a single act of soliciting a woman for prostitution did not meet such test. In *R v Goldstein, R v Rimmington (Anthony)* [2006] 1 A.C. 459, it was said that prosecutions for public nuisance should be rare. A public nuisance is an unlawful act or omission to discharge a legal duty, which endangers lives, safety, health, property or comfort of the public. A person claiming to be entitled to restrain a public nuisance, or to compel the performance of public duty, is bound to bring an action in the name of the Attorney-General; the person bringing the action is known as a “relator”.

Apart from such cases, and distinct from relator actions, a public nuisance is a civil wrong and actionable when a private individual has suffered particular damage over and above the general inconvenience and injury suffered by the public, and that the particular damage suffered is direct and substantial (*Vanderpant v Mayfair Hotel Co.* [1930] 1 Ch 138) and see also *Mistry v Thakor* [2005] All E.R. (D) 56 (Jul).

Examples of public nuisance are leaving dangerous articles such as defective cellar flaps or unlighted scaffolding on a highway (*Penny v Wimbledon Urban DC* [1899] 2 Q.B. 72) or defective premises adjoining the highway (*Harrold v Watney* [1898] 2 Q.B. 320) or carrying on activities off the highway which cause danger to those on it (*Castle v St Augustine Links* [1922] 38 T.L.R. 615); similarly discharging oil from a ship in an estuary of a river and damaging a foreshore (*Southport Corp v Esso Petroleum Co Ltd* [1956] A.C. 218); reducing the depth of water in the river (*Tate & Lyle v Greater London Council* [1983] 2 W.L.R. 649; picketing on the highway (*Hubbard v Pitt* [1976] Q.B. 142 and *News Group Newspapers Ltd v SOGAT 82 (No. 2)* [1987] I.C.R. 181); and motor coaches parked on the highway (*Att Gen v Gastonia Coaches Ltd* [1977] R.T.R. 219).

Relator action. Where an action is brought to abate a public nuisance, the person wishing to sue may not bring the action in his own names, but must bring it as a relator in the name of the Attorney General, who is the nominal claimant for the relator, and who conducts the case. The consent of the Attorney General must be obtained.

The Attorney General may refuse consent and is discretion is absolute, and cannot be enquired into by the courts (see *Gouriet v Union of Post Office Workers* [1978] A.C. 435 at 484, per Viscount Dilhorne, a former Attorney General). Where the Attorney General is incorrectly joined, he should take active steps to rectify the position as quickly and inexpensively as possible: *Bahamas Hotel Maintenance & Allied Workers v Bahamas Hotel Catering & Allied Workers* [2011] UKPC 4.
Injunction. A claimant is prima facie entitled to an injunction against a person committing a wrongful act, and continuing as a nuisance, and the wrongdoer is not entitled to have his wrongful act sanctioned by an order for damages in lieu. Damages in lieu should only arise in exceptional circumstances – *Regan v Paul Properties DPF (No. 1) Ltd* [2007] Ch. 135; and *Watson v Croft-Promo Sport Ltd* [2009] EWCA Civ 15. Such cases may include the presence of exceptional circumstances or oppression of a defendant – *Shelfer v City of London Electric Lighting Corp* [1895] 1 Ch. 287; and *Jaggard v Sawyer* [1995] 1 W.L.R. 269. See, too, on these principles: *HKRUK II (CHC) Ltd v Marcus Alexander Heaney* [2010] EWHC 2245 (Ch). The appropriate order for the abatement of nuisance where the court is persuaded to make an order, is that the party committing the nuisance should abate the nuisance. It is not for the court to set out a detailed schedule of works for the defendant to complete – *Long v Southwark LBC* [2005] EWCA Civ 403 at [65]. In general it is not necessary for words to be specified to abate a statutory nuisance: *R. v Falmouth and Truro Port HA* [2000] 3 All E.R. 306. In previous editions of this work it was said that this then implies that the question whether the steps taken were reasonable steps will be decided as part of the issue of deciding whether the order has been complied with. This has much to commend itself, but parties may wish to consider whether, for their own comfort and security of knowledge as to what steps might be required an accepted as necessary by a tortfeasor, that they agree a schedule of work to be done which may form part of a judgment order (or alternatively, be an indication to the court of what both parties agree would amount to reasonable steps. The question that would arise thereafter in such a case would be whether those steps have been carried out, and in a manner that satisfied the injunction granted). In *Elvington Park Ltd v York CC* [2009] EWHC 1805 (Admin), it was said that where an abatement notice set a requirement “to take steps necessary to prevent noise”, an abatement notice must specify the steps required or it would be invalid.

See *Fawcett v Phoenix Inns Ltd* [2003] EWCA Civ 128, where damages and an injunction were awarded. However, an injunction will not ordinarily be granted if the nuisance is temporary or occasional; or causes no real injury to health or property (see *Att Gen v Mayor of Preston* (1897) 13 T.L.R. 14, and *Harper v Haden* [1933] 1 Ch. 289). The classic statement of when an injunction would not be granted laid down in *Shelfer v City of London Electric Lighting Corp* [1895] 1 Ch. 287, was reiterated in *Jaggard v Sawyer* [1995] 1 W.L.R. 269 and followed by Jacob J. In *Hammersmith and Fulham LBC v Creska Ltd* [1999] All E.R. (D) 644, although see now, *Regan v Paul Properties DPF (No. 1) Ltd* [2007] Ch. 135; and *Watson v Croft-Promo Sport Ltd* [2009] EWCA Civ 15. However, if the temporary operations are unreasonable, then an injunction will be granted (*De Keyser’s Hotel Ltd v
Spicer Bros (1914) 30 T.L.R. 257; and Franklin Mint Ltd v Baxtergate Investment Co, Transcript, March 12 1998 CA).

An injunction may be suspended until the defendants have been given time to end the nuisance (see Stollmeyer v Petroleum Development Co Ltd [1918] A.C. 485; and John Trenberth Ltd v National Westminster Bank (1979) 253 E.G. 151).

An injunction will be granted for the benefit of a section of the public (see Kennaway v Thompson [1981] Q.B. 88 and Miller v Jackson [1977] Q.B. 966). An injunction was granted when criminal proceedings under the Control of Pollution Act 1974 were inadequate – City of London Corp v Bovis Construction Ltd [1992] 3 All E.R. 697.

An injunction may be amended, but if effective by way of a court undertaking that should only be amended other than on appeal where there was a significant change of circumstances: Mid-Suffolk DC v Clarke [2006] L.L.R. 284.

Once it is shown that a nuisance has emanated from the defendant’s land, and that the defendant has been put on notice that there was such a nuisance, the onus of proof passes to the defendant to show that he cannot by reasonable steps abate the nuisance – see Marcic v Thames Water Utilities Ltd [2002] 2 All E.R. 55; [2002] 2 W.L.R. 932; and Long v Southwark LBC [2002] EWCA Civ 403 at [65] (but obiter in the latter case).

PERSONAL INJURY

See the Personal Injury section for a more detailed consideration of this topic.

PRODUCT LIABILITY

Product liability deals with the quality and safety of products as between businesses (suppliers, producers and distributors) and consumers. The law of product liability contains both criminal/regulatory and private law elements.

The civil law causes of action available to a person who has suffered injury, loss or damage as a result of a faulty or dangerous product. Broadly-speaking, litigation can be commenced on the basis of a breach of contract (usually as to the implied term of satisfactory quality), negligence or breach of statutory duty under the Consumer Protection Act 1987 and its associated sector-specific
regulations. Secondly, the article addresses the criminal and regulatory aspect of product liability. Primarily it is Pt II of the Consumer Protection Act 1987 which creates offences for failure to comply with any sector-specific regulation made pursuant to s.11 of the Act. Finally, the article will address the civil law regulatory powers available to enforcement authorities under the Enterprise Act 2002 (which, although not specific to the law of product liability, is a relevant alternative to criminal prosecution).

Contractual Liability: Claims may be brought for breach of contract, in particular of express terms relating to the product(s) in question, as well as for misrepresentation under the Misrepresentation Act 1967. Of particular importance in relation to contractual liability are the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982 and the Consumer Rights Act 2015. The 1979 and 1982 Acts apply to all contracts entered into prior to 1 October 2015 (whether in a business or consumer context) and the Consumer Rights Act 2015 also includes similar provisions for consumer contracts entered into from 1 October 2015 (see below). The key provision of both Acts is that which creates an implied term that goods sold or bailed "in the course of a business" are of "satisfactory quality": Sale of Goods Act 1979, s.14, Supply of Goods and Services Act 1982, s.9, Consumer Rights Act 2015, s.9 (the last also includes an equivalent provision for "digital content" at s.34).

"Satisfactory quality" is defined in all three Acts as "the standard that a reasonable person would regard as satisfactory" taking into account any description of the goods, the cost/consideration provided for sale or bailment, and "all other relevant circumstances".

In considering the cost or consideration provided for the goods in question, one must be careful to realise that a difference between the cost and value of the goods will not always render them not of satisfactory quality. The legislation is aimed at addressing the quality of the goods themselves, rather than the quality of the bargain struck between the parties (BS Brown & Son Ltd v Craiks Ltd [1970] 1 W.L.R. 752).

Further, the Sale of Goods Act 1979 and Consumer Rights Act 2015 (at s.14(2B) and s.9(3) respectively) include a list of aspects of the goods which should be considered when deciding whether they are of "satisfactory quality": "fitness for all the purposes for which goods of the kind in question are commonly supplied"; "appearance and finish"; "freedom from minor defects"; "safety"; and "durability".

Although there is some overlap between the laws of contract and tort in relation to product liability contractual claims have two advantages. First liability in contract is usually (but not always) strict, i.e. there is no need to prove an element of negligence. For example, an innocent misrepresentation, if
it induced the purchase of the product in question, can give rise to a claim for breach of the implied terms described above. Secondly, claims can be made in contract for pure financial losses.

Tortious Liability - At Common Law: Tortious liability for defective and unsafe products is well known at common law. Donoghue v Stevenson [1932] A.C. 562, perhaps the best known of all negligence authorities, was a product liability claim in relation to a decomposed snail in a bottle of ginger beer. Contemporaneous attempts to limit the principle in Donoghue to cases involving food and drink were unsuccessful (for example Grant v Australian Knitting Mills Ltd [1936] A.C. 85), and it has been applied generally to impose liability in respect of a range of products.

Further, product liability in tort extends beyond the immediate supplier-consumer relationship (i.e. the contractual relationship), to third parties who suffer loss or damage. Of particular significance is the extension of the law to so-called "by-standers". In Lambert v Lewis [1982] A.C. 225 liability was upheld against the retailers of a towing hitch with a faulty mechanism where the fault had caused the death of a third party driver when a caravan became unhitched from the purchaser's car while travelling at speed on the motorway.

In relation to defendants, tortious liability extends not just to manufacturers but also to wholesalers, retailers, assemblers, repairers and hirers, as well as to those inspecting for quality and safety. Outside of these categories, whether or not a defendant may become subject to a product liability claim, will be subject to the ordinary common law rules as to the existence of a duty of care.


Section 2 imposes such liability on "producers", "any person who ... has held himself out to be a producer", and "any person who has imported the product" into a member state of the European Union (s.2(2)),”where any damage is cause wholly or partly by a defect” (s.2(1)).

In Ide v ATB Sales Ltd [2008] EWCA Civ 424; [2009] R.T.R. 8 the Court of Appeal considered the question of causation under the Act and reaffirmed that if all except one of the possible causes of the damage in question could be eliminated, the judge was not bound to accept that which remained it was nevertheless improbable. For a recent example of the application of the principles in Ide see: Love v Halfords Ltd [2014] EWHC 1057 (QB); [2014] R.T.R. 32.
Part I of the Act is aimed primarily at the safety of the product in question according to the standard reasonably expected by "persons generally". In particular, safety should be considered in relation to the risk of damage to property, death and personal injury (s.3(1)). In considering what "persons generally" might reasonably expect, "all circumstances shall be taken into account" including marketing materials, instructions and warnings, reasonably expected uses of the product, and the time of supply by the producer (s.3(2)).

The concept of a "defect" under the Act has been most fully considered in A v National Blood Authority (No.1) [2001] 3 All E.R. 289 in which 114 claimants brought a group action following contraction of Hepatitis C caused by infected blood supplied by the NBA. Mr Justice Burton stated that what persons generally are entitled to expect under s.3 of the Act is an objective assessment which may, in certain cases, be more or less than what the public actually expects.

The court concluded in respect of the blood in question:

"They were not ipso facto defective ... but defective because I am satisfied that the public at large was entitled to expect that the blood transfused to them would be free from infection. There were no warnings and no publicity material ... (paragraph 80)"

By contrast, for example, a plastic container of dishwasher powder was held not to be defective in circumstances where the claimant, a toddler, became ill after ingesting it from a bottle fitted with a "squeeze-and-turn" safety cap (Tesco Stores Ltd v Pollard [2006] EWCA Civ 393; (2006) 103(17) L.S.G. 23).

Section 4 of the Act sets out six statutory defences:

- That the defect is attributable to compliance with a requirement imposed by an enactment or other EU obligation;
- That the defendant had at no time supplied the product to another;
- That the supply of the product was not in the course of a business and that the defendant does not otherwise fall within s.2(2), or that it applies only by virtue of things done otherwise than with a view to profit;
- That the defect did not exist at the time of sale;
- That the state of scientific or actual knowledge was such that the producer could not have discovered the defect at the time the product was in his control;
That the defect constituted a defect in a product in which the product in question had been comprised ("the subsequent product"), and was wholly attributable to the design of the subsequent product or instructions given by the producer of the subsequent product.

In particular the fifth item was considered in the National Blood Authority case where it was concluded that "scientific and technical knowledge" refers to "the most advanced available (to anyone, not simply to the producer in question)".

Section 5 of the Act deals with damage sufficient to give rise to liability: it does not apply to any loss of or damage to property if the amount which would fall to be awarded does not exceed £275 (s.5(4)).

There are also a number of schedules to the Act. Of particular importance for Pt I is Sch.1 which inserts s.11A into the Limitation Act 1980. In respect of actions relating to defective products it gives a period of 10 years from the date of supply in which to commence proceedings. However, in relation to actions where damage in question is personal injury or damage to property, the limitation period is three years from the latest of either the date on which the cause of action accrued, or the claimant’s date of knowledge.

In addition to the foregoing, s.41 of the Act (found in Pt V) provides that any breach of an obligation imposed by a safety regulation created pursuant to s.11 (see below) "shall be a duty owed to any person who may be affected by a contravention of the obligation and... shall be actionable accordingly."

Criminal Liability - Consumer Protection Act 1987, Parts II and IV: Parts II and IV of the Act (Pt III has been repealed in its entirety) are concerned with consumer safety. They will be of particular interest to trading standards departments, who are given the obligation of enforcement (s.27). The following is no more than a brief tour of their key provisions.

Section 10 of the Act, which imposed a general product safety requirement, was repealed by the General Product Safety Regulations 2005/1803 (below), which now exclusively addresses the general requirement that a product placed on the market be "safe". However, the section continues to appear in the leading textbooks on the subject as much of the case law which arose from it remains of relevance.

Section 11 of the Act empowers the Secretary of State to make regulations for the purpose of ensuring goods are safe, or, if unsafe, are not available generally or to certain classes of person, or that appropriate information is provided in relation to the goods.
Breach of such regulations can lead to one of four possible offences under s.12:

- Supply, offering or agreeing to supply, or exposing or possessing for supply of the goods in question (s.12(1));
- For those who make or process such goods, failure to follow requirements to carry out a particular safety test or to deal with them in such a way as to ensure they are safe (s.12(2));
- Contravention of any requirement prohibiting or requiring the provision of information in relation to the goods (s.12(3));
- Failure to give information to another for the purposes of that other exercising any function if such failure is without reasonable cause, or if such information is knowingly or recklessly false in a material manner (s.12(4)).

In addition to criminal prosecution, the Secretary of State may serve on anyone thought to be supplying unsafe goods "prohibition notices" and "notices to warn" under s.13. Prohibition notices prohibit the supply of the goods in question and notices to warn require the person to whom the notice is addressed to public a warning about the goods in question. The latter power is rarely, if ever, used. Contravention of such notices of itself constitutes a summary offence (s.13(4)).

Further, enforcement authorities (as defined in s.27) may serve a "suspension notice" on any person, prohibiting them from taking certain steps without the authority's permission in relation to certain goods. Such notices may last for a period of not more than six months (s.14(1)). In particular such notice can prevent the addressee supplying the goods, offering to supply them, agreeing to supply them or exposing them for supply. Contravention of a suspension notice is a summary offence (s.14(6)). Further, the addressee has a statutory right of appeal against the issue of a suspension notice by way of application to the magistrates court in England and Wales and, in Scotland, the Sheriff court.

Part IV of the Act deals with enforcement and sets out myriad powers to ensure that evidence is properly collected and tested prior to the issue of a prosecution or any notice. It will also be subject to some minor, unsubstantial amendments upon the coming into force of Sch.6 of the Consumer Rights Act 2015 (see paras 37 - 47 thereof).

In particular, enforcement authorities have statutory powers to search premises (s.29) to ascertain compliance with safety requirements. In relation to the power to undertake such a search, it must be carried out at a "reasonable hour" (usually during business hours). A search cannot be conducted at "premises occupied only as a person's residence". A right to make test
purchases and a number of ancillary matters were formerly set out in s.28. However, this was repealed as of 1 October 2015 and replaced by the generally applicable rights of enforcers at Sch.5 to the Consumer Rights Act 2015.

Criminal Liability - Consumer Protection Act 1987, Statutory Defence: Part V of the Act sets out miscellaneous provisions. Of primary importance is the statutory defence at s.39. It provides that it shall be a defence for a defendant "to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence" (s.39(1)). Whether the defence is made out is a question of fact in each case: Tesco Supermarkets Ltd v Nattrass [1972] A.C. 153.

It is important to bear in mind that there are two halves to the defence under s.39: "reasonable steps" and "due diligence". The former refers to the establishment of a system to prevent the commission of an offence, whereas the latter requires steps to see the system actually works. There is extensive case law on appropriate systems in respect of various products and industries. However, generally, it is established that compliance with a British Standard does not necessarily equate with the exercise of due diligence: Balding v Lew-Ways Ltd (1995) 159 J.P. 541.

It is clear that within the statutory defence it is open to the defendant to allege that the offence was "due to the act or default of another" or as a result of "reliance on information given by another" (s.39(2)). In the context of corporate defendants it is acceptable to refer to the "act or default" of an individual employee unless that person is in control of the company's overall activities. Those who "represent the directing will and mind of a company and control what it does" do not constitute "another" for these purposes: Tesco Supermarkets Ltd v Nattrass [1972] A.C. 153.

Criminal Liability - General Product Safety Regulations 2005: The General Product Safety Regulations 2005/1803 are one of the few non sector-specific legislative instruments. Intended as a catch-all, under reg.3 they apply "insofar as there are not specific provisions with the same objectives in rules of [EU] law governing the safety of the product other than [Directive 2001/95 of the European Parliament on general product safety]." However, their use is likely to become less necessary as the EU's sectoral directives become increasingly comprehensive.

Under reg.5 a "producer" shall not "place a product on the market", "offer or agree to place a product on the market or expose or possess a product for placing on the market", "offer or agree to supply a product or expose or possess a product for supply", or "supply a product" unless it is a "safe product". In considering what constitutes a "safe product" there is a
presumption of compliance in circumstances where there is no specific EU law covering the product and it otherwise complies with UK health and safety requirements (reg.6).

In addition, reg.7 requires that producers provide consumers with "relevant information" to facilitate an assessment of the "risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious... " and "to take precautions against those risks".

The Regulations also impose equivalent obligations on distributors (reg.8) and producers and distributors jointly (reg.9) to ensure that unsafe products do not reach consumers.

Offences are created by reg.20 in respect of contraventions of regs 5, 7, 8, and 9, as well as for failure to comply with a safety notice. Most of the offences are summary only except for contravention of regs 5 and 8(1)(a) (obligation on distributor not to supply etc. a dangerous product), which are triable either way.

In terms of enforcement, the relevant authorities (reg.10) have all the same obligations as are found within the Consumer Protection Act 1987 in terms of notices and warnings (regs 11 to 16). The additional powers which were previously found at reg.21 onwards, have now been repealed by the Consumer Rights Act 2015 and are governed by the generally applicable rights and obligations of enforcers in Sch.5 thereto.

The Regulations also include a statutory defence of due diligence, similar to that found in s.39 of the Consumer Protection Act 1987 (reg.29), as well as a specific defence in respect of antiques (reg.30).

Other Relevant Legislation: Some are product-specific and regulate the supply of what can be properly considered inherently unsafe products (for example the Children and Young Persons (Protection from Tobacco) Act 1991 and the Fireworks Act 2003). Beyond mentioning them in passing, it is unnecessary to consider them further.

However, the Enterprise Act 2002 should be briefly considered since it gives designated enforcers powers to address large scale questions of consumer detriment. Obviously product liability issues may therefore fall within its scope.

Of particular significance are the powers under Pt 8 of the Enterprise Act which enables enforcement authorities (including trading standards departments) to prevent conduct which is thought to constitute a domestic or Community (i.e. European) infringement. It was subject to amendment following the coming into force of Sch.7 of the Consumer Rights Act 2015 which
sets out certain ""enhanced consumer measures..."". A "domestic infringement" is any act done in the course of a business which harms the collective interests of consumers and constitutes a breach of domestic law (s.211). Following amendments by the Consumer Rights Act 2015 (Sch.7 para.3), this definition has been further restricted to such acts or omissions done by those who have a place of business in the UK or done for those in the UK. A "Community infringement" is any act or omission which harms the collective interests of consumers and constitutes a contravention of any Community law, or any law of an EEA State which gives effect to a "listed Regulation" (s.212). The difference between the two is therefore that Community infringements relate only to European law, have no requirement of acting "in the course of a business" and is not limited to the UK. The definition of a community infringement remains unchanged by the 2015 Act.

If there has been such an infringement, an enforcer must consult with the offender and the Competition and Markets Authority (CMA) to attempt to achieve cessation of the behaviour in question (s.214). The 2015 Act (Sch.7 para.5) also extends the usual 14 day consultation period (s.214(4)(a)) to 28 days where the offender is represented by a body which operates a consumer code approved by certain specified bodies (including enforcers). In the event that such consultation is unsuccessful an enforcer has two options: either to apply to the court for an enforcement order requiring the person to, in effect, cease the offending behaviour (s.215). Alternatively, to issue an undertaking to the offender which is dealt with by s.219. An undertaking may include a requirement for the offender to take "enhanced consumer measures" as defined by s.219A. Thereunder, an enhanced consumer measure are categorised into ""redress", "compliance" or "choice"", as defined. Per the new s.219B of the 2002 Act, such measures can only be included within an undertaking as the court or enforcer considers to be "just and reasonable" taking into account the likely costs and benefits of doing so. In the event that an undertaking issued and then breached by the offender, the CMA has the right to apply to the court, which, among its other powers, may make an enforcement order (s.220).

Clinical Negligence (see section on Medical Negligence)

The cause of action is normally in the tort of negligence, but may be in contract (especially where private medical services are concerned). The claimant's statement of case should be sufficiently informative both to enable the defendant to deal with the main factual allegations, but also to require the defendant to answer them. This necessitates making the main factual allegations in separate paragraphs or sub-paragraphs, in somewhat greater detail than appropriate in other personal injury pleadings.
Animals Act 1971

Liability is in the tort of negligence and for breach of statutory duty. The House of Lords confirmed the wide scope of the statutory tort for animals which are commonly domesticated in the UK in *Mirvahedy v Henley* [2003] UKHL 16.

PREMISES AND OCCUPIERS

Liability is principally for breach of a common duty of care under the Occupier’s Liability Act 1957, but may also be in general common law negligence, and occasionally in contract (e.g. for breach of a contractual licence where an express or implied term regulates the safety of the premises). It may also be in respect of the Occupier’s Liability Act 1984, the Landlord and Tenant Act 1985 and/or the Defective Premises Act 1972. When drafting Particulars in respect of the Occupier’s Liability Act 1957 case (a person who is on the land lawfully having received a direct or implied invitation or someone who is not trespassing), it is only necessary to set out that the claimant was a visitor and then to add to the allegation of negligence an allegation of breach of statutory duty, namely s.2 of the Occupier’s Liability Act 1957. The Occupier’s Liability Act 1984 is of relevance only to injured persons who are not visitors, for example as in 81-W28.

When an accident occurs on school premises, reference may be made to the Education (Schools Premises) Regulations 1999.

Occupational/Employer’s Liability

The principal heads of claim are in the tort of negligence (where *Wilsons & Clyde Coal v English* [1938] A.C. 57 establishes a duty on an employer at common law to take reasonable care for the health and safety of his employees, consisting of four alternative (they are not mutually exclusive, and thus may also co-exist) elements: a duty to provide safe premises; a duty to provide safe plant and equipment; a duty to provide safe and competent fellow employees; and a duty to provide a safe system of work). Usually, contractual duties co-exist. (*Matthews v Kuwait Bechtel* [1959] 2 Q.B. 57, CA.).

TITLE TO GOODS – TORTS AGAINST GOODS

An attempt at rationalising some aspects of the law was made with the Torts (Interference with Goods) Act 1977 but it did not seek a systematic reform. Section 1 of the Act coined a new description for torts affecting goods by introducing the expression “wrongful interference with goods” but no new tort was created. Instead, the following existing torts were included:
(a) conversion;

(b) trespass to goods;

(c) negligence so far as it resulted in damage to goods or to an interest in goods;

(d) any other tort so far as it results in damage to goods or to an interest in goods.

The nature of conversion. Any act which is an interference with the dominion of the true owner of goods is a conversion of those goods (Hollins v Fowler (1875) L.R. 7 H.L. 757 at 766, per Blackburn J. referred to in Baker v Barclays Bank [1955] 1 W.L.R. 822: see also Kuwait Airways v Iraq Airways Co [2002] 2 A.C. 883). In some senses, conversion is a tort of absolute liability. Any person who deals with chattels does so at their peril. Although it is not necessary to show that the defendant knew of the claimant’s interest in the goods or of any other interest in the goods. Neither negligence nor intention to harm are ingredients of the tort: fault is similarly irrelevant (OBG Ltd v Allan [2007] UKHL 21 at [308]). Where a man deals with goods as his own “you need not enquire as to his intention” (Caxton Publishing Co v Sutherland Publishing Co [1939] A.C. 178 at 189).

A person therefore is guilty of conversion if he deals with goods in a manner inconsistent with the rights of the true owner intending to negative the rights of the true owner or to assert a right inconsistent with that right (Lancashire & Yorkshire Railway v Mac Ncill (1919) 88 L.J.K.B. 601).

It is often helpful to consider conversion in terms of the categories of act which usually constitute the tort.

Conversion by taking. Any unauthorised taking of the goods of another with the intention of exercising dominion (however temporary) over them is a conversion (Kuwait Airways v Iraq Airways Co [2002] 2 A.C. 883). If the taking of the goods is without that intention, there is a trespass to goods but no conversion (Fouldes v Willoughby (1841) 8 M. & W. 540). The defendant need not intend to acquire title or to assert a full title. An unauthorised borrowing of a chattel can amount to conversion (e.g. joy-riding in a car; Aitkin Agencies Ltd v Richardson [1967] N.Z.L.R. 65). A taking can be constructive as where the holder of documents of title to goods (e.g. a bill of lading) takes some active steps to exercise dominion over them, as by endorsing the document to another.
If a person merely takes possession of premises in which there are goods belonging to another, there will be no conversion unless he intends to take possession of the goods as well (Thorogood v Robinson (1845) 6 Q.B. 769). However, subsequent use of, disposal of or dealing with the goods will amount to a conversion (W Hanson (Harrow) Ltd v Rapid Civil Eng Ltd (1987) 38 B.L.R. 106).

Conversion by transfer. A person who is in wrongful possession of goods and unlawfully parts with that possession is guilty of conversion. Sale and delivery of another person’s goods is a typical conversion of those goods whether the sale confers no title on the purchaser (Martindale v Smith (1841) 1 Q.B. 389) or whether the sale comes within one of the exceptions to the rule nemo dat quod non habet and does pass title. Sale without delivery, however, will only amount to conversion if the sale is effective to pass title to the goods: otherwise there is no change either of title or of possession to found a claim in conversion. The defendant must take some active steps that brings about the delivery of goods (or the documents of title) away from the true owner (RH Willis and Son v British Car Auctions Ltd [1978] 1 W.L.R. 438).

The transfer need not be by way of a contract intended to pass title. A carrier or warehouseman who delivers goods to an unauthorised person can be guilty of conversion.

Transferring goods in circumstances where the transferee can acquire a lien over them can amount to conversion (Syeds v Hay (1791) 4 Term. Rep. 260). It is sufficient to be a party to an unauthorised transfer of possession (Hiort v Bott (1874) L.R. 9 Exch. 86).

Conversion by detention. The distinction between detinue and conversion used to be that, with the former, mere possession adverse to the rights of the person entitled to possession was sufficient and it was unnecessary to show any intention to deal with the goods in a way inconsistent with those rights. In practice, however, a demand by the person with possessory title followed by an unjustified refusal to deliver up was treated as a conversion, thus rendering detinue largely otiose even before its abolition in 1977.

A demand is necessary before the detention will be actionable (Clayton v Le Roy [1911] 2 K.B. 1031) and the defendant must be in possession at the time of the demand. If he is not, then there is no conversion by detention (although there may have been an earlier conversion by transfer: Featherstonehaugh v Johnson (1818) 8 Taunt. 237).
The demand must be unconditional (*Rushworth v Taylor* (1841) 3 Q.B. 699) and the refusal must also be unconditional. A detainer may be entitled to a reasonable time in which to make enquiries but, once that has elapsed, whether or not the detainer is satisfied as to the claimant's rights, he must hand over the goods (*Alexander v Southey* (1821) 5 B. & Ald. 247).

Delay in complying with the demand will normally render the defendant an insurer of the goods for subsequent damage so that if the goods are stolen during the period after the demand the bailor is liable (*Mitchell v Ealing LBC* [1979] Q.B. 1).

**Miscellaneous conversions.** If goods are wrongfully lost or destroyed or are so treated as to lose their identity (e.g. flour baked into bread), this can amount to conversion. Even conduct which leads to confiscation of the goods so that they are lost to the true owner may suffice. Thus, where a car was used for smuggling and was confiscated by Customs, this was a conversion by the bailee of the car (*Moorgate Mercantile Co Ltd v Finch and Read* [1962] 1 Q.B. 701). Wrongful use of goods will be conversion, if it displays an intention to use the property as one's own and such an intention will readily be inferred if the use is such as to damage the goods or to diminish their value.

The copying of works in which copyright exists no longer amounts to an act of conversion (*Copyright, Designs and Patents Act 1988*).

**Conversion by a bailee.** A bailee who, in breach of his bailment, makes a transfer unauthorised by his bailor is guilty of conversion (e.g. hirer who purports to sell the goods hired). So also is a bailee who, in breach of his duty to the bailor, permits the goods to be lost or destroyed (s.2(2)). A depositee who returns goods to his depositor does not commit conversion even if the depositor has no right to the goods (*Hollins v Fowler* (1875) L.R. 7 H.L. 757) but if, before this occurs, he is presented with a demand by the true owner and then returns the goods to the original depositor he will be liable.

**Subject-matter of conversion.** This is now defined by the Act for all torts of wrongful interference. “Goods” include all chattels personal other than things in action and money (s.14(1)). Realty can only be the subject-matter of conversion when severed (e.g. coal taken from a mine: *Mills v Brooker* [1919] 1K.B. 555).

The exclusion of “money” is slightly misleading. Money in specie (i.e. coins and notes) can be converted: it is money in the abstract (e.g. in a bank account) which cannot.
Negotiable instruments and title deeds are primarily documents creating “things in action” but they are at the same time physical objects, pieces of paper. If the piece of paper is unlawfully converted, the damages will be assessed on the basis of the value of the rights created by the document (Kleinwort v Comptoir National d’Escompte de Paris [1894] 2 Q.B. 157; Midland Bank Ltd v Reckitt [1933] A.C. 1).

If, by reason of a fraudulent alteration, the piece of paper is valueless (e.g. a fraudulently altered cheque), no rights arise from it and a claim in conversion will fail: Smith v Lloyds TSB Bank Plc [2001] Q.B. 541: [2001] 1 All E.R. 424.

The right to sue

The claimant must show that at the time of the conversion he was either in actual possession of the goods or entitled to immediate possession of them. It is not necessary to show a title of absolute ownership. Title unaccompanied by either actual possession or an immediate right to possession is insufficient to support an action in conversion (The Winkfield [1902] P. 42. The title to possession must be a legal title: an equitable title will not be sufficient: MCC Proceeds Inc v Lehman Bros International Europe [1998] 4 All E.R. 675).

Even a person in possession of goods which he has acquired knowing them to have been stolen has a title good against everyone except the true owner or someone claiming under him (Costello v Chief Constable of Derbyshire Constabulary [2001] 3 All E.R. 150; Jaroo v Attorney General of Trinidad [2002] 2 W.L.R. 705).

The interest on which the claimant relies must have vested in him at the time of the act of conversion (The Future Express [1993] 2 Lloyds Rep. 543; Smith (Administrator of Cosslett Contractors Ltd) v Bridgend CBC [2002] 1 A.C. 336), unless the right to sue passed to the claimant as part of the transfer of the goods to him (Bristol and West of England Bank v Midland Ry [1891] 2 Q.B. 653).

Where goods have been bailed, it will depend on the terms of the bailment who is to be treated as being in possession of the goods or as entitled to possession. If the bailment confers exclusive possession on the bailee as long as the bailment lasts, only the bailee can maintain an action for conversion as the bailor has no immediate right to possession. Examples of such bailments are letting on hire, pledging or delivering the goods to someone, who acquires a lien (Milgae v Kebble
An unpaid vendor protected by his lien has exclusive possession. The purchaser cannot bring an action unless he has tendered the price and thus becomes immediately entitled to possession (Lord v Price (1874) L.R. 9 Exch. 54).

Title to sue was considered by the Court of Appeal in Iran v Barakat Galleries Ltd ([2007] EWCA Civ 1374; [2008] 1 All E.R. 1177). Where the owner of goods who had an immediate right to possession of them, albeit that they were in the possession of a third party, by agreement transferred his title to a new owner, the new owner could bring a claim in conversion against the person in whose possession they were. Where the owner of goods with an immediate right to possession of them by contract transferred the latter right to another, so that he no longer had an immediate right to possession but retained ownership, it would seem right in principle that the transferee should be entitled to sue in conversion. A fortiori, if the contract provided that when the transferee entered into possession, ownership would be transferred to him.

If the bailee commits an act inconsistent with the bailment which terminates the bailment or entitles the bailor to do so, the bailor has the necessary right to possession to sue the bailee or any transferee from him (Jelks v Hayward [1905] 2 K.B. 460). A breach of bailment by a pledgee or an unpaid seller does not give the pledgor or buyer a right of action: only if redemption or payment of the price is tendered can they sue (Halliday v Holdgate (1868) L.R. 3 Exch. 299).

A bailee at will (e.g. the borrower under a gratuitous loan) has a concurrent possession with his bailor: either may sue. A servant or agent may have merely custody of the goods and possession will remain exclusively with the employer or principal who alone can sue.

As mere possession will suffice to ground an action, a finder or other person who has come into actual possession of goods may sue. Much of the old law concerning the difference between such possession (called “special property”) and title to the goods (“general property”) has become academic with the abolition of the rule known as jus tertii which prohibited a defendant from setting up as a defence the fact that some person other than the claimant or a person through whom the defendant claimed had a better title than the claimant (see s.8(1)). A co-owner can sue his fellow owner in conversion where the goods have been destroyed or disposed of whether or not such disposal was effective to transfer title to the transferee (see s.10).
Not every act by a bailee which may set up a right inconsistent with that of the bailor will amount to a conversion by the bailee. This was emphasised by the Court of Appeal in *BMW Financial Services (GB) Ltd v Bhagwanani* ([2007] EWCA Civ 123; [2007] All E.R. (D) 26).

**Relief**

The available relief is:

(a) an order for delivery of the goods and for the payment of any consequential damages;

(b) an order for delivery of the goods, but giving the defendant the alternative of paying damages by reference to the value of the goods, together in either alternative with payment of any consequential damages;

(c) damages (s.3(2)).

Relief under (a) is at the discretion of the court (s.3(3)) and such an order can later be altered by the court (s.3(4)). The claimant may choose between (b) and (c). An order under (b) can be satisfied by the delivery of the goods (subject to payment of consequential damages) (s.3(5)).

If the defendant is no longer in possession of the goods only damages can be claimed.

**Damages**

The starting-point for the measure of damages is the market value or replacement value of the goods at the date of the conversion (*Joe Hall Ltd v Barclay* [1937] All E.R. 620). If the value of the goods has increased since conversion the increase can be recovered as consequential damages (*IBL v Coussens* [1991] 2 All E.R. 133). If the value of the goods has declined, the claimant may recover damages assessed by reference to the value at the date of conversion thereby preventing the tortfeasor profiting from his wrongdoing (*Solloway v McLaughlin* [1938] A.C. 247; *Kuwait Airways v Iraq Airways Co* [2002] 2 A.C. 883).

If a chattel is one of the kind used by the claimant in the course of the business (e.g. let out for hire), the claimant can recover the loss of income from the chattel and if the claimant has been put to
additional expense by being deprived of the chattel (e.g. by hiring in a replacement), he can recover his loss.

If the claimant has only a limited interest in the goods, he may nonetheless recover the full measure of damages against a third party with no claim to the goods. Where, however, two or more persons have different interests in the goods (e.g. a finance company and a hirer) each is entitled to sue. Where both are claimants, s.7(2) provides that the wrongdoer is relieved of the effect of double recovery. Where one owner only is a party, that claimant has a duty to account in the proper sum to any other owner with a right to claim. If enforcement results in double recovery, a claimant must reimburse the wrongdoer to the extent that the claimant is unjustly enriched (see s.7(3) and (4)).

Where an innocent converter has improved the goods, he and bona fide purchasers from him can claim an allowance against the damages to reflect the value of the improvement (s.6).

Where damages are or would fall to be assessed on the footing that the claimant is being compensated for the whole of his interest in the goods (whether or not there is an allowance for contributory negligence), actual payment of the damages or settlement of the action will in general operate to extinguish the claimant’s title to the goods (s.5).

Trespass to goods

The overlapping nature of torts relating to goods may have largely deprived the tort of trespass to goods of an independent existence. The fact, however, that the circumstances giving rise to a claim in conversion of goods by destruction or taking also give rise to a claim in trespass, should not blur the essential differences in the two claims. Similarly, where goods are damaged by the careless act of the defendant. The same facts may give rise both to a claim in negligence and a claim in trespass.

A deliberate taking away out of possession of the claimant is the most obvious form of trespass to goods, as in any unpermitted contact or damage to another’s goods/ both are direct and immediate interference. It is not clear whether the tort is actionable without damage. The defendant’s conduct must be blameworthy so that in the absence of negligence, accidental damage will not amount to trespass (National Coal Board v JE Evans & Co [1951] 2 K.B. 861 – the case of damage to an underground cable caused without negligence). However, deliberate conduct (in the erroneous belief held by the defendant that he was acting lawfully) does not amount to a defence if the act otherwise amounts to trespass (Wilson v Lombank Ltd [1963] 1 W.L.R. 1294).
The right to sue. The only person who can normally sue is the person in possession of the goods at the time of the trespass. A trustee with legal title to the goods is treated as being in possession although physical possession may be with the beneficiary (White v Morris (1852) 11 C.B. 1015). A bailment at will confers a joint possession on bailor and bailee and either may sue. An owner may be in possession through a servant or agent. The personal representatives of a deceased may sue in trespass notwithstanding the fact that probate or letters of administration have not been granted. As with conversion, one co-owner can sue another only if the goods are destroyed or disposed of (s.10).

Interim orders to delivery

Section 4 confers jurisdiction on the High Court and the County Court concurrently to make interim orders for the delivery up of property, pending a decision on the rights of the parties. The procedure is governed by CPR r.251(1)(e). Under RSC Ord. 29 r.2A applications before the issue of proceedings were not permitted: no such limitation exists under CPR r.25.1(1)(e).

The court has an unfettered discretion under the 1977 Act but will balance the needs of the parties and take into account the adequacy of damages as an alternative remedy (Howard E Perry & Co Ltd v British Railways Board [1980] 2 All E.R. 579).

For the factors to be taken into account on an application, see CBS UK Ltd v Lambert [1983] Ch. 37. There must be clear evidence that the defendant is likely, unless restrained by the court, to dispose of the chattels. The court will not normally make an order in relation to household goods, tools and stock-in-trade. There should be evidence of wrongdoing on the defendant’s part. An order made under s.4 should clearly identify the chattels, permit the claimant to enter the defendant’s premises only with his permission, and order delivery up of the chattels to the claimant’s solicitors. In addition, the defendant should be given liberty to apply to vary or set aside the order.

TRESPASS TO LAND

Trespass. Trespass to land is a tort comprising physically entering or remaining on land in the possession of the claimant or placing an object on or projecting over the land in the possession of the claimant. Obviously, in each case, the act must be carried out without the licence or consent of the claimant.
**What is trespass?** Trespass is a tort to land (note that trespass is not confined to freehold and real property, but also extends to exclusive rights, e.g. over reserved burial plots (Reed v. Madon [1989] Ch. 408, with regard to the Cemeteries Clauses Act 1847) and includes the ground sub-soil and airspace above, and each of the sub-divisions of the same, (See the useful summary on this point in Clerk & Lindsell on Torts, 20th Edn (London: Sweet & Maxwell, 2010), paras. 17-30 to 17-31) consists of: (1) entering land in the possession of the claimant; or (2) remaining on such land; or (3) placing or projecting any object on or over land, but in each case without lawful justification. Unlike nuisance or negligence, a trespass is actionable even without damage being suffered. (It is a matter of interest whether the old rule that even trespass which is minor or de minimis in nature is actionable (see Yelloly v Morley (1910) 27 T.L.R. 20) will survive CPR Pt 3 r. 3.4 aimed, inter alia, at discouraging actions which are an abuse of process, if not instituted for a justifiable purpose such as the resolution of a boundary dispute.) Trespass actions are also used to settle disputes about title to land, or if a defendant interferes with a claimant’s airspace that amounted to trespass save that that conduct would not constitute trespass if the interference were at such great height that it did not interfere with the claimant’s airspace – Laiqat v Majid [2005] All E.R. (D) 231 (Jun). Contrast the position generally as regards depth of land in Bocardo SA v. Star Energy UK Offshore Ltd [2010] UKSC 35.

Justification may be by operation of law or statute (for example, by the Access to Neighbouring Land Act 1992, granting qualified rights, subject to meeting certain conditions, to enter on a neighbour’s land to carry out repairs to one’s own land; and the Party Wall etc Act 1996 s.8 with regard to repairs to party walls). It is a defence that any encroachment was “wholly inadvertent and involuntary” (Braithwaite v South Durham Steel Co Ltd [1958] 1 W.L.R. 986) or that entry was necessary to preserve life or property (see Cape v Sharp [1910] 1 K.B. 168), but in such cases the defendant must prove that the necessity arose without any negligence on his part and likewise with performance of the acts in respect of the entry (see Rigby v Chief Constable of Northamptonshire [1985] 1 W.L.R 1242).

The act must be a physical interference with the claimant’s land but can be committed by placing an object upon or even up against the claimant’s land (Gregory v Piper (1829) 9 B. & C. 591) or, for instance, by placing a sign or crane which projects over the claimant’s land (Kelsen v Imperial Tobacco [1957] 2 Q.B. 334; Anchor Brewhouse Developments v Berkeley House (Docklands Developments) Ltd [1987] 2 E.G.L.R. 173.
Furthermore, an act which was formerly lawful can become a trespass if a right to enter land was for a particular time period or if a licence to remain on land is revoked. In such circumstances, the formerly lawful occupier of premises will become a trespasser.

Equally, a person who has licence to enter lands for a particular purpose will be a trespasser if he enters the land for another purpose.

In order to maintain a claim for trespass, the claimant must normally have an immediate right to occupy the land (Wuta-Ofei v Danquah [1961] 1 W.L.R. 1238; Fowley Marine (Emsworth) Ltd v Gafford [1968] 2 Q.B. 618). Hence, where the land is let, it is the tenant and not the landlord who possesses the right to bring a claim in trespass. The landlord in that situation does not have an immediate right to possession of the land. The landlord may have a right to damages if he can show that as a result of physical damage to the property, the value of his reversionary interest has been diminished. A licensee or lodger who has no exclusive possession of the land has no right to bring a claim in trespass.

Actual possession of the land is presumptive proof of ownership and is sufficient against a trespasser who cannot show any better title or authority (Browne v Dawson (1841) 12 Ad. & E. 624; Delaney v T.P. Smith Ltd [1946] K.B. 397).

The continuation of a trespass constitutes a fresh right of action (Drake v Bedfordshire CC [1944] K.B. 620) notwithstanding that damages may already have been recovered for the original trespass (Bowyer v Cook (1847) C.B. 236).

Where the trespass is an encroachment, such as an extension which is built partly on the claimant’s land, damages in lieu of an injunction may be appropriate. A line of cases including Jaggard v Sawyer [1995] 1 W.L.R. 269, A.G. v Blake [2001] 1 A.C. 268; Amec Developments Ltd v Jury Hotel Management (UK) Ltd [2001] 1 E.G.L.R. 81; and WWF World Wide Fund for Nature v World Wrestling Federation Inc [2006] EWHC 184 have established that the measure of damages in such circumstances is conventionally analysed in terms of the loss of bargaining opportunity or the price payable for the compulsory acquisition of a right or interest in land.

Aggravated damages may be claimed where the trespass is accompanied by high-handed, insulting or oppressive conduct. Such conduct must have occurred when the trespass is committed.

It is a defence to a claim in trespass that the acts complained of are authorised, either by means of a lease or licence granted by the owner of the land, by means of an easement or by virtue of a statutory power authorising the person to enter the land.

**What makes an act a trespass?** If a defendant has placed something against the claimant’s wall (*Gregory v. Piper* (1829) 9 B. & C. 591), or a sign projecting over the claimant’s shop (*Kelsen v Imperial Tobacco Co* [1957] 2 Q.B. 334) this may be a trespass; or if a defendant shoots into or over the claimant’s land (*Picketing v Rudd* (1815) 1 Stark. 56); or “oversails” it with a crane (*Anchor Brewhouse Developments Ltd v. Berkley House (Docklands Developments) Ltd* (1987) 284 E.G. 625; *Franklin Mint Ltd v. Baxtergate Investment Co* Unreported March 12, 1998 CA.

The claimant must plead an act of physical interference with his land, but there will be sufficient interference of this if, for example, matter is deliberately placed so that natural forces will carry it to the claimant’s land, for example by jettisoning oil at sea (*Southport Corp v Esso Petroleum Ltd* [1956] A.C. 218 (but not according to Lords Radcliffe and Tucker, at 242 and 244 respectively)); see, too, *Home Brewery Co Ltd v. Davis (William) & Co (Leicester) Ltd* [1987] Q.B. 339, where it was said that the result would have been the same whether the claimant had claimed in nuisance or trespass.

A continuing state of affairs, which was originally lawful as being permitted for a reasonable time but which has become unlawful by expiry of that time, is a trespass (*Konskier v. Goodman* [1928] 1 K.B. 421). So, also, where an express licence is revoked or lawfully terminated, the former licensee becomes a trespasser if he refused to vacate (cf. *Wilde v Waters* (1855) 24 L.J.C.P. 193; and *Thompson v Park* [1944] K.B. 408).
There may also be a trespass if the defendant has a right to enter the land for a particular purpose, but in fact enters it for a different purpose (Wilcox v Kettel [1937] 1 All E.R. 223) or abuses that authority. In the latter case, the trespasser is a trespasser ab initio (see Six Carpenters’ Case (1610) 8 Rep. 146a; but see also Chic Fashions (West Wales) Ltd v. Jones [1968] 2 Q.B. 299 for criticisms of the former case as anachronistic, but not overruling it, and Cinnamond v British Airports Authority [1980] 1 W.L.R. 582, applying it). As a result, although a member of the public has a right to use the highway for the purpose of passing and re-passing (and for activities incidental to doing this) he does not have the right to use the highway for any other purpose, for example picketing premises, unless protected by legislation (Hubbard v Pitt [1976] Q.B. 142; but see DPP v Jones [1999] 2 W.L.R. 625, where it was held that peaceful and non-obstructive assemblies were not “trespassory assemblies” within the Public Order Act 1986).

Continuing trespass. Each occasion when an act of trespass is committed or continued amounts to a new trespass, and can be sued on as a new cause of action (Holmes v Wilson (1839) 10 Ad. & E. 503; Drake v Bedfordshire CC [1944] K.B. 620) even if damages have been recovered for the original wrong (Bowyer v Cook (1847) C.B. 236 and see Wheeler v Keeble (1914) Ltd [1920] 1 Ch. 57). Where there is a continuing trespass a claimant may be held to have acquiesced in the trespass so as to be estopped in complaining of the trespass. However, estoppel or acquiescence will only apply where the claimant has encouraged or allowed the defendant to believe something to the defendant’s detriment (Jones v Stones [1999] 1 W.L.R. 1739, applying the dicta of Oliver J. in Habib Bank Ltd v Habib Bank AG Zurich [1981] 1 W.L.R. 1265 at 1283-1285).

What must be affected for there to be a trespass? What must be affected is, generally real and corporeal property. (But see para. 49-01, fn. 105). The claimant does not need to have exclusive possession of the property in question for all purposes (Cox v Glue (1848) 5 C.B. 533; Wellaway v Courtier [1917] 1 K.B. 200). It is sufficient if he has an exclusive right, for example of cutting turf (Wilson v Mackreth (1766) 3 Burr. 1824) or some other benefit of the land to take (called in the past a “profit á pendre”) such as shooting or fishing rights (Fitzgerald v Firbank [1897] 2 Ch 96, and see Mason v Clarke [1955] A.C. 778). However, other incorporeal hereditaments, such as a right of way, or a right of water cannot be the subject-matter of a trespass (Bryan v Whistler (1828) 8 B. & C. 288 at 292). The proper cause of action for interference with an easement is in nuisance.

Who can sue in trespass? To be entitled to sue for trespass, the claimant must usually be in possession of the land or have a present right to possession of the land (see Bocardo SA v Star
Energy UK Onshore Ltd [2010] UKSC 35; and also Wuta-Ofei v Danquah [1961] 1 W.L.R. 1238; Fowley Marine (Emsworth) Ltd v. Gafford [1968] 2 Q.B. 618). Where land is held under a tenancy, it is the tenant rather than the landlord who is the proper person to sue for trespass (Aftersoil v Stevens (1808) 1 Taunt. 183). However, if the trespass has caused physical harm to the property such that the damage is likely to affect the landlord’s reversionary interest (that is, the interest of the landlord in the property on termination of the tenancy), the landlord can sue for damage to his reversionary interest (Mayfair Property Co v Johnston [1894] 1 Ch. 508). On the other hand someone who is a licensee or lodger, who has no exclusive possession, cannot sue for trespass (Allan v Liverpool Overseers (1874) L.R. 9 Q.B. 180 at 181, 192). Possession of land by a claimant extends to everything on or below it which may be regarded as part of the land, for example including a safe built into a wall (City of London Corp v Appleyard [1963] 1 W.L.R. 982), as well as the airspace above it (see Woollerton and Wilson Ltd v. Richard Castain Ltd [1970] 1 W.L.R. 411; and Franklin Mint Ltd v Baxtergate Investment Co (Transcript, March 12, 1988, CA)).

However, if the claimant has only actual possession as owner this gives rise to a presumptive proof of property, and is sufficient to allow the claimant to take neither admitted nor denied action against a defendant who commits an act of trespass (also referred to in these circumstances in relation to the claimant as a “mere wrongdoer”) provided the defendant cannot show any better title or authority (Browne v Dawson (1841) 12 Ad. & El. 624; Delaney v TP Smith Ltd [1946] K.B. 393). If a claimant has only a possessory right the defendant cannot defeat the claimant’s claim by setting up what is called a “jus tertii” (that is, to claim that there is someone with a better title to sue in trespass than the claimant) unless the defendant can show that he acted under the authority of that “better” right.

A claimant who is the owner of the soil may maintain an action for trespass against a defendant (who is himself entitled to rights over the land) for acts of trespass which are not justified by the exercise of those rights (Earl of Lonsdale v Rigg (1857) 1 H. & N. 924). As a result, ownership of land that is subject to use as a highway if only as to the surface, will usually be vested in the highway authority (Hickman v Maisey [1900] 1 Q.B. 752, but see Tithe Redemption Commission v Runcom Urban DC [1954] Ch 383).

The owner of the sub-soil of land, of which the surface belongs to another, may maintain an action for trespass to the subsoil (Stammers v Dixon (1808) 7 East. 203; Cox v. Glue (1848) 5 C.B. 533).
The position of co-owners. One co-owner cannot sue another co-owner for trespass unless he has been wholly excluded from the land (Murray v Hall (1849) 7 C.B. 4412). In such a case the court may order one co-owner to pay to the other a sum in the nature of an occupation rent (Dennis v McDonald [1981] 1 W.L.R. 810). (Otherwise the remedy of one co-owner against another is an action for partition or for an account.).

**Damages.** In the case of entry without physical damage, damages are the sum a reasonable person would pay for the right of user (cf. Philipps v Homfray (1871) L.R. 6 Ch. 770). If a residential property or a property that might have been rented out is unlawfully occupied, then a “reasonable rent” can be claimed even without proof that letting could have been possible (Swordheath Properties Ltd v Tabet [1979] 1 All E.R. 240; and Inverugie Investments Ltd v Hackett [1995] 3 All E.R. 841 PC).

In the case of physical damage to land the normal measure of damage is diminution in value (see, e.g. Nalder v Ilford Corp [1951] 1 K.B. 822). However, actual expenditure may be recoverable where the expenditure is reasonable in terms of repair and reinstatement and the claimant intends to do the work himself (Perry v Sidney Philipps & Sons [1982] 1 W.L.R. 197) on the grounds that this is the manner in which to put the claimant in the same position as he was in prior to commission of the trespass (Dominion Mosaics and Tile Co v Trafalgar Trucking Co [1990] 2 All E.R. 246 CA). In cases of encroachment, the level of damages may take into account the increased value to the defendant for any taking of property – Horsford v Bird [2006] UKPC 3. See, where land is appropriated by an individual, in the relevant approaches to culminating mesne profits: Ramzan v Brookwide Ltd [2010] EWHC 2453 (Ch).

“Aggravated” damages may be awarded where the trespass was high-handed and “insolent” (Jolliffe v Willmett & Co [1971] 1 All E.R. 478).

Limitation. Classic trespass cases (called trespass “quare clausum fregit”) must be brought within six years of the cause of action accruing: Limitation Act 1980 s.2.

Actions for the recovery of land must be brought within 12 years of the cause of action accruing to the claimant or to the person through whom the claimant now claims: Limitation Act 1980 s.15(1) and Sch.1 Pt II in the case of the Crown or corporations sole.

**CONSPIRACY**
Different types of conspiracy. Historically, there are two kinds of conspiracy, the elements of which are distinct:

(i) an “unlawful means” conspiracy in which the participants combine together to perform activities which are themselves unlawful; and

(ii) a combination to perform activities which, although not themselves per se unlawful, are done with the sole of predominant purpose of injuring the claimant: “It is in the fact of the conspiracy that the unlawfulness resides”, per Lord Watson in *Allen v Flood* [1898] A.C. 1 at 108.

Necessary elements of an action in conspiracy. The claimant must plead and prove the following necessary elements: See *Kuwait Oil Tanker Co v Al Bader* [2000] 2 All E.R. Comm 271, CA, para. 108:

(i) a combination or agreement between two or more individuals (required for both types of conspiracy);

(ii) an intent to injure (required for both types of conspiracy but must be shown as the sole or predominant purpose for type (2) above);

(iii) pursuant to which combination or agreement and with that intention certain activities were carried out;

(iv) Resulting loss and damage to the claimant.

Combination or agreement. It is not necessary to show that there was anything in the nature of an express agreement, whether formal or informal. The court looks at the overt acts of the conspiracy and infers from those activities that there was agreement to further the common object of the combination. It is sufficient that two or more persons combine with the necessary intention or that they deliberately co-operate, albeit tacitly, to achieve a common end. Neither is it necessary that all those involved should have joined the conspiracy at the same time, but all those said to be parties to the conspiracy should be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they are acting in concert. The question in relation to any particular scheme or enterprise in which only one or some of the alleged conspirators can be shown to have directly participated is whether that enterprise fell within the overall scope of their common design (*Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All E.R. (Comm) 271 at paras 111-112).
It is possible for a conspirator to join later. However, a person is only liable for the damage that is suffered from the time that he joins the conspiracy; he is not liable retrospectively for the damage that has been suffered prior to his joining (O’Keefe v Walsh [1903] 2 L.R. 681).

How much of the principal fraudster’s scheme must the defendant know before incurring liability for the whole or part of the consequences? Where two or more persons combine with a view to stealing form the claimant wherever possible it is unnecessary to show that the defendant conspirators knew of or planned every specific subsequent theft: Kuwait Oil Tanger Co SAK v Al Bader [2000] 2 All E.R. (Comm) 271. However, where a bit-part player in a multifaceted fraud knows of only one aspect of the fraud and is ignorant of the others he may not be liable for anything more than the loss properly attributable to that part of the fraud of which he is aware: IS Innovative Software Ltd v Howes [2004] EWCA Civ 275. In Bank of Tokyo-Mitsubishi UFJ Ltd v Baskam [2009] EWHC 1276 (Ch) Briggs J. suggested (at para.847) the answer in each case lay in a:

“painstaking analysis of the extent to which the particular defendant shared a common objective with the primary fraudsters and the extent to which the achievement of that objective was to the particular defendant’s knowledge to be achieved by unlawful means intended to injure the claimant”.

Should the names of all conspirators not be known it is acceptable to plead a conspiracy between “A, B and [other] persons whose names are presently unknown to the claimant” (Giblan v National Amalgamated Labourers Union of Great Britain and Ireland [1903] 2 K.B. 600). An allegation of conspiracy must be properly particularised. It is essential that the facts on which reliance is to be placed in support of the existence of a conspiracy are clearly identified and that the logical connection between those facts and the substantive allegations in the pleadings is made clear. This means the claimant must both plead the primary facts on which he relies and set out clearly how they give rise to the inference that the defendants were parties to a conspiracy: Cannock Chase DC v Kelly [1978] 1 W.L.R. 1; Paragon Finance Plc v Hare, The Times, April 1, 1999.

Intention to injure. For an “unlawful means” conspiracy (type (1) above), it is not necessary to show a predominant intent to injure, but there must be alleged and proved some intention to injure (Lonrho v Fayed [1992] 1 A.C. 448, Customs and Excise Commissioners v Total Network SL [2008] 1 A.C. 1174 per Lord Scott at para. 56).
For a conspiracy of type (2) above, a “lawful means” conspiracy, in to plead and prove that the conspirators had the sole or predominant intention of injuring the claimant (Crofter Hand Woven Harris Tweed Co v Veitch [1942] A.C. 435 at 445, per Lord Simon L.C.; Lonrho v Fayed [1992] 1 A.C. 448 at 467, per Lord Bridge). See now also Customs and Excise Commissioners v Total Network SL [2008] 1 A.C. 1174 at paras 41 and 56.

The mental element of intention to injure the claimant will be satisfied where the defendant intends to injure the claimant either as an end in itself or as a means to an end such as to enrich himself or protect or promote his own economic interests. It will not be satisfied where injury to the claimant is neither a desired end nor a means of attaining it but merely a foreseeable consequence of the defendant’s actions. Where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant, that is where loss to the claimant is “the obverse side of the coin from gain to the defendant” the defendant’s gain and the claimant’s loss are to the defendant’s knowledge inseparably linked. The defendant cannot obtain one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks his state of mind will satisfy the mental ingredient of the tort: see OBG Ltd v Allan [2008] 1 A.C. 1 per Lord Hoffman at [62] and per Lord Nicholls at [164]-[167] regarding intent to injure within the context of the economic tort of interference with the claimant’s business by unlawful means. No distinction can be drawn between what was held in OBG about intention to cause loss by unlawful means and conspiracy: Meretz Investments NV v ACP Ltd [2008] Ch.244 at para. 146. OBG is authority that in this context what is required is actual intention or reckless indifference. The same applies to knowledge. Relevant knowledge is actual knowledge or reckless indifference. Reckless indifference in this context means a conscious decision not to inquire into the existence of a fact: Baldwin v Berryland Books [2010] EWCA Civ 1440 at para. 48.

Knowledge of unlawfulness. In Meretz Investments NV v ACP Ltd [2008] Ch. 244 the Court of Appeal held that it was a condition of liability that the defendant knows that the claimant’s loss was to be caused by the use of unlawful means: “A defendant should not be liable for conspiracy to injure by unlawful means if he believes that he has a lawful right to do what he is doing” per Toulson L.J. at para. 174. See also Digicel (St Lucia) Ltd v Cable & Wireless Plc [2010] EWHC 774 (Ch) at Annex I, paras 86-119.

It is not a necessary ingredient of unlawful means conspiracy that the unlawful means must be actionable at the suit of the claimant against at least one of the conspirators. In Customs and Excise Commissioners v Total Network SL [2008] 1 A.C. 1174 the House of Lords held that criminal conduct

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at common law or by statute can constitute unlawful means in unlawful means conspiracy, provided
that it is indeed the means whereby the relevant loss is intentionally inflicted upon the claimant (see
per Lord Walker at paras 95-96). To this extent “unlawful means” has a wider meaning in the tort of
conspiracy than it has in the tort of intentionally causing harm by unlawful means.

However, the precise scope of what constitutes an unlawful act for the purposes of unlawful means
conspiracy is uncertain. It is not clear whether every crime will constitute an unlawful act for these
purposes or whether the tort extends to crimes directed against third parties or even torts
committed against third parties: see Total Network SL at paras 43, 96, 116-117, 124, 222-223. In
Digicel (St Lucia) Ltd v Cable & Wireless Plc [2010] EWHC 774 (Ch) Morgan J. concluded that a breach
of a statutory obligation which was not an actionable breach and which was not a criminal offence
did not constitute “unlawful means” for the purpose of the tort of conspiracy to injure by unlawful
means (see Annex I at paras 56-62).

It has generally been assumed in a number of cases that breach of fiduciary duty and breach of
contract are unlawful means for the tort of conspiracy to injure by unlawful means (e.g. Fiona Trust
& Holding Corp v Privalov [2010] EWHC 3199 (Comm) at para.69 where the unlawful means included
breach of fiduciary duty, bribery, dishonest assistance and knowing receipt) but the desirability of
this has been questioned since there already exist accessory liability for dishonest assistance in a
breach of fiduciary duty and breach of contract are unlawful means for that tort of inducing breach
of contract: see the discussion in Digicel at Annex I paras 63-69 and Aerostar Maintenance
International Ltd v Wilson [2010] EWHC 2032 (Ch) at paras 170-172. In Meretz Investments NV v
ACP Ltd [2008] Ch. 244 the Court of Appeal held that where a party does something which he is
entitled to do because of his contractual right conferred by A, the fact that it results in a breach of
B’s contract with A cannot constitute unlawful means of which A can complain in an action for
unlawful means conspiracy. The court has to look at the whole of the means used by the alleged
tortfeasor and not simply its effect on the party rendered in breach (see paras 148, 167-170).

Damage. Damage is the gist of a civil action for conspiracy. The tort is complete only if the
agreement is carried into effect so as to damage the claimant. (Marrinan v Vibart [1963] 1 Q.B. 234;
Midland Bank v Green (No. 3) [1979] 1 Ch. 496, affirmed by Lord Denning M.R. in the Court of Appeal

In conspiracy damages are at large in the sense that they are not limited to a precise calculation of
the amount of the actual pecuniary loss actually proved: Quinn v Leathem [1901] A.C. 495. In
coming to a view as to the level of damages which a defendant ought to pay, the court will consider all the circumstances of the case, including the conduct of a defendant and the nature of his wrongdoing: Noble Resources Saturday v Gross [2009] EWHC 1435 (Comm). However, that damages are at large does not mean that it is sufficient simply to plead, without any particulars, that loss and damage has been suffered. Such a pleading has been described as grossly inadequate: Lonrho Plc v Fayed (No.5) [1993] 1 W.L.R. 1489, 1494 (Dillon L.J.).

Defences to an action in conspiracy. The defendants may deny the conspiracy generally so long as the defence makes clear that every allegation of fact in the particulars of claim is denied (John Lancester Radiators Ltd v General Motors Radiators Co Ltd [1946] All E.R. 685, CA), or the defendants may serve separate defences or join in a common defence and deal separately with the allegations made against each of them individually. Plainly it is advisable to deal specifically with the allegations if this can be done.

It is for the claimant to establish that the defendants conspired together with the object or purpose of injuring or causing damage to him and that he has thereby suffered loss (see Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] A.C. 435).

If the defendants desire to contend, not only that this was not their object or purpose, but that the purpose of the combination between them was bona fide to promote or forward or defend their own interests or the interests of those they represent, each ground of justification or lawful excuse should be expressly pleaded, and the facts and matters relied on should be fully set out. However, such a defence of justification is not available in the case of “unlawful means” conspiracy (type (1) above): Lonrho v Fayed [1992] 1 A.C. 448; Crofter v Veitch, above.

For two or more persons to agree together to induce others not to enter into any contracts with the claimant is not an actionable tort when such advice is given justifiably and bona fide for the good of the persons advised (see South Wales Miners’ Federation v Glamorgan Coal Co [1905] A.C. 239 at 245, 251), or from motives of self interest in fair trade competition (Mogul Steamship Co v McGregor [1892] A.C. 25), or where the predominant purpose of the combination was the legitimate promotion of the interests of the persons combining (Crofter Hand Woven Harris Tweed Co Ltd v Veitch, above; Scala Ballroom (Wolverhampton) Ltd v Ratcliffe [1958] 1 W.L.R. 1057, CA).

Trade union objectives may be a legitimate justification. In Crofter Hand Woven Harris Tweed Co Ltd v Veitch, above, Lord Wright said (at 469) that “The true contrast is, I think, between the case where
the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any such just cause”.

The following agreements have been held to be justified:

(a) a campaign against a colour bar in a club: Scala Ballroom (Wolverhampton) Ltd, above;

(b) the enforcement of a closed shop: Reynolds v Shipping Federation [1924] 1 Ch. 28;

(c) attempts to force an employer to refuse to employ trade unionists: December Thomson & Co v Deakin [1952] Ch. 646.

INTENTIONAL ECONOMIC TORTS

There has been for some years a degree of confusion as to the proper identification of the economic torts of inducing breach of contract and unlawful interference causing loss; they have frequently been classed and discussed together, through the use of such concepts as “direct” or “indirect” interference. This confusion has been swept aside by the House of Lords case of OBG Ltd v Allan [2008] 1 A.C. 1 in which the House of Lords comprehensively reviewed these torts, concluding that they were separate causes of action, with separate and distinct requirements: “...it is time for the unnatural union between the Lumley v Gye tort and the tort of causing loss by unlawful means to be dissolved” (OBG above, per Lord Hoffman at para.38).

Knowledge. A party must be shown to have known that they were including a breach of contract. It is not enough that a defendant knows that he is procuring an act which, as a matter of law or construction of the contract, is a breach, nor that he ought reasonably to have known that it is a breach: OBG v Allan per Lord Hoffman at para. 39; British Industrial Plastics Ltd v Ferguson [1940] 1 All E.R. 479.

As in other areas of the law, a deliberate decision not to take up the means of acquiring the relevant knowledge ("turning a blind eye") will suffice: Emerald v Lowthian [1966] 1 W.L.R. 691 per Lord Denning M.R. at 700-701; OBG v Allan per Lord Hofmann at para. 40.

Intention. The Defendant is liable if he intended to persuade the contracting party to breach the contract. Intentional interference presupposes knowledge of the contract. With that knowledge the
defendant proceeded to induce the other contracting party to act in a way the defendant knew was a breach of that party’s obligations under the contract. If the defendant deliberately turned a blind eye and proceeded regardless he may be treated as having intended the consequence he brought about. A desire to injure the claimant is not an essential ingredient of this tort: OBG per Lord Nicholls at para. 192. It is necessary for the claimant to have been “targeted” or “aimed at”. The breach of contract must have been either itself the object of the defendant’s activity, or the means by which the defendant’s actual object was to be accomplished, as opposed to being merely a foreseeable consequence. In OBG (ibid. at para. 43) Lord Hoffman expressed the view that Millar v Bassey [1994] E.M.L.R. 44 was for this reason wrongly decided.

Breach of contract. A breach of an existing contract is a fundamental requirement of this tort. Accordingly authorities which appear to expand the tort of inducing breach to include a liability for preventing or hindering performance (e.g. Torquay Hotel v Cousins [1969] 2 Ch. 106), or for violating rights other than those arising pursuant to contract (e.g. Low Debenture Trust Corp v Ural Caspian Oil Corp [1995] Ch. 152 (inducing a breach of a director’s fiduciary duty) are now better seen as cases of causing loss by unlawful means.

A positive act of inducement or procurement is essential to the wrong. Failing to stop a breach if not enough: see OBG per Lord Nicholls at para. 189. To prevent the performance of a contractual obligation is not the same thing in law as inducing its breach. The former may give rise to the tort of causing loss by unlawful means; the latter requires the defendant’s conduct to have operated on the will of the contracting party: OBG per Lord Nicholls at paras 174-180 and discussion in Meretz Investments NV v ACP Ltd [2008] Ch 244 at paras 129-140, 177.

Damage. The claimant must prove that the actions of the defendant have caused him loss. Thus where it is clear that the contract-breaker would have taken the same steps anyway, the actions of the defendant will not have been the effective cause of the loss (Jones Bros (Hunstanton) Ltd v Stevens [1955] 1 Q.B. 275).

If the breach is such that, in the ordinary course of business, it must cause loss, it is unnecessary to demonstrate and prove particular items of loss. In this sense, damages are “at large”: Exchange Telegraph Co v Gregory [1896] 1 Q.B. 147; British Motor Trade Association v Salvadori [1949] Ch 556. Where damage can be proved, or inferred, the claimant can recover subject to ordinary principles of remoteness: British Motor Trade Association v Salvadori, cited above; Boxfoldia Ltd v NGA [1988] I.R.L.R. 383. It may be possible also to claim for non-pecuniary loss such as injured feelings (this
would be consistent with also to claim for non-pecuniary loss such as injured feelings (this would be consistent with *Pratt v B.M.A.* [1919] 1 K.B., but see *Lonrho v Fayed (No. 5)* [1993] 1 W.L.R. 1489).

Defences. An honest belief by the defendant that the outcome will not involve a breach of contract is inconsistent with him intending to induce a breach of contract, so a defendant can escape liability by relying on his own mistaken assessment of the legal position *Mainstream Properties Ltd v Young* [2005] EWCA Civ 861; [2005] I.R.L.R. 964; *OBG Ltd v Allan* per Lord Nicholls at paras 201-202; *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303; [2008] Ch. 244 at paras 118-119. It is sufficient to avoid liability for inducing breach of contract that a person believes they were entitled to act as they did. A person who intended to produce a result which they believed they were entitled to produce does not have the requisite intention to cause harm for the purposes of the tort of inducing breach of contract: *Meretz Investments NV* at paras 122-127.

There may be a defence of justification to this tort, however it defies precise definition and will depend upon the circumstances of the particular case (see *OBG* per Lord Nicholls at para. 193; *Meretz Investments NV* at para. 142). It has been said that regard must be had to the parties to the contract, the grounds for the breach, the means employed to break it, procuring the breach: per Romer L.J. in *Glamorgan Coal Co Ltd v S. Wales Miners’ Federation* [1903] 2 K.B. 545 at 574-5, decision upheld in the House of Lords at [1905] A.C. 239.

B. *Causing loss by unlawful means*

Following the *OBG case* referred to above, the essential elements of this tort may be identified as follows:

(1) use by the defendant of unlawful means, thereby

(2) interfering with the actions of a third party in relation to the claimant;

(3) intention to cause loss to the claimant;

(4) damage

per Lord Hoffman in the *OBG case* at paras. 45-47.
Unlawful means. To qualify as “unlawful means” activities against a third party must be actionable by the third party, subject only where they are not actionable because no loss has been suffered: per Lord Hoffman in OBG at para. 49, referring to National Phonographic Co Ltd v Edison-Bell Consolidated Phonographic Co Ltd [1908] 1 Ch. 335 and Lonrho v Fayed [1990] 2 Q.B. 479.

Interference. In OBG, Lord Hoffman emphasised the importance of establishing that the actions of the defendant have interfered with the freedom of the third party to deal with the claimant. It is not enough that the activities can be shown to have been actionable by the third party if they do not impact upon his liberty of action in relation to the claimant: RCA Corporation v Pollard [1983] Ch 135; Isaac Oren v Red Box Toy Factory Ltd [1999] F.S.R. 785.

Intention to cause loss. The concept of intention is as above in relation to an intention to procure breach: it is necessary to show something more than loss as a foreseeable consequence. Loss must either be shown to be the end in itself, or the means to some other desired end, such as the defendant’s own enrichment: OBG para. 62, referring to Tarleton v McGawley (1794) 1 Peake 270. For a case where there was insufficient intention see Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants [1987] I.R.L.R. 3.

BRIBERY

Elements of the cause of action. “[A] bribe consists in a commission or other inducement, which is given by a third party to an agent as such, and which is secret from his principal” (per Leggatt J. in Anangel Atlas Compania Navieva Saturday v Ishikawajima-Harima Heavy Industries [1990] 1 Lloyd’s Rep. 167 at 171).

The claimant must plead and prove the following:

(i) payment or other inducement;

(ii) made (or promised) to an agent of the other person with whom the briber is dealing;

(iii) who is known to the briber to be an agent; and

(iv) that the payments are unknown to the principal.
The payer of the bribe acted with a corrupt motive;

- the agent’s mind was actually affected by the bribe;

- the payer knew or suspected that the agent would conceal the payment from the principal;

the principal suffered any loss or that the transaction was in some way unfair: the law is intended to operate as a deterrent against the giving of bribes, and it will be assumed that the true price of any goods bought by the principal was increased by at least the amount of the bribe, but any loss beyond the amount of the bribe itself must be proved; or

the bribe was given specifically in connection with a particular contract, since a bribe may also be given to an agent to influence his mind in favour of the payer generally (e.g. in connection with the granting of future contracts).”

There are two main tests of whether a payment amounts to a bribe:

(i) Conflict of interests: whether the payment or other benefit resulted in the agent having a personal interest which conflicted (or might have conflicted) with his duty to the principal: *Petrotrade Inc. v Smith* [2000] 1 Lloyd’s Rep 486 at para. 17; *Logicrose Limited v Southend United Football Club Limited* [1988] 1 W.L.R. 1256, 160F-H. A principal is entitled to have his agent’s disinterested advice; a bribe undermines that entitlement.

(ii) Secrecy: whether the payment or other benefit was kept secret from the principal. See, for example, *Logicrose* at 1262, quoting Chitty L.J. in *Shipway v Broadwood* at p.373: “The real evil is not the payment of money, but the secrecy attending it.”
In *Imageview Management Ltd v Jack* [2009] 1 Lloyd’s Rep 436, the Court of Appeal recently underscored in strong terms the centrality of the conflict of interest test. The Court rejected an argument that a payment by a football club to an agent was a “harmless” collateral payment and emphasised that the strict non-profit rule was necessary as a matter of policy “as a real deterrent to betrayal” (at para.50).

What constitutes a bribe/secret commission. A secret commission or bribe need not be a payment. The principles in relation to secret commission/bribery apply to bribes in other forms, for example gifts, an arrangement to pay or other inducements (in *Amalgamated Industrials Ltd v Johnson & Firth Brown Ltd*, *The Times*, April 15, 1981 an offer of employment was treated as a bribe). The key to the determination of the question as to whether or not a payment or other inducement constitutes a bribe is to ask whether the making of it puts the agent into a position where his duty to his principal and his interest (in receiving the payment) conflict (*Anangel v IHI*, above; *Meadow Schama and Company v Mitchell and Company Ltd* (1973) 228 E.G. 1611; *Barry v The Stoney Point Canning Co.* (1917) 55 C.R. 51).

It is not necessary that the bribe actually induces a contract. The focus is not on the outcome of the payment but on the fact that it is made with a view to perverting the judgment or conduct of the recipient (*Petrotrade Inc v Smith* [2000] 1 Lloyd’s Rep. 486.

Who may be sued. Both the agent and the briber are jointly and severally liable to the principal. In relation to the payer of the bribe it should be noted that a third party briber is regarded as a party to the agent’s breach of duty even where: (i) he thought that the agent would tell or had told the principal of the payment (*Shipway v Broadwood* [1899] 1 Q.B. 369 at 373; *Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 Q.B. 233 at 248-250; and *Taylor v Walker* [1958] 1 Lloyd’s Rep. 490 at 509-513); or (ii) he was not aware of the agent’s interest in the transaction but he did know that the agent did not intend to disclose the dealing to the principal (*Logicrose Ltd v Southend United FC* [1988] 1 W.L.R. 1256 at 1260-1262).

**Remedies.** A principal may choose between two distinct remedies, both against the agent, and the third party briber:

(i) restitution of the amount of the bribe or secret commission; or in the alternative

(ii) damages in deceit for any loss suffered by the principal as a result of the fraud.
It now appears that a claimant may also be able to sue for an account of profits from the briber and the agent: see *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd’s Rep, 643, Toulson J.; *Ultraframe v Fielding* [2006] F.S.R. 17, Lewison J. at paras 1589-1594 (see further Goff & Jones at para. 33-002). The Nineteenth Edition of *Bowstead & Reynolds On Agency* (art.96) suggests that a briber’s liability may now be better classified under the head of accessory liability (as clarified in *Brunei v Tan* etc.). It should be noted that in *Fyffes* the remedy of account of profits from the briber was not in fact profits. He found that it was highly probably that the claimant would have entered into a service agreement with the third party even if the relevant fiduciary had not been dishonest.

The recent Court of Appeal case of *Imageview v Jack* (above) also dealt with the circumstances in which a fiduciary who has acted in breach of fiduciary duty and against whom an account of profit is ordered may be given an allowance for skill and effort. Four points were emphatically restated in the judgment: (i) it must be inequitable for the beneficiaries to take the profit from the fiduciary without paying for the skill and labour; (ii) the power to grant such an allowance to fiduciaries is to be exercised sparingly out of concerns not to encourage fiduciaries to act in breach of fiduciary duty; (iii) such an allowance is unlikely to be allowed where the fiduciary duty has been involved in surreptitious dealings; and (iv) the burden is on the fiduciary to convince the court that an accounting of his or her entire profits was in appropriate in the circumstances (paras 52 and 56). See also *Rahme v Smith and Williamson Trust Corp Ltd (Administrators of the Estate of Stephen John Voice)* [2009] EWHC 911 (Ch).

Prior to the Court of Appeal decision in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2011] EWCA Civ 347 there had been widespread support for the view that under English law unauthorised profits acquired by fiduciaries in breach of fiduciary duty are held upon constructive trust for the principal: following the Privy Council decision in *Attorney General for Hong Kong v Reid* [1994] 1 A.C. 324; see also *Daraydan Holdings Ltd V Solland International Ltd* [2005] Ch. 119; and *Ultraframe* at para. 1490. So bribes have been held to be trust property for the purposes of a knowing receipt claim: *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch). However, in *Sinclair Investments* the Court of Appeal declined to follow the Privy Council decision in *Reid* and instead followed five previous decisions of the Court of Appeal and upheld the First Instance decision of Lewison J. ([2010] EWHC 1614 (Ch)) that unauthorised profits made by a fiduciary, otherwise than by acquiring and exploiting property formally owned (or treated as owned) by the principal itself, give riser only to a personal obligation to account rather than a constructive trust.
This means that such unauthorised profits cannot be traced e.g. into proceeds of sales nor can a proprietary claim be asserted to such proceeds. See in particular paras 72 to 92 of the judgment of Neuberger L.J.

The restitutionary claim is available against the third party briber although he has paid, rather than received the bribe, on the basis that the principal “is entitled to treat the benefit obtained by a promised to the agent as part of the consideration which should have been received by the principal (if he is a vendor) or as excess consideration provided by the principal (if he is a purchaser)” (per Millett J. in the Logicrose case, above). It has been suggested that the restitutionary liability of a third party derives from the imposition of a constructive trust for “dishonest assistance” in the agent’s breach of fiduciary duty—but this was not followed in the Petrotrade case, above.

The remedy in deceit for damages is clearly preferable if the amount of the loss exceeds the bribe, or if the property acquired with it has decreased in value; obviously, also, against an agent who never in fact received the bribe.

Note that the principal cannot recover under all heads and must elect prior to judgment which remedy to take (Mahesan case, above).

If a contract has been concluded with the third party briber, the principal may rescind it about initio, alternatively it may be terminated for the future (Panama & South Pacific Telegraph Co v India Rubber, etc., Company (1875) L.R. 10 Ch. App. 515; Armagas Ltd v Mundogas S.A. (The Ocean Frost) [1986] A.C. 717).

The agent who takes a bribe may forfeit his right to any remuneration or commission (Meadow Schama and Company v Mitchell and Company Ltd (1973) 228 E.G. 1511), and lose his right to an indemnity (Stange & Co v Lowitz (1898) 14 T.L.R. 468; Nicholson v Mansfield & Co (1901) 17 T.L.R. 259); a principal may also be justified in dismissing him without notice (Swale v Ipswich Tannery Ltd (1906) 11 Com. Cas. 88; Baston Deep Sea Fishing & Ice Company v Ansell (1888) 39 Ch.D. 339).

Defences. It is a defence that the principal knew of the payment, or would have known if he had thought about it. The principal must have sufficient knowledge to understand the implications of the arrangement so a partial disclosure will be insufficient (Bartram & Sons v Lloyd (1904) 90 L.T. 357). The burden of proving that the principal knew is on the agent/third party (Jordy v Vanderpump (1920) 64 S.J. 324) and therefore this must be specifically pleaded in the defence. It is not a defence.
that there was no dishonesty. The principal in *Anangel* (above) also applies where there has been no improper conduct or motivation on the part of the agent (*Allwood v Clifford* [2002] E.M.L.R. 3).

The pleading of and evidence as to a market practice for commissions to be payable may be relevant to the issue “secrecy”: *Secretary of State for Justice v Topland Group Plc* [2011] EWHC 983 (Q.B.), King J.

Payments made after the conclusion of the transaction will not be regarded as bribes unless it appears that such gifts were expected or arranged at the outset, or were made to influence future transactions (*Smith v Sorby* (1875) 3 Q.B.D. 552; *Hough v Bolton* (1885) 1 T.L.R. 606).

**THE RULE IN RYLANDS V FLETCHER**

*Rylands v Fletcher* is a common law rule of strict liability in tort which stems from judgment of Blackburn J. in the eponymous case. Liability under the rule is triggered if a person brings onto his land and keeps there something "likely to do mischief if it escapes". In such circumstances he is deemed to act "at his peril" and will be "answerable for all the damage which is the natural consequences of its escape". The rule has been described as "alive and well" in the 21st Century although it is rarely invoked. Nevertheless, it continues to provide a cause of action in some cases, normally involving the storage of hazardous materials.

The essence of the rule is that the defendant must have used his land for an unusual purpose which subjected his neighbours to the risk of substantial damage in the event of an escape. Given the centrality of Blackburn J’s judgment (in the Court of Exchequer Chamber) to the Rule it is worth citing the relevant passage of his judgment in its entirety:

"We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff’s default, or, perhaps, that the escape was the consequence of vis major, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

Per Blackburn J. in *Rylands v Fletcher* (1865-66) L.R. 1 Ex. 265.
The House of Lords upheld the decision and emphasised the strict nature of the duty in the following terms:-

"If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." Per Lord Cranworth in *Rylands v Fletcher* (1868) L.R. 3 H.L. 330.

From this it is clear that there must be something unusual and potentially hazardous about the land use; the House of Lords judgments referred to unnatural land uses at various points. The case of *Rylands* itself concerned the storage of a large body of water in a reservoir; although, as will be apparent from the detailed analysis below, this does not mean that the storage of water per se is regarded as an unnatural use of land. Other examples drawn from the case law include the storage of chemicals, sewerage, diseases (in research laboratories), petrol, explosives, polystyrene and other flammable materials. Recent decisions have tended to limit the scope of those land uses which can be deemed "unnatural"; see *Transco Plc v Stockport MBC* [2003] UKHL 61; [2004] 2 A.C. 1.

There must be an "escape" from land which means that damage contained within the boundaries of the property cannot give rise to liability under the Rule: see *Read v J Lyons & Co Ltd* [1947] A.C. 156 in which the House of Lords ruled that there could be no liability under the rule where an explosion in a munitions factory had been contained within the boundaries of the factory. Although *Rylands* is concerned with escapes from land, in certain cases parties may be liable notwithstanding the fact that they have no legal interest in the property itself. The key issue is whether they had complete control over the site and the activity conducted upon it: see *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 K.B. 772 and *Rainham Chemical Works Ltd (In Liquidation) v Belvedere Fish Guano Co Ltd* [1920] 2 K.B. 487.

Thus the rule in *Rylands v Fletcher* is concerned with danger from physical objects escaping from land where they have been accumulated (in *Ellison v Ministry of Defence* 81 Build L.R. 101 the defendant succeeded in part because there was no “accumulation” by him of the things on the land the escape of which was said to have caused the harm in question). In nuisance, liability can arise from intangible things, such as noise, and even though nothing is actually kept upon the premises. In nuisance there is no requirement for an accumulation or an escape, and liability does not arise if
there is a reasonable user of the land. In *Rylands v Fletcher* the defence that the use of land constitutes a natural user has been substituted by a test of “ordinary user”.

**Liability under Rylands v Fletcher.** A person who for his own purposes brings on to his land and collects and keeps there “anything” “likely to do mischief if it escapes”, will be at risk if he fails to prevent it escaping, and will be liable for damage, which is the natural result of its escape (see *Rylands v Fletcher* (1866) 1 Ex. 265; (1868) L.R. 3 H.L. 330). Foreseeability of damage is not a relevant element in this cause of action.

“Things” which have been held in the past as within the rule include; electricity (*National Telephone Co v Baker* [1893] 2 Ch. 186), explosives (*Rainham Chemical Works Ltd v Belvedere Fish Guano* [1921] 2 A.C. 465); C.S. gas canister (*Rigby v Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242); a motor car petrol tank (*Musgrove v Pandelis* [1919] 2 K.B. 43 and *Perry v Kendricks Transport Ltd* [1956] 1 All E.R. 154), fumes (*Halsey v Esso Petroleum Co Ltd* [1961] 2 All E.R. 145), coal (see *Anthony v Coal Authority* [2005] EWHC 1654 (QB)) and interferences of caravan dwellers (*Att Gen v Corke* [1933] Ch. 89), although a landlord’s unneighbourly tenants were held not within the rule, where there was no control over them (*Smith v Scott* [1973] Ch. 314). Note that in the House of Lords ruling in *Transco Plc (formerly BG Plc and BG Transco Plc) v Stockport MBC* [2004] 1 All E.R. 589; 91 Con. L.R. 28, the court considered that the threshold for liability should be high, limited to matters of exceptional risk. However, consider the observation of Lord Goff in *Cambridge Water Co v Eastern Counties Leather* [1994] 2 A.C. 264, that large amounts of solvents stored on site for commercial purposes would be such a “thing” within the rule.

**Strict Liability.** Although it may be that some fault may be necessary in nuisance, it appears that it is no defence that the thing escaped without the defendant’s neglect, or even that he had no knowledge of its existence. It has been suggested that the strict liability in *Rylands v Fletcher* has been somewhat attenuated (see *Dunne v North Western Gas Board* [1964] 2 Q.B. 806; *Pearson v North Western Gas Board* [1968] 2 All E.R. 669 and *British Celanese Ltd v AH Hunt (Capacitors) Ltd* [1969] 1 W.L.R. 959). However, in the light of the ruling in *Cambridge Water Co v Eastern Counties Leather* [1994] 2 A.C. 264 this is to be doubted, and see also *Transco Plc (formerly BG Plc and BG Transco Plc) v Stockport MBC* [2004] 1 All E.R. 589; 91 Con. L.R. 28.

**Escape.** There must be an escape from where the defendant has occupation to another place outside his occupation or control, so that a claimant would fail when an explosion occurred within
the factor where she worked (see Read v Lyons [1974] A.C. 156). The House of Lords has affirmed the need in this cause of action for an escape “from one tenement to another”; Transco Plc (formerly BG Plc and BG Transco Plc) v Stockport MBC [2004] 1 All E.R. 589; 91 Con. L.R. 28. It was suggested, obiter, that there will not be an “escape” within the rule in Rylands v Fletcher if that escape was the result of a deliberate act to create the “escape” (Rigby v Chief Constable of Northamptonshire [1985] 1 W.L.R. 1242), but this, it is submitted, is to be doubted as good law.

It has been held that the escape may be from property of which the defendant is in occupation to the highway or from the highway (see Rigby v Chief Constable of Northamptonshire [1985] 1 W.L.R. 1242). However, if Lord Goff’s recommendation that the rule in Rylands v Fletcher be aligned with the common law principles established for nuisance is accepted by the courts, then in the light of Hunter v Canary Wharf Ltd [1997] A.C. 655, this proposition from the Rigby case, if it were considered to be a proposition of general application, would not remain good.

**Non-natural user.** This has been a traditional term in Rylands v Fletcher. Liability was for something not naturally there. “It must be some special use bringing with it increased danger, and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community” (see Rickards v Lothian [1913] A.C. 263, approved in Read v Lyons [1974] A.C. 156). However, whilst ordinary use has been extended to cover domestic recreational uses and even some industrial use (see Cambridge Water Co v Eastern Counties Leather Plc [1994] 2 A.C. 264 at 308D), the creation of employment, even in a small industrial complex or for the benefit of a local community is not within the protection of ordinary user.

**Origins of the rule:** The origins of the Rule are complex and the subject of much academic debate in that it is difficult to discern from the case how it builds upon earlier authority. In Cambridge Water Co Ltd v Eastern Counties Leather Plc [1994] 2 A.C. 264, the House of Lords cited with approval the work of Professor Newark who argued that the Rule arose as an offshoot of nuisance. Whereas nuisance is concerned with an ongoing state of affairs, Rylands is concerned with a sudden escape. The Rule in Rylands ensured that the strict standard of liability applied by nuisance could be utilized in respect of certain land uses where lasting damage could result from isolated escapes. In this respect the Rule could be regarded as plugging a gap left by nuisance. Although, as will be apparent from the “key areas of complexity or uncertainty” section, Professor Newark’s theory is strongly contested.
Non-natural user: At the heart of liability under Rylands is the notion that liability will only be triggered if the defendant has used his land (or the land over which he has control) for the storage of a substance "likely to do mischief if it escapes". This denotes some un-natural (or non-natural) land use which risks causing substantial damage to neighbouring property should such an escape occur. Rylands itself arose from the escape of water from a reservoir onto neighbouring property via disused mine-workings of which the defendant was unaware. The storage of very large amounts of water in this manner was deemed to constitute such a non-natural land use. Thus, the defendant was held liable notwithstanding the fact that he was not at fault in failing to discover the disused mine-workings during construction.

The storage of chemicals or other materials liable to constitute a threat to public health, property or the environment constitute classic examples of non-natural land uses which may trigger liability under the rule. However, it should be noted that, as a result of progress and technological change, activities which may hitherto have been regarded as non-natural may become regarded as natural and ordinary land uses. For example, in British Celanese Ltd v AH Hunt (Capacitors) Ltd [1969] 1 W.L.R. 959 long strips of metal foil, stored in the yard of an electronics manufacturer, blew away in strong winds and shorted out an electrical substation thereby interrupting the electricity supply to the claimant's factory causing damage to work in progress and economic loss. As regards the claim in Rylands, Lawton J. held that in 1964 the storage of such raw materials used in electronics manufacturing could not be a regarded as a "special" use of land meaning something out of the ordinary or hazardous. More recently, in Northumbrian Water Ltd v Sir Robert McAlpine Ltd [2014] EWCA Civ 685; 154 Con. L.R. 26 it was held that the use of concrete in construction could not, in this day and age, be regarded as anything other than normal and reasonable.

Rylands itself concerned damage caused by water. However, it is important to note that the storage of water per se does not constitute non-natural user. Reservoir building is a potentially dangerous enterprise because of the volume of water concerned. By way of contrast, in Rickards v Lothian [1913] A.C. 263 the storage of water for domestic purposes was deemed not to constitute a non-natural use of land. In Transco Plc v Stockport MBC [2003] UKHL 61; [2004] 2 A.C. 1, where a large water main serving a block of flats burst and damaged the claimants gas main, the House of Lords held that, despite the large volumes of water concerned, piping water for domestic use was clearly a routine and ordinary use of land. Although it seems that domestic sewerage would still be regarded as a non-natural use of land due to its noxious nature: see Smeaton v Ilford Corp [1954] Ch. 450.
The other type of land use which has been a fertile ground for litigation under the rule concerns the storage of flammable material which combusts and causes fire damage to neighbouring property. In LMS International Ltd v Styrene Packaging & Insulation Ltd [2005] EWHC 2065 (TCC); [2006] T.C.L.R. 6, the defendant was in the business of manufacturing polystyrene blocks, the storage of which was found to constitute a non-natural user due to their flammable nature. However, this should now be read in the light of the Court of Appeal decision in Stannard (t/a Wyvern Tyres) v Gore [2012] EWCA Civ 1248; [2013] 1 All E.R. 694 in which the storage of large quantities of tyres, pursuant to a tyre fitting business, was found not to constitute a non-natural use of land. However, a far more restrictive aspect of the judgment is the notion that an escape of fire must be distinguished from the escape of the material which caught fire in the first place. There is further discussion of this under "key areas of complexity or uncertainty", below.

**Escape:** There must be an escape of material beyond the bounds of the property where the material was kept. The classic case law example is provided by Read v J Lyons & Co Ltd [1947] A.C. 156 where the claim failed because the explosion was contained within the bounds of the factory.

A related issue concerns the fact that the escape must have occurred from land over which the defendant had control; which means that those other than the owner (whether under a freehold or leasehold arrangement) may be liable in appropriate circumstances. In Charing Cross Electricity Supply Co v Hydraulic Power Co [1914] 3 K.B. 772, the defendant's owned a hydraulic main which burst and damaged electricity cables. Although they did not own the subsoil in which the main was buried the defendants controlled it and enjoyed a licence to run the main through the land. In Rainham Chemical Works Ltd (In Liquidation) v Belvedere Fish Guano Co Ltd [1920] 2 K.B. 487, the sole directors of a company which manufactured explosives incurred personal liability under Rylands v Fletcher notwithstanding the fact that it was the company which owned the site from which the escape occurred. Although the House of Lords rejected the notion that the company was a mere agent or sham, the complex agreements under which the site was managed indicated that the directors could still be regarded as occupiers if not owners of the site. In this sense they could be regarded as enjoying sufficient control of the site and the activities conducted thereon.

**Personal injuries:** There is now an overwhelming consensus to the effect that liability under Rylands v Fletcher is concerned with escapes from the defendant's land (or land over which he
has sufficient control) causing harm to the claimant’s land. In the past there have been some attempts to establish liability under Rylands in respect of personal injury claims unconnected with any interest in land; see Hale v Jennings Brothers [1938] 1 All E.R. 579. However, the use of Rylands in such circumstances was firmly rejected by Lord Macmillan in Read v J Lyons & Co Ltd [1947] A.C. 156.

**Foreseeability of harm:** Although Rylands v Fletcher establishes strict liability, in Cambridge Water Co Ltd v Eastern Counties Leather Plc [1994] 2 A.C. 264 the House of Lords held that it is still necessary to show that the harm was foreseeable. In this case the harm was not foreseeable because no one could have foreseen that chemicals could have penetrated the bedrock beneath the works. Moreover, at the time the spillages occurred drinking water containing such levels of the chemicals in question was perfectly acceptable. It was unforeseeable that in years to come new European regulations would be passed which would render the water unfit.

**Defences:** Liability under Rylands is strict but it is not absolute. This means that the defendant will have a defence in certain circumstances.

The defence of Act of God or Act of Nature establishes a defence in respect of harm caused by natural phenomena, such as extreme weather events, which are beyond the control of the defendant and against which it is not possible to take precautions. See, for example, Nichols v Marsland (1876) 2 Ex. D. 1.

A defence may also be available where the damage is caused by the intervention of a malevolent third party; as in the case of Perry v Kendricks Transport [1956] 1 W.L.R. 85. Although, rather than establishing a specific defence the case establishes that such acts may break the chain of causation between the defendant’s land use and the claimant’s harm: see novus actus interveniens under Causation.

The final defence relates to consent or common benefit. Where the claimant gains a direct benefit from the defendant’s land use it could be argued that he has consented to the risk which is a generally applicable defence in tort; see volenti non fit injuria. An alternative explanation is that there is a specific defence applicable to Rylands known as "common benefit" which precludes the claimant from obtaining damages in such circumstances. In
Kiddle v City Business Properties Ltd [1942] 1 K.B. 269 it was held that the defence would apply
where damage was caused by water supply to a building upon which the claimant also relied.