

Windfarms- Whither Nuisance?

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- **Introduction**
- Definitional problems
- ‘[what] is a nuisance is immersed in undefined uncertainty.’-F Newark, ‘The Boundaries of Nuisance’ (1949) 65 LQR 65
- ‘unlawful interference with a person’s use or enjoyment of land, or of some right over it.’-P Winfield *Textbook on Law of Torts* (1st ed, London, 1937) at 462

Introduction (cont)

- ‘any act which renders the enjoyment of life and property ‘uncomfortable’ or subjects the neighbourhood ‘to material discomfort and annoyance.’ J Lindsay Duncan (ed) A T Glegg, *The Law of Reparation in Scotland* (4th ed, Edinburgh, 1955) 324.
- Most-cited Scottish nuisance case-*Watt v Jamieson* 1954 SC 56 at 57 (per Lord President Cooper)
- ‘proper angle of approach is from the standpoint of the victim as opposed to that of alleged offender.’
- ‘The balance in all such cases has to be held between the freedom of a proprietor to use his property as he pleases, and the duty on a proprietor not to inflict material loss or inconvenience on adjoining property and, in every case, the answer depends on considerations of fact and degree. The critical question is whether what he is exposed to was *plus quam tolerabile* when due weight has been given to all surrounding circumstances of the offending conduct and its effects.’

Introduction (cont)

- *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 (per Lord Wright)
- 'it is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society.'

Wind-farms

- What constitutes nuisance is difficult to define in abstract.
- Law of nuisance crystallised during 19th century.
- Steeped in Victorian past. Law simply represents respective rights of landed proprietors of that era?
- Law represents *mores* of bygone era?
- To what extent, if any, is law of nuisance capable of meeting modern day challenges?
- Advent of wind-farms
 - -cause noise
 - -negative visual impact

Windfarms and Noise

- ‘Amplitude modulation’ ‘whoosing’ ‘whoomping’
- Audible low-frequency tones. ‘Hum’
- 1996 Working Group on Wind Turbine Noise-ETSU-R-97.
- Advice to developers and planners on environmental assessment of noise from wind-farms
- No UK case law on noise from windfarms and private nuisance cx windfarms and planning regime. esp EIA. Fertile source of litigation.

Windfarms-Visual Impact

- Few nuisance cases based on defendant carrying on activity which is visually unattractive or has a negative visual impact.
- Generally, the claimant has only succeeded in a nuisance action where the adverse state of affairs comprises some form of pollution.
- However, see *Williams v Network Rail Infrastructure Ltd* [2017] PLCS 94
- Can one successfully raise an action in relation to a state of affairs (ie presence of wind farm) which, although visually unattractive, is simply confined to the land of the defender?
- No direct authority on point.

Windfarms-Visual Impact (cont)

- *Hunter v Canary Wharf Ltd* [1997] 2 AllER 426
- Interference with television reception by very tall tower held(HL) not to be nuisance.
- Little discussion as to whether an emanation from D's premises was condition precedent to liability in nuisance.
- Difference between buildings and wind-farms-wind turbine blades revolve. Strobe effect.
- Potentially greater negative visual impact

Windfarms-Visual Impact (cont)

- *Thomson-Schwab v Costaki* [1956] 1 WLR 335
- Sight of prostitutes from C's premises
nuisance
- *Laws v Florinplace* [1981] 1 All ER 659
- Sex shop and cinema-nuisance
- No doctrinal reason why visual impact of
windfarm could not rank as nuisance in law

Flexibility of the Law of Nuisance?

- Is the law of nuisance sufficiently flexible to deal with both noise and especially, the visual impact presented by wind-farms?
- Development of law of nuisance pedestrian
- Is the law capable of rising to new environmental challenges?
- *St Helens Smelting Co. v Tipping* (1865) 11 HL Cas. 642
- *Sedleigh-Denfield v O'Callaghan* [1940] AC 880
- *Goldman v Hargrave* [1967] 1 AC 645
- *Leakey v National Trust* [1980] QB 485
- *Smith v Littlewood Organisation Ltd* [1987] AC 241
- Trilogy of cases demonstrate flexibility of law of nuisance in reforming itself to deal with new environmental challenges

Flexibility of the Law of Nuisance(cont)

- *Willis v Derwentside DC* [2013] EWHC 738

Nuisance and Environmental Regulation

- Planning permission and its impact on the private law of nuisance
- *Lawrence v Fen Tigers Ltd.* [2014] 2 WLR 433
- Planning permission to construct stadium. Speedway. Stock car. Former agricultural land.
- Noise. C raises action in private nuisance.
- Did planning permission change character of land? No!
- Did planning permission sanction creation of nuisance? No

Nuisance and Environmental Regulation (cont)

- *Lawrence* (cont)
- To what extent planning decisions are relevant in private nuisance actions uncertain.
- Planning decisions are of 'some relevance' in deciding if adverse state of affairs ranks as nuisance.
- Opportunity to clarify law inter-relationship between planning permission and law of nuisance.

Nuisance and Environmental Regulation (cont)

- *Barr v Biffa Waste Services Ltd.* [2012] EWCA Civ 312
- Landfill site. Smell. Site run in conformity with permit. 1st instance. No nuisance. User of premises reasonable. No nuisance. Law of nuisance should 'march in step' with relevant statutory regime-per Coulson J.
- Court of Appeal reverses decision.
- Can decision in *Barr* rest comfortably with *Lawrence*?

Nuisance and Human Rights

- What impact does human rights jurisprudence impact on development of law of nuisance?
- Paucity of case law
- *Dennis v MoD* [2003] Env LR 34
- *King v Advocate General for Scotland* [2009] CSOH 169
- Factors one can take into account when determining if adverse state of affairs ranks as nuisance, uncertain.
- However, *Fadeyeva v Russia* (2007) 45 EHRR 10
- More adverse state of affairs complained of typical of modern life, less likely Art 8 ECHR infringed.
- Windfarms typical of modern life? Probably not!

Conclusions

- Noise from windfarms-unreasonably loud noise would rank as nuisance
- Visual impact-state of affairs which is in motion. Bifurcated attack on senses
- Possible ranks as nuisance
- Not contrary to authority could rank as nuisance
- '[the] law of nuisance is to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances.'
Sturges v Bridgman (1879) 11 Ch D 852 at 858 (per Thesiger LJ)