Corporation v. *York Montague Ltd.* [1997] A.C. 191) is elegant sleight of hand. It is problematic enough to discern the "scope" of a *statutory* duty, where the notion of legislative intention shaping the duty is not entirely nonsensical. But the quest for the scope of the common law duty of care can only be another way of re-phrasing the familiar remoteness question, the value judgment about the limits of the defendant's responsibility. Unsurprisingly, though it was mentioned by all three judges in *Conarken*, Lord Hoffmann's principle ultimately provided no substantive help in deciding that the schedule 8 payments were recoverable.

JANET O'SULLIVAN

PECUNIA NON OLET

LANDFILL sites are smelly. Recently, because of increased recycling, they have become smellier. Removing glass and paper concentrates the organic element in waste, and, because recycling takes time, when the waste reaches landfill, it is older and riper. Some Hertfordshire residents living near a landfill site noticed the difference. They complained to the Environment Agency (EA), which prosecuted the landfill site's operators (Biffa) for violating their licence under the Environmental Protection Act 1980. The EA won, but only after Biffa challenged the EA's powers, and despite the successful prosecution the odours continued. As Coulson J. subsequently found, Biffa intimidated and bullied a pusillanimous EA. The exasperated residents sued in private nuisance. By the time of trial, the smell was, thankfully, under control, but the case continued as an action for damages. Biffa denied liability, arguing the EA's licence provided a complete defence of statutory authority. That argument, unsurprisingly, found no favour with Coulson J., but he found for the defendants on other grounds (*Barr* v. *Biffa Ltd.* [2011] EWHC 1003).

Coulson J.'s reasoning, to summarise a 135 page judgment in 200 words, was that, although waste disposal contractors, having no statutory obligation to accept waste from particular customers or to dump waste at all, are not statutory undertakers in the *Marcic* sense (the statutory obligations lie on county councils not their contractors), the EA licence's terms nevertheless control the central common law question of whether the defendant's user of its land was reasonable. The licence eventually required only that Biffa use "best available techniques", not that it achieve a specific level of odour. Even though the EA clearly thought Biffa had repeatedly violated its licence, the claimants, for reasons not fully explained, declined to assert that Biffa was in breach or was otherwise "negligent". Even the successful

https://doi.org/10.1017/S0008197311000754 Published online by Cambridge University Press

prosecution counted for nothing, because the claimants (again mysteriously) claimed not to rely on it. Consequently, no liability arose.

Coulson J. added that nearly all the claims would have failed anyway because most claimants could not prove the smell went "beyond that which might be regarded as acceptable within the confines of ordinary 'give and take'" on more than 52 occasions in any calendar year. One could write a note entirely on this part of his judgment, on the arbitrary figure of 52, the oddity of using calendar years rather than 12 month periods or shorter periods (such as seasons) and above all Coulson J.'s failure to separate frequency and intensity (when a smell is sufficiently bad to drive one from one's house, is it really not actionable unless it happens 52 times a year?). This note, however, will deal only with some other and more basic issues.

Planning permission cannot justify nuisance. It can alter a locality's character, against which interference in amenity is judged, but isolated permissions cannot affect the common law position. In *Wheeler* v. *J.J. Saunders* [1995] 2 All E.R. 697, for example, the Court of Appeal held that planning permission for a piggery provided no protection from a nuisance action complaining about the smell of pigs. The issue is ultimately one of jurisdiction. Planning authorities are denied jurisdiction over private property rights because they are not courts, objectors have no right of appeal and they receive no compensation. The EA is similarly not a court and offers individual objectors to licence applications neither appeals nor compensation, except where works take place on objectors' property. How, then, is this case different?

Coulson J. attempts to distinguish the planning cases by saying that the relevant permissions gave developers no express leave to create the interferences later criticised, whereas Biffa's licence explicitly allowed for some odour. But *Wheeler* concerns a pig farm. It is inconceivable that the planning authority failed to realise that piggeries stink. Coulson J. also asserts that Biffa'a licence contained specific conditions about how it should operate, whereas planning permissions contain only general conditions. But that is not so. Planning permissions, especially for business premises, often contain highly specific conditions, for example controlling delivery times. Coulson J. covers himself by asserting that Biffa's licence changed the nature of the locality. He simultaneously found, however, that the locality had always been one of mixed use, including both homes and landfill. The locality had not changed. The smelliness of the waste had changed.

Another problem is *Dennis* v. *Ministry of Defence* [2003] EWHC 793. Coulson J. claims that "common sense" dictates that detailed statutory provision, whether in EA licences or statutory nuisance, should limit common law nuisance. Otherwise activities authoritatively declared permissible in the public interest might be obstructed. In

https://doi.org/10.1017/S0008197311000754 Published online by Cambridge University Press

Dennis, however, Buckley J. declared actionable an activity specifically excluded from the scope of statutory nuisance, namely military activity. Moreover, *Dennis's* reasoning relies on an approach diametrically opposed to Coulson J.'s. *Dennis* implies that the whole public should bear the costs of securing public benefits, not the subset of the public who suffer nuisances. Public interest considerations might justify denying an injunction but surely not denying liability itself.

The contrast between *Barr* and *Dennis* concerns a matter of principle. What should be the relationship between statutory environmental regulation and common law nuisance? Coulson J. quotes approvingly Lord Goff's assertion in *Cambridge Water* that more "well-informed and carefully structured [environmental] legislation" means "less need for the courts to develop the common law" and "that it may well be undesirable that they should do so" (at 192). But restraining common law development is entirely different from cutting back common law rights. Moreover, courts sometimes forget that statutory schemes can themselves assume that courts will decide questions of property rights and liability independently. That is, after all, what courts do. The Environmental Protection Act 1980 is itself an example. Section 73(6) creates a civil action for violations of EA licences, but also provides that it operates "without prejudice" to other rights of action. Coulson J. attempts to explain s.73(6) away, asserting that, if claimants could sue in private nuisance for things that did not break the terms of EA licences, the statutory action would serve no purpose, for the common law route would always be easier than the statutory route. But Coulson J.'s reasoning empties of meaning the "without prejudice" clause. If nuisance is governed by EA licences, why bother preserving it? It also fails to appreciate that, as *Barr* itself illustrates, nuisance victims often want to avoid costly private litigation, preferring to urge action on public authorities.

Section 73(6)'s purpose is to create a civil action of lower risk than common law nuisance, an action in which the state bears the costs of investigating and proving breach. The "without prejudice" clause preserves common law rights of action for individuals willing to bear such costs, especially in situations (again as *Barr* illustrates) in which the authorities hold back. The 1980 Act requires no curtailment of private nuisance.

Ultimately, *Barr* concerns whether commercial firms should benefit from knowing that, if they can bully (or lobby) their way out of regulatory action, they can ignore individuals' interests. Since regulators are evidently easier to bully than the courts, judges should perhaps ask whether it is right to entrench the results of such bullying.

DAVID HOWARTH

https://doi.org/10.1017/S0008197311000754 Published online by Cambridge University Press