defendant "did the act or made the omission charged", can it be asked to say (in effect) "yes, he did the act charged, in that he killed the victim; but because of his state of diminished responsibility this was the *actus reus* of manslaughter, not murder"? The Court of Appeal ruled that no such invitation could be put to the jury. In the course of reaching this decision the Court once again considered *Egan*. It did not formally overrule it, because it felt that *Egan* was not concerned with the precise issue now before it: but it made it very plain that it thought that it was incorrect.

At one level the *Attorney-General's Reference (No. 3 of 1998)* is an unexciting decision, because it merely reaffirms that the law is as everyone had previously imagined. At a different level, however, it provokes two important reflections. The first is how easy it is for even the Crown Court to get a basic point of criminal law astonishingly wrong. The second reflection is how bizarre it is that, when this happens and causes a visibly dangerous defendant to be wrongly acquitted, the resulting proceedings in the Court of Appeal always leave the improperly obtained acquittal intact. As the law now stands, the most the Court of Appeal can do when hearing an Attorney-General's reference brought following an acquittal is to wring its judicial hands about the error in the court below, and express the hope that the same mistake will not be made again—however obviously wrong the acquittal was, and however dangerous the offender.

Some weeks ago, this rule of criminal procedure was called into question in a public lecture given by Lord Morris, the present Attorney-General. The fact that the defendant in the case the subject of this note "walked free"—with or without his snooker cue—adds strength to Lord Morris's argument that the Court of Appeal should sometimes have the power to set aside an acquittal.

J.R. SPENCER

NUISANCE, LOCAL AUTHORITIES AND NEIGHBOURS FROM HELL

ONE of the most difficult current problems for tort lawyers is the extent to which the normal rules of tort, developed over decades of litigation between private individuals, should apply in undiluted form to local and other public authorities. Most individuals have never seen a child drowning in a puddle or about to walk off a cliff, and would not hesitate to help them if they did, but public authorities, empowered by Parliament, are faced every day with the delicate and expensive task of protecting others from harm. It has

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become all too apparent, as the courts (domestic and European) grapple with the thorny question of when a common law duty of care should exist in the context of the careless exercise of, or failure to exercise, statutory powers, that the ordinary rules of negligence liability need considerable refinement to operate sensibly in such a political field. Moreover those difficulties and differences do not disappear merely because a tort other than negligence is involved, and this has been amply illustrated in three recent cases, each involving actions against local authorities in the tort of nuisance.

In the first case, *Hussain and another* v. *Lancaster City Council* [1999] 2 W.L.R. 1142, the claimants, Malazam Hussain and Linda Livingstone, owned a freehold shop and residential property on the defendants' notorious housing estate. For several years, the claimants had endured racially motivated attacks, harassment and abuse of a most horrific kind, ranging from intimidation and verbal threats to assault, firebomb attacks and other criminal damage, perpetrated by a number of identifiable people. Many of the culprits were council tenants living on the estate, but others (including at least one of the ringleaders, an itinerant of "no fixed abode") were merely temporary visitors. The police were unable to contain this campaign of abuse. The perpetrators usually dispersed once the police were called, only to return later; moreover when, exceptionally, a prosecution for criminal damage or breach of the peace did succeed, nothing more severe than binding over orders or moderate fines was imposed. No doubt, potential witnesses who could have helped secure more serious convictions were themselves too intimidated to come forward.

The claimants therefore brought an action in nuisance and negligence against the council, claiming damages and injunctive relief. In negligence, their claim was based on the council's alleged failure to exercise its statutory powers (in its capacity both as housing association and as highway authority) so as to prevent council tenants, their visitors and those using the public highway on the estate from committing the acts of harassment. In nuisance, the gist of the claimants' case was similar: they alleged that, having failed to take effective steps to avert acts of nuisance committed by its tenants and their visitors, the council had adopted or continued the nuisance and thus was liable for it. The council applied to have the statement of claim struck out as disclosing no reasonable cause of action and succeeded before the master, but the action was reinstated on appeal to a judge. The council appealed in turn to the Court of Appeal.

The Court of Appeal unanimously allowed the appeal and struck out the claim. Hirst L.J. gave the principal judgment,

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retaining the structure of the claimants' pleadings and arguments by dealing separately with nuisance and negligence. In passing, it is worth noting that the case law is not as neatly divided as this nor, as will be seen, should it be. Although nuisance liability is imposed on the creator of the nuisance irrespective of negligence (since it is no defence that all reasonable care was taken to avoid the nuisance), where (as here) the claim is against someone other than the perpetrator, namely the occupier of land from which the nuisance emanates, negligence is a requirement for liability in nuisance. As Lord Goff said in *Cambridge Water Co Ltd.* v. *Eastern Counties Leather plc* [1994] 2 A.C. 264 "... in respect of a nuisance which has arisen through natural causes, or by the act of a person for whose actions the defendant is not responsible ... the applicable principles in nuisance have become closely associated with those applicable in negligence".

The court first decided that there was no prospect of liability in nuisance for two reasons, the first based on the "scope" of the tort and the second on "the ambit of responsibility of landlords for their tenants' acts of nuisance". So far as its scope is concerned, Hirst L.J.'s surprising conclusion was that the essence of nuisance is that "the defendant's use of the defendant's land interferes with the plaintiff's enjoyment of the plaintiff's land", but here, although the acts of harassment unquestionably interfered with the plaintiffs' enjoyment of their land, "they did not involve the tenants' use of the tenants' land and therefore fell outside the scope of the tort". This proposition, part of the *ratio decidendi* of the case, is extremely controversial. Elsewhere, nuisance is universally defined simply as unlawful interference with the plaintiff's enjoyment of his property, whether or not it derives from the defendant's use of his property. This accords with the elementary principle that it is the creator of a nuisance who is primarily liable for it, while the occupier of land from which it emanates might also be liable if he continued or adopted the nuisance (in other words, if he was at fault). Of course the perpetrator and the occupier will usually be one and the same person, but where they are not and, for example, a trespasser has caused the nuisance or where a nuisance emanates from activities in a public place, such authority as there is suggests that the perpetrator is nonetheless liable.

This was not, however, the only basis on which the nuisance claim was rejected. Hirst L.J. was on much more orthodox territory when he examined the extent of landlords' liability for nuisance, concluding that landlords are not liable for the acts of their tenants unless they have expressly authorised the nuisance or impliedly authorised it by letting for a purpose which necessarily involves a

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nuisance. The absence of any such authorisation was the ground on which the plaintiffs' claim failed in *Smith* v. *Scott* [1973] Ch. 314, in which a local authority landlord had housed a disruptive homeless family next door to the plaintiffs' home. Moreover this strict rule had not been in any way modified by the later decision of the Court of Appeal in *Page Motors Ltd.* v. *Epsom and Ewell Borough Council* (1983) 80 L.G.R. 337, in which a local authority was held liable for the damage and nuisance caused to the plaintiffs' property by gipsies, who had squatted for several years on adjoining land belonging to the authority. That case, Hirst L.J. explained, could be distinguished on the basis that the local authority deliberately chose not to take proceedings against the gipsies, providing them instead with water, skips and other services, "thus in effect adopting the gipsies' nuisance".

So looking just at nuisance principles, the claim was struck out for two reasons, one considerably more orthodox than the other. To that straightforward list of nuisance arguments, the court could have added a third: since *Hunter* v. *Canary Wharf Ltd.* [1997] A.C. 655, it is clear that for all forms of private nuisance, including intangible interference, "the action is not for causing discomfort to the person but for causing injury to the land". This in turn justifies the "hyper-sensitive plaintiff" restriction on nuisance liability, which usually means that a plaintiff using his property in a particularly sensitive way cannot render the defendants' activities a nuisance, if the average person would not be disturbed by them, since this sort of interference has no effect on the value of the land. The tragic facts of *Husssain* illustrate a level of personal victimisation and harassment, targeted at the claimants themselves, which cannot remotely be regarded as a tort against the value of the claimants' land: if they had moved to another part of the estate, the harassment would no doubt have moved with them.

In truth, the essence of the claimants' complaints was that the local authority had the power to prevent criminal acts of harassment and damage, but unreasonably failed to use those powers. Hirst L.J. had no hesitation in rejecting the claimants' arguments that the imposition of a duty of care would be fair, just and reasonable, citing Lord Browne-Wilkinson's words in *X* v. *Bedfordshire County Council* [1995] 2 A.C. 633 that "the courts should proceed with great care before holding liable those who have been charged by Parliament with the task of protecting society from the wrongdoings of others".

This brief conclusion conceals an extremely complex problem. On the one hand, decisions as to how to manage problem tenants, prevent criminal harassment and control improper use of the

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highway are often discretionary political decisions, and as such are properly regarded by private law courts as non-justiciable. On the other hand, the European Court of Human Rights disapproves of this sort of immunity (see *Osman* v. *United Kingdom* [1999] B.H.R.C. 293), and in its shadow, the House of Lords in *Barrett* v. *Enfield London Borough Council* [1999] 3 W.L.R. 79 (decided since *Hussain*) has become more cautious about striking out cases against public authorities on the basis either that discretionary decisions were involved or that a duty of care would not be just, fair and reasonable. In addition, as Lord Hutton recognised in *Barrett*, the central issues in claims of this kind will often indicate not "no duty", but "no fault"—the reasonableness of the local authority's response given the delicacy and difficulty of the problem, its limited resources and other priorities—and views differ as to whether in such a case it is fairer to give claimants the chance, or spare them the futility, of a full trial.

The former view prevailed in *Lippiatt and another* v. *South Gloucestershire Council* [1999] 3 W.L.R. 137. Here the claimants were tenants of a large farm situated on either side of a main road. The defendant council owned a narrow strip of land immediately adjacent to the road, having purchased it many years before with a view to straightening the road, but the work had never been carried out and the strip was vacant. In 1991, a large number of travellers took up residence on the strip without the council's permission. The travellers caused a considerable nuisance to the claimants: they obstructed and trepassed onto the claimants' fields, depositing rubbish, animals and excrement, stole and damaged the claimants' property, animals and crops, and assaulted the claimants' families and employees. In 1993 the claimants brought proceedings against the council, once again on the basis that, having failed to prevent the nuisance, the council could be said to have adopted it, and sought damages and an injunction compelling the eviction of the travellers. No separate claim in negligence was made. The claim for an injunction was overtaken by events, when the council obtained a court order evicting the travellers in 1994, but the claimants still wanted damages to compensate for their three years of misery.

The case came up for trial just two weeks after the Court of Appeal's judgment in *Hussain* had been delivered. In the light of that new precedent, the council made a preliminary application at the start of the trial that the statement of claim should be struck out, as in *Hussain*, as disclosing no reasonable cause of action, on the basis of the decision in *Hussain* that nuisance must involve the defendant's use of the defendant's land. The issue of whether the authority had adopted or continued the nuisance was not argued at

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this stage. At first instance the judge accepted that *Hussain* was applicable and struck out the action, noting that here (unlike the *Page Motors* case) the acts of the travellers took place on the claimants' property (indeed, strictly they were better described as acts of trespass, but this technical point was not taken). The Court of Appeal reversed this decision, distinguishing *Hussain* in tones of some scepticism.

First, it was noted that in *Hussain* the perpetrators' conduct "was not in any sense linked to, nor did it emanate from, the homes where they lived", whereas here the allegation was that the travellers congregated on the authority's land and used it as a "base" for their activities. So the nuisance in this case was the "presence" of the travellers on the authority's land, with their disposition to commit acts of vandalism. Fine, save that it is not entirely clear why these features did not also apply in *Hussain*, particularly since the perpetrators in that case were clearly using the public highway, again owned and controlled by the local authority, as the base from which to launch their activities. But Sir Christopher Staughton observed, "we need not rule on that today". Secondly the court noted that, so far as adoption is concerned, the nuisance in this case was caused not by tenants but by trespassers, the assumption being that landowners have greater powers to control and remove their trespassers than their tenants.

As a decision solely on the scope of the tort of nuisance, this is orthodox and sensible. Once again, however, the complexity lies in the status of the defendants (quite unlike private landowners with no reason not to evict travellers as quickly as legal process permits) and the reasonableness of their decision to adopt a tolerant stance towards their local "traveller" problem, *at the expense of* the livelihood and property of the claimants. And this problem is no less complex merely because the claim is framed in nuisance rather than negligence.

In contrast, the decisions of the local authority in the final case of the recent trio, *Southwark London Borough Council* v. *Mills and others* [1999] 4 All E.R. 449, were clearly reasonable and, the House of Lords considered, gave rise to no remedy for the aggrieved claimants. The claimants were tenants in flats converted and let by the defendant local authority. Owing to inadequate soundproofing, everyday sounds from one flat could be heard in the adjoining flat, making life intolerable for the occupants. Proceedings were brought against the landlord on two grounds, breach of its leasehold covenant for quiet enjoyment and authorisation of a nuisance, but both were rejected by a unanimous House of Lords.

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First, their Lordships stressed that the significant feature of the landlord's covenant for quiet enjoyment (meaning "without interruption" not "without noise") in a lease is that it is prospective only. So a landlord could be liable for disturbing the tranquillity of a flat which was perfectly insulated when it was let, but here the flats were let with the inherent defect of poor soundproofing. As Lord Millett explained, "An undesirable feature of the flat was its propensity to admit the sounds of the every day activities of the occupants of adjoining flats. The landlord covenanted not to interfere with the tenant's use and enjoyment of a flat having that feature." Put another way, a landlord gives no warranty as to the condition or fitness of leasehold property and the covenant for quiet enjoyment cannot be used to create such a warranty by the back door.

The nuisance action was likewise doomed. A landlord cannot be liable for authorising the nuisance of his tenants if what the tenants were doing was not itself a nuisance, and here all the tenants had been doing was making such noise as is inevitably generated by modern living (coughing, flushing lavatories, watching television and so on). As Lord Hoffmann explained, "If the neighbours are not committing a nuisance, the council cannot be liable for authorising them to commit one".

Overall, their Lordships made it quite clear that tortious liability of any kind would be inappropriate in a case such as this. Of the numerous statutes regulating the state and condition of residential leasehold premises, none imposes any obligations as to soundproofing, and the courts will not do what Parliament chooses not to do. Nor will they enlarge the scope of contractual warranties beyond the terms of the landlord's covenants in a lease. Private sector tenants have no need of extra protection: after all, they can simply opt not to rent unpleasantly noisy premises. For the recipient of local authority housing for whom market forces offer no help, the law of tort will not enhance the quality of the accommodation provided. For, as Lord Millett explained, the council's decision not to soundproof the offending flats was an entirely reasonable decision of political priorities: "Its budget for 1998–1999 for major housing schemes was under £55m... The borough-wide cost [of installing soundproofing] could be of the order of £37m. The relevant local residents association has considered that the installation of sound insulation is not a priority need." Whether you cry nuisance or negligence, either way it is difficult to find a clearer example of a policy decision which should

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be non-justiciable in the private law sphere, and which was in any event entirely reasonable.

JANET O'SULLIVAN

INTERPRETING CONTRACTS—THE PRICE OF PERSPECTIVE

WHEN a court seeks the meaning of a written contract, it meets a barrier on the outskirts of the document, a barrier imposed by the parol evidence rule. Traditionally, if a court wants to go beyond the barrier for a wider perspective of what the document might mean, it requires a permit on one or more of three grounds. The first is "technicality": that, although the words appear clear, they have a technical meaning that is not apparent without seeking extrinsic evidence. The second is "ambiguity": that the words are not clear and the ambiguity must be resolved from a wider perspective. The third is "absurdity": that a literal reading is not just unreasonable but unworkable or absurd and that that reading must be avoided by taking once again a wider perspective. The perspective is one which takes in the purpose and background (also called the matrix) of the document.

It was no more than the third ground that seems to have been in the mind of Lord Wilberforce in *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381, 1385 (H.L.), when he said this: if it can be shown that one interpretation completely frustrates the object of the contract, "to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found". However, some years later the thoughts of Lord Wilberforce, not for the first time, were "reinterpreted". In 1997 in *Investors Compensation Scheme Ltd.* v. *West Bromwich BS* [1998] 1 W.L.R. 896, 912 (H.L.) Lord Hoffmann surprised us, not for the last time, by referring to "the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce", with the result that almost all "the old intellectual baggage of 'legal' interpretation has been discarded". In particular (p. 913), the "meaning of words is a matter of dictionaries and grammars; the meaning of a document ... is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even ... to conclude that the parties must, for whatever reason, have used the wrong words or syntax."

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