Extract from Coventry v. Lawrence [2014] UKSC 13

"Coming to the nuisance"

47. For some time now, it has been generally accepted that it is not a defence to a claim in nuisance to show that the claimant acquired, or started to occupy, her property after the nuisance had started – ie that it is no defence that the claimant has come to the nuisance. This proposition was clearly stated in *Bliss* 4 Bing NC 183, 186 per Tindal CJ. Coming to the nuisance appears to have been assumed not to be a defence in *Sturges v Bridgman* 11 Ch D 852. And in *London, Brighton and South Coast Railway Co v Truman* (1885) LR 11 App Cas 45, 52, Lord Halsbury LC described the idea that it was a defence to nuisance as an "old notion … long since exploded" and he also said that "whether the man went to the nuisance or the nuisance came to the man, the rights are the same" in *Fleming v Hislop* (1886) LR 11 App Cas 686, 697.

48. More recently, in *Miller v Jackson* [1977] 1 QB 966, 986-987, the majority of the Court of Appeal held that the principle was well-established. However, Lord Denning MR, in the minority, considered that the proper approach was for court to "balance the right of the cricket club to continue playing cricket on their cricket ground", as they had done for 70 years, "as against the right of the householder", whom he described as "a newcomer" who had built "a house on the edge of the cricket ground which four years ago was a field where cattle grazed": see pp 976 and 981. He held that there was no nuisance given that the cricket club had "spent money, labour and love in the making of [the pitch]: and they have the right to play upon it as they have done for 70 years", and answered with a resounding no his own rhetorical (in both senses of the word) question whether this was "all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it?": see p 978.

49. Geoffrey Lane LJ (with whom Cumming-Bruce LJ agreed) accepted, albeit with some regret, that it was not for the Court of Appeal "to alter a rule which has stood for so long", namely "that it is no answer to a claim in nuisance for the defendant to show that the plaintiff brought the trouble on his own head by building or coming to live in a house so close to the defendant's premises that he would inevitably be affected by the defendant's activities, where no one had been affected previously": p 987. Accordingly, he concluded that the claim in nuisance was made out.

50. The respondents suggest that there is authority prior to the decision in Bliss 4 Bing 183, which supports the contention that the law was somewhat different in earlier times. *Leeds v Shakerley* (1599) Cro Eliz 751 was cited as an authority for the proposition that coming to the nuisance was a defence, but it may well be explained on the ground that the wrong complained of was the single act of diverting a watercourse, as opposed to the continuing loss of the watercourse. In his Commentaries on the Laws of England 1st ed, (1765-1769), Vol II Chap 26, p 403, Blackstone, after explaining that a defendant can be liable in nuisance for setting up a tannery near my home, continues "but if he is first in possession of the air and I fix my habitation near him, the nuisance is of my own seeking, and must continue". And in the criminal, public nuisance, case of *R v Cross* (1826) 2 Car & P 483, 484, Abbott CJ said that a defendant whose trade was said to be a nuisance to a householder or a

user of a road "would be entitled to continue his trade [if] his trade [had been] legal before the erection of the houses in the one case, and the making of the road in the other".

51. In my view, the law is clear, at least in a case such as the present, where the claimant in nuisance uses her property for essentially the same purpose as that for which it has been used by her predecessors since before the alleged nuisance started: in such a case, the defence of coming to the nuisance must fail. For over 180 years it has been assumed and authoritatively stated to be the law that it is no defence for a defendant to a nuisance claim to argue that the claimant came to the nuisance. With the dubious 16th century exception of *Leeds* Cro Eliz 751, there is no authority the other way, as the observations of Blackstone and Abbott CJ were concerned with cases where the defendant's activities had originally not been a nuisance, and had only become an arguable nuisance as a result of a change of use (due to construction works) on the claimant's property.

52. Furthermore, the notion that coming to the nuisance is no defence is consistent with the fact that nuisance is a property-based tort, so that the right to allege a nuisance should, as it were, run with the land. It would also seem odd if a defendant was no longer liable for nuisance owing to the fact that the identity of his neighbour had changed, even though the use of his neighbour's property remained unchanged. Quite apart from this, the concerns expressed by Lord Denning in *Miller* [1977] 1 QB 966 would not apply where a purchasing claimant has simply continued Page 15 with the use of the property which had been started before the defendant's alleged nuisance-causing activities started.

53. There is much more room for argument that a claimant who builds on, or changes the use of, her property, after the defendant has started the activity alleged to cause a nuisance by noise, or any other emission offensive to the senses, should not have the same rights to complain about that activity as she would have had if her building work or change of use had occurred before the defendant's activity had started. That raises a rather different point from the issue of coming to the nuisance, namely whether an alteration in the claimant's property after the activity in question has started can give rise to a claim in nuisance if the activity would not have been a nuisance had the alteration not occurred.

54. The observations I have quoted from Blackstone and Abbot CJ were in the context of cases where the defendant's activity only becomes a potential nuisance after a change of use or building work on the claimant's property, and they therefore provide some support for the defendant in such a case. However, in both *Sturges and Miller*, it appears clear that the defendant's activities pre-dated the plaintiff's construction work, and it was only as a result of that work and the subsequent use of the new building that the activities became a nuisance. However, Miller was not concerned with damage to the senses, but with physical encroachment on, and potential physical damage to, the plaintiffs and their property (through cricket balls). In *Sturges*, the only issue raised by the unsuccessful defendant was prescription, the nuisance at least arguably involved more than offence to the senses, and the plaintiff's construction work merely involved an extension to an existing building (see at 11 Ch D 852-853, 854, 860-861).

55. It is unnecessary to decide this point on this appeal, but it may well be that it could and should normally be resolved by treating any pre-existing activity on the defendant's land, which was originally not a nuisance to the claimant's land, as part of the character of the neighbourhood – at least if it was otherwise lawful. After all, until the claimant built on her land or changed its use, the activity in question will, ex hypothesi, not have been a nuisance. This is consistent with the notion that nuisance claims should be considered by reference to what Lord Goff referred to as the "give and take as between neighbouring occupiers of land" quoted in para 5 above (and some indirect support for such a view may be found in *Sturges*, at pp 865-866).

56. On this basis, where a claimant builds on, or changes the use of, her land, I would suggest that it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance provided that (i) it can only be said to be a nuisance because it affects the senses of those on the claimant's land, (ii) it was not a nuisance before the building or change of use of the claimant's land, (iii) it is and has been, a reasonable and otherwise lawful use of the defendant's land, (iv) it is carried out in a reasonable way, and (v) it causes no greater nuisance than when the claimant first carried out the building or changed the use. (This is not intended to imply that in any case where one or more of these requirements is not satisfied, a claim in nuisance would be bound to succeed.)

57. It would appear that the Court of Appeal adopted this approach in *Kennaway v Thompson* [1981] QB 88. In that case, Lawton LJ seems to have assumed that the noise made by the defendant's motorboats on the neighbouring lake should not be treated as a nuisance in so far as it was at the same level as when the plaintiff built her house nearby, and was a reasonable use reasonably carried out. However, a subsequent and substantial increase in the level of noise (due to larger boats and increased proximity to the plaintiff's house) and in the frequency of activity did constitute a nuisance.

58. Accordingly, it appears clear to me that it is no defence for a defendant who is sued in nuisance to contend that the claimant came to the nuisance, although it may well be a defence, at least in some circumstances, for a defendant to contend that, as it is only because the claimant has changed the use of, or built on, her land that the defendant's pre-existing activity is claimed to have become a nuisance, the claim should fail.