360 ***Bernstein* v *Skyviews & General*** [1977] 2 All ER 902

The claimant sued for damages for trespass against Skyviews, which had taken an aerial photograph of his home from about 630 feet, crossing his land in order to do so. It was *held* – by Griffiths, J – that an owner of land at common law had rights above his land to such height as was necessary for the ordinary use and enjoyment of the land and the structures upon it. The plane was, therefore, too high to be trespassing. In any case, s 40(1) of the Civil Aviation Act 1949 (see now Civil Aviation Act 1982, s 76) provides a defence to such a claim where the height was reasonable. However, the judge did say that constant surveillance from the air with photographing might well be actionable nuisance.

Trespass to land: effect of revocation of licences

361 ***Winter Garden Theatre (London) Ltd* v *Millennium Productions Ltd*** [1948] AC 173

The respondents were permitted by a contractual licence to use the Winter Garden Theatre, Drury Lane, which belonged to the appellants, for the purpose of producing plays, concerts or ballets in return for a weekly payment of £300. There was no express term in the licence providing that the appellants could revoke it. However, the appellants did revoke it, giving the respondents one month in which to quit the premises, but stating that they were prepared to give fresh notice for a later date if the respondents required further time in which to make other arrangements. The respondents contended that the licence could not be revoked so long as the weekly payments were continued. The appellants claimed that it was revocable on giving reasonable notice.

Held – on a proper construction of the contract, the licence was not intended to be perpetual, but nevertheless could only be determined by reasonable notice. What was reasonable notice depended on the commitments of the licensees and the circumstances of the parties. In this case the notice given by the appellants was reasonable and valid to determine the licence.

Comment This case also has a bearing on the ejection of hooligans from soccer and other sports grounds. They may have paid and have a contractual right to enter, but as Viscount Simon said in this case: 'The ticket entitles the purchaser to enter and, if he behaves himself, to remain on the premises until the end of the event which he has paid to witness.' This clearly implies that those who do not behave in a reasonable way cease to be licensees and become trespassers and can be evicted.

362 ***Hounslow London Borough Council* v *Twickenham Garden Developments*** [1970] 3 WLR 538

A building owner granted a licence under a building contract to a builder to enter on his land and do work there. The procedure for terminating the building contract involved an architect giving notice that the work was not being carried out properly. Such a notice was given but the building contractor refused to leave the land and carried on his work. The owner claimed an injunction and damages for trespass.

Held – by Megarry, J – in view of the fact that it was not certain whether the architect's notice had been given as a result of following proper procedures, the contract had not necessarily been terminated and the builder was not, unless and until that was done, a trespasser. The owner's action failed.

Trespass to land: self-help

363 ***Hemmings* v *Stoke Poges Golf Club*** [1920] 1 KB 720

The claimant was employed by the defendants and occupied a cottage belonging to them. Later he left the defendants' service and was called upon to give up possession. On refusal, he and his property were ejected with no more force than was necessary.

Held – the defendants were not liable for assault or trespass.

Comment (i) Since this case concerns the eviction of an employee/occupier, it would seem to be overruled on its facts by s 8(2) of the Protection from Eviction Act 1977. Hemmings could now claim damages for breach of that Act. However, the principle behind the decision on the *Hemmings* facts is still relevant in that the occupier of property could eject a person not covered by the 1977 Act, e.g. a squatter, from his property by the use of reasonable force.

(ii) It will, of course, *not* be regarded as reasonable to fire a shotgun at a trespasser to effect his removal and such a trespasser may be awarded damages (see *Revill* v *Newberry, The Times*, 3 November 1995).

Wrongful interference with goods: what is possession?

364 ***The Tubantia*** [1924] P 78

The claimant, who was a marine salvor, was trying to salvage the cargo of the *SS Tubantia* which had been sunk in the North Sea. He had discovered the wreck and marked it with a marker buoy, and his divers were already working in the hold, when the

defendant, a rival salvor, appeared on the scene and started to send divers down to salvage the cargo from the wreck.

Held – whoever was the owner of the property salvaged, the claimant was sufficiently in possession of the wreck to found an action in trespass.

Conversion: may be based on a possessory title: finders of property

365 ***Parker* v *British Airways Board*** [1982] 1 All ER 834

The claimant was in BA's first class lounge at Heathrow waiting for a flight. He found a gold bracelet on the floor and gave it to an employee of BA together with his name and address asking that it be returned to him if not claimed. It was not claimed but BA sold it. The claimant sued in conversion and the Court of Appeal *held* that the claimant was entitled to the proceeds of sale.

Comment This principle was applied in two earlier cases, i.e. *Bridges* v *Hawkesworth* (1851) 21 LJ QB 75 where the finder of some banknotes which were lying on the floor in the public part of a shop was held entitled to them as against the shopkeeper; and *Hannah* v *Peel* [1945] KB 509, where a soldier billeted in a house found a brooch lying loose in an upstairs room, and he was held entitled to it as against the freeholder of the property who had no knowledge of the brooch until the claimant found it.

Conversion: possessory title: goods on or attached to land or buildings

366 ***South Staffordshire Water Co* v *Sharman*** [1896] 2 QB 44

The claimant company sued the defendant in detinue (now wrongful interference by conversion), claiming possession of two gold rings found by the defendant in the Minster Pool at Lichfield. The claimant was the owner of the pool and the defendant was a labourer it employed to clean the pool. It was in the course of cleaning the pool that the defendant came across the rings. He refused to hand them to his employer, but gave them to the police for enquiries to be made to find the true owners. No owner was found and the police returned the rings to the defendant who retained them.

Held – the rings must be given over to the claimant. The claimant was the freeholder of the pool, and had the right to forbid anyone coming on the land; it had a right to clean the pool out in any way it chose. The claimant possessed and exercised a practical control over the pool and had a right to its contents.

Comment It is also worth noting *Elwes* v *Brigg Gas Co* (1886) 33 Ch D 562 where it was held that a prehistoric boat found some six feet below the surface of the land belonged to the landowner and not to the finders. Similarly, in *Corporation of London* v *Appleyard* [1963] 2 All ER 834, the owner of a building site was held entitled against workers of a demolition contractor to banknotes found in a wall safe in an old cellar.

Conversion: the relationship between the claimant and the goods

367 ***Jarvis* v *Williams*** [1955] 1 All ER 108

Jarvis agreed to sell some bathroom fittings to Peterson and at Peterson's request delivered them to Williams. Peterson refused to pay the price and Jarvis agreed to take them back if Peterson would pay for collection. Peterson accepted this offer and Jarvis sent his lorryman, with a letter of authority, to collect the fittings but he was told that he could not take them, so he returned empty-handed. Jarvis claimed against Williams in conversion for the return of the goods.

Held – on the delivery to Williams the property in the goods passed to Peterson, and the arrangement for re-collection did not re-vest the property in Jarvis. It follows that at the time of collection, Jarvis had no right of property in the goods to sustain an action in conversion.

Conversion: the defendant's conduct

368 ***Fouldes* v *Willoughby*** (1841) 8 M & W 540

The claimant had put his horses on the defendant's ferry boat and, a dispute having arisen, the defendant asked the claimant to take them off. The claimant refused so the defendant did so, and since the claimant refused to leave the boat, the defendant ferried him across the river. The claimant sued in conversion. Maule, J directed the jury that the putting of the horses ashore was a conversion, but on appeal, the Court of Exchequer *reversed* the decision and found there was no conversion. Lord Abinger, CB said:

> In order to constitute a conversion it is necessary either that the party taking the goods should intend some use to be made of them by himself or by those for whom he acts, or that owing to his act, the goods are destroyed or consumed to the prejudice of the lawful owner. The removal of the horses involved not the least denial of the right of the [claimant] to enjoyment or possession of them and was thus no conversion.

369 ***Oakley* v *Lyster*** [1931] 1 KB 148

Oakley, a demolition contractor, agreed to pull down an aerodrome on Salisbury Plain and reinstate the land, a process which involved disposing of 8,000 tons of hard core and tar macadam. He thereupon rented three and a half acres of a farm on the opposite side of the road on which to dump it. He sold 4,000 tons, but in January 1929, there was still 4,000 tons undisposed of when Lyster bought the freehold of the farm. Shortly afterwards Oakley found that some of the hard core was being removed on Lyster's instructions, and Oakley saw him and was told that Lyster had bought the land and all that was on it, and on 9 July 1929, his solicitors wrote to Oakley to this effect and forbade Oakley to remove the hard core otherwise he would become a trespasser on Lyster's land. Correspondence followed but at the trial it was admitted that Oakley was a lawful tenant and owner of the hard core. While the correspondence was continuing, Oakley agreed to sell that 4,000 tons to Mr Edney, but in view of Lyster's claim, Edney withdrew and the stuff was undisposed of. The conversion alleged was the removal by Lyster of some of the hard core and the denial of title in the correspondence.

Held – the defendant was liable in damages for conversion. In the correspondence Lyster was asserting and exercising dominion over the goods inconsistent with the rights of the true owner, Oakley. Nor was it sufficient to allow Oakley to resume dominion over the hard core and remove it. He was entitled to damages of £300 for the loss of the sale to Edney.

Conversion: principle of liability; where the defendant has acted honestly

370 ***Elvin and Powell Ltd* v *Plummer Roddis Ltd*** (1933) 50 TLR 158

A fraudulent person ordered a consignment of goods from the claimants in the name of the defendants. He then telephoned the defendants in the claimants' name, saying that the goods had been dispatched to them in error and that they would be collected. The fraudulent person then himself collected the goods from the defendants and absconded with them. The claimants now sued the defendants for conversion.

Held – as involuntary bailees of goods, the defendants had acted reasonably in returning them, as they believed, to the claimants, by a trustworthy messenger. They had not committed conversion.

Comment An honest defendant was also held not liable in conversion in *Marcq* v *Christie Manson & Woods Ltd (t/a Christies)* [2002] EWHC 2148. In that case an innocent buyer of a stolen painting sent it for sale by auction to the defendants. It did not meet the reserve price and the defendants returned it to the innocent purchaser who eventually sold it. The defendants acted in good faith and without notice that the innocent purchaser did not own the painting. The defendants checked the painting on the stolen art register but received a negative reply. The true owner later sued the defendants in conversion but failed. The mere receipt by an auctioneer of stolen goods does not make him liable in conversion. There was no delivery by the auctioneer to a purchaser. If there had been the High Court said that the defendants would have been liable. The innocent purchaser who delivered the goods to the auctioneer would have been liable because he denied the owner's title by delivering for sale. He was also clearly liable when he later sold the painting.

Public nuisance: obstruction of the highway; dangerous activities near the highway

371 ***Attorney-General* v *Gastonia Coaches***, *The Times*, 12 November 1976

G, a coach operator, owned 22 coaches of which 16 were parked in residential roads adjoining the Gastonia offices. No matter how carefully these coaches were parked, they inevitably interfered with the free passage of other traffic. It was *held* – on a public relator action by the Attorney-General – that Gastonia was guilty of a public nuisance and would be restrained from parking the vehicles on the highway. Damages would also be awarded to private litigants who had suffered from the emissions of exhaust gases, excessive noise and obstruction of drives.

Comment (i) Reference should also be made to *Campbell* v *Paddington BC* (1911) (see Chapter 20) which is an example of an action by a private person for a public nuisance.

(ii) Public nuisance in terms of interference with a public path arose in *Wandsworth LBC* v *Railtrack plc* [2001] 1 WLR 368. The claimant sought to recover from the defendant its costs in regard to rectifying problems caused by pigeons congregating under the defendant's railway bridge. The pigeon droppings were causing substantial discomfort and inconvenience to members of the public using a footpath. The High Court ruled that the defendant was liable in public nuisance. The defendant had control of the bridge and the means to prevent pigeons from roosting under the bridge. The claimant was entitled to recover its reasonable costs in putting things right but in the absence of damage to its property it had no right to a claim in private nuisance.

372 ***Castle* v *St Augustine's Links Ltd and Another*** (1922) 38 TLR 615

On 18 August 1919, the claimant was driving a taxicab from Deal to Ramsgate when a ball played by the second defendant, a Mr Chapman, from the thirteenth tee on the golf course, which was parallel with the Sandwich Road, struck the windscreen of the taxicab. In consequence, a piece of glass from the screen injured the claimant's eye and a few days later he had to have it removed. He then brought this action.

Held – the claimant succeeded. Judgment for £450 damages was given by Sankey, J. The proximity of the hole to the road constituted a public nuisance. Compare *Bolton* v *Stone* [1951] AC 650, where cricket balls had been hit out of the ground and into the highway six to 10 times in 35 years but had injured nobody.

Held – no nuisance. See also *Miller* v *Jackson* [1977] 3 WLR 20, where the Court of Appeal held that the public interest, which requires young people to have the benefit of outdoor games, may be held to outweigh the private interest of neighbouring householders who are the victims of sixes landing in their gardens so that it would be impossible to use the garden when cricket was being played. Thus, no injunction was granted, even though the sportsmen were *held* to be guilty of both nuisance and negligence.

Comment In *Kennaway* v *Thompson* (1980) the Court of Appeal refused to follow this approach on the matter of an injunction and said in effect that a court ought not to refuse an injunction if the tort is established merely because there is benefit to a section of the public.

373 ***Tarry* v *Ashton*** (1876) 1 QBD 314

A lamp projected from the defendant's premises over the highway. It fell and injured the claimant, who then sued the defendant in respect of his injuries.

The defendant had previously employed an independent contractor, who was not alleged to be incompetent, to repair the lamp and it was because of the negligence of that contractor that the lamp fell. Even so, the defendant was *held* liable and the decision suggests that there is strict liability in respect of injuries caused by artificial projections over the highway.

374 ***Dymond* v *Pearce*** [1972] 1 All ER 1142

A lorry was left parked on a road subject to a 30 mph speed limit with its lights on beneath a street lamp. The claimant collided with the vehicle and suffered injury. He sued the defendants alleging negligence and nuisance. It was *held* – by the Court of Appeal – that the claim in negligence failed as there was no evidence to show that the driver had not acted reasonably in the circumstances. The claim in nuisance also failed, for although a nuisance had been created, the injury suffered resulted solely from the negligence of the motorcyclist himself. Of more importance than the actual decision are the comments made in the Court of Appeal regarding the relationship between negligence and nuisance in terms of fault. See in particular Edmund Davies, LJ, who said: 'But if an obstruction be created, here too, in my judgment, fault is essential to liability in the sense that it must appear that a reasonable man would be bound to realize the likelihood of risk to highway users resulting from the presence of the obstructing vehicle on the road.'

Nuisance: utility or benefit of activity no defence: nor is coming to the nuisance

375 ***Bliss* v *Hall*** (1838) LJ CP 122

The defendant carried on the trade of a candle-maker in certain premises near to the dwelling house of the claimant and his family. Certain 'noxious and foul smells' issued from the defendant's premises and the claimant sued him for nuisance. The defence was that, for three years before the claimant occupied the dwelling house in question, the defendant had exercised the trade complained of in this present establishment.

Held – this was no answer to the complaint and judgment was given for the claimant.

Comment In *Miller* v *Jackson* [1977] 3 WLR 20 the Court of Appeal decided that it was no defence to the claim in nuisance that the cricket ground only became a nuisance when the claimant built a house close by it.

376 ***Adams* v *Ursell*** [1913] 1 Ch 269

The claimant was a veterinary surgeon and he purchased a house in 1907 for £2,370. In November 1912, the defendant opened a fried fish shop at premises adjoining the claimant's house. Very soon after the commencement of the business, the claimant's house was permeated with the odour of fried fish, and the vapour from the stoves filled the rooms 'like fog or steam'.

Held – an injunction would be granted because the defendant's activities materially interfered with the ordinary comfort of the claimant and his family; and it did not matter that the shop was in a large working-class district and, therefore, supplied a public need.

377 ***Dunton* v *Dover District Council*, *The Times*, 31 March 1977**

The Council provided a play area for children of a housing estate on grazing land at the rear of the claimant's hotel. The playground was not fenced and there was no restriction on the age of the children using it. The claimant suffered noise and inconvenience and was awarded £200 damages and a continuing injunction against the Council that the playground should only be open between 10 am and 6.30 pm to children under 12 years of age.

Nuisance: modes of annoyance

378 ***Christie* v *Davey*** [1893] 1 Ch 316

The claimant was the occupier of a semi-detached house, and she and her daughter gave pianoforte, violin and singing lessons in the house, four days a week for 17 hours in all. There was also practice of music and singing at other times, and occasional musical evenings. The defendant, a woodcarver and a versatile amateur musician, occupied the adjoining portion of the house, and he found the activities of the claimant and her family annoying. In addition to writing abusive letters, he retaliated by playing concertinas, horns, flutes, pianos and other musical instruments, blowing whistles, knocking on trays or boards, hammering, shrieking or shouting, so as to annoy the claimant and injure her household's activities.

Held – what the claimant and her family were doing was not an unreasonable use of the house, and could not be restrained by the adjoining tenant. However, the adjoining tenant was himself restrained from making noises to annoy the claimant, the court being satisfied that such noises had been made wilfully for the purpose of annoyance.

Comment (i) It was held in *Khorasandjian* v *Bush* [1993] 3 WLR 476 by the Court of Appeal that harassment by unwanted telephone calls was actionable as a private nuisance. The claimant alleged that the defendant's unwanted telephone calls were causing her great distress. A court order restraining the defendant from 'using violence or harassing, pestering or communicating with' the claimant was affirmed by the Court of Appeal.

The decision is founded in private nuisance and does not involve the creation of a new tort, i.e. harassment. For a situation where there was public nuisance, see *R* v *Johnson (Anthony Thomas)* (1996).

(ii) In *Paterson* v *Humberside County Council*, *The Times*, 19 April 1995 the claimant successfully claimed damages for nuisance and negligence for cracks in his house resulting from trees planted by the Council in soil which to the Council's knowledge was of medium shrinkability.

(iii) Nuisance emanating from low flying aircraft was the source of a case entitled *Dennis* v *Ministry of Defence*, *The Times*, 6 May 2003. Harrier squadrons trained at RAF Wittering. The claimant's property was adjacent to the base. Aircraft flew at low altitudes and frequently over the claimant's property when landing. The claimant alleged that this constituted a nuisance at common law and an infringement of his human rights under Art 8 of the Convention (right to respect for private and family life). The High Court found for the claimant on both grounds but would not grant an injunction to stop the flying because this was in the public interest. Furthermore, the Harrier training was scheduled to end some nine years after the date of the proceedings. However, an award of damages would be made and this would satisfy the infringements in terms of nuisance at common law and breach of human rights. The award was for capital loss, loss of amenity and loss of commercial opportunities. Damages of £950,000 were awarded. The court stated that the defendant had not acquired the right to commit any nuisance by prescription because the claimant had neither consented to nor acquiesced in the nuisance.

379 ***Hubbard* v *Pitt*** [1975] 3 All ER 1

The defendants picketed in the road outside the offices of the claimant estate agents to protest against a particular property development. An interlocutory injunction was granted to restrain them from doing so. The Court of Appeal *held* – dismissing their appeal – (*a*) that the original ground for granting the injunction, namely, that street picketing other than in furtherance of a trade dispute was unlawful, was correct; (*b*) that the balance of convenience required an injunction to be issued there being a serious issue to be tried.

Comment As regards what is lawful picketing in a trade dispute, s 15(1) of the Trade Union and Labour Relations Act 1974 (see now s 220 of the Trade Union and Labour Relations (Consolidation) Act 1992) provides: 'It shall be lawful for a person in contemplation or furtherance of a trade dispute to attend – (*a*) at or near his own place of work, or (*b*) if he is an official of a trade union, at or near the place of work of a member of that union whom he is accompanying and whom he represents, for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working.' This provision would not appear to provide a defence if pickets approached and stopped vehicles.

Nuisance: duration of offending acts

380 ***British Celanese Ltd* v *A H Hunt (Capacitors) Ltd*** [1969] 2 All ER 1252

The defendants allowed metal foil to escape from their land and foul the bus bars of overhead electric cables. The claimants lost power and their machines were clogged up and time and material wasted.

Held, by Lawton, J:

(*a*) the defendants were not liable under *Rylands* v *Fletcher*, because there was no non-natural use of land;
(*b*) the defendants owed a duty of care to the claimants and could be liable in negligence – the claimants had a proprietary interest in the machines which were damaged and could recover loss flowing from that – pure economic loss was not involved;
(*c*) the defendants were liable in nuisance – an isolated happening such as this could create an actionable nuisance and the claimants were directly and foreseeably affected.

Nuisance: effect of malice or evil motive

381 ***Hollywood Silver Fox Farm Ltd* v *Emmett*** [1936] 2 KB 468

The claimants were breeders of silver foxes and erected a notice board on their land inscribed: 'Hollywood Silver Fox Farm'. The defendant owned a neighbouring field, which he was about to develop as a building estate, and he regarded the notice board as detrimental to such development. He asked the claimants to remove it, and when this request was refused, he sent his son to discharge a 12-bore gun close to the claimants' land, with the object of frightening the vixens during breeding. The result of this activity was that certain of the vixens did not mate at all, and others, having whelped, devoured their young. The claimant brought this action alleging nuisance, and the defence was that Emmett had a right to shoot as he pleased on his own land.

Held – an injunction would be granted to restrain Emmett. His evil motive made an otherwise innocent use of land a nuisance.

Comment (i) It seems at first sight difficult to reconcile the above case with *Bradford Corporation* v *Pickles* (1895), see Chapter 20. The difference probably is in the fact that *Hollywood Silver Fox Farm* v *Emmett* was an action for nuisance by noise, so that the defendant's motive was relevant in establishing the tort. In *Bradford Corporation* v *Pickles*, the action was really one for interference with a servitude or right over land, and motive was not relevant in establishing the rights of the parties.

(ii) In *Christie* v *Davey* (1893) (see Case **378**) also, North, J took into account the malice of the defendant by saying that the noise was 'made deliberately and maliciously for the purpose of annoying the [claimant]'.

Nuisance: act need not cause ill-health or diminish the value of property

382 ***Bone* v *Seale*** [1975] 1 All ER 787

Over a period of $12^{1}/_{2}$ years smells coming from a neighbouring pig farm owned by the defendant had caused a nuisance to properties owned by the claimant who sought an injunction restraining the nuisance and damages. The judge found that no diminution in the value of the properties had resulted but granted an injunction and awarded over £6,000 damages. The defendants appealed, saying, amongst other things, that the award was too high. It was *held* – by the Court of Appeal allowing the appeal against the award – that by drawing a parallel with loss of sense of smell as a result of personal injury the award was erroneous and £1,000 for the claimant would be substituted.

Nuisance: who can sue? who can be sued?

383 ***Malone* v *Laskey*** [1907] 2 KB 141

The defendants owned a house which they leased to Witherby & Co, which sublet it to the Script Shorthand Company. The claimant's husband was employed by the latter company, and was allowed to occupy the house as an emolument of his employment. A flush cistern in the lavatory of the house was unsafe, the wall brackets having been loosened by the vibration of the defendants' electric generator next door. The claimant told Witherby & Co of the situation, and it communicated with the defendants who sent two of their plumbers to repair the cistern gratuitously. The work was carried out in an improper and negligent manner, and four months later the claimant was injured when the cistern came loose. The claimant sued the defendants (*a*) in nuisance, and (*b*) in negligence.

Held – there was no claim in nuisance against the defendants. The claimant was not their tenant, and in nuisance the tenant is the person to sue, not other persons present on the premises, though such persons may have a claim where the nuisance is a public nuisance. Further, there was no claim in negligence, because the defendants owed no duty of care: first, because there was no contractual relationship; second, because the defendants did not undertake any

duty towards the claimant. They were under no obligation to carry out repairs but sent their plumbers merely as a matter of grace. This was a voluntary act and was not in any sense the discharge of a duty. The defendants were not in occupation of the premises and had not invited the claimant to occupy them.

Comment (i) The case still represents the law regarding nuisance. Regarding the claim for negligence it was overruled in *Billings* v *Riden* [1958] AC 240, where it was held that there may be liability in negligence, where premises are left in a dangerous condition by workmen so that injury results, even though the injured person is not the occupier but is a visitor to the premises.

(ii) The *Khorasandjian* case (see p 491) should be noted here. The claimant, aged 18, received the calls at her mother's home in which the claimant had no proprietary interest. Nevertheless, the Court of Appeal said she could sue for private nuisance. Dillon, LJ said it would be ridiculous to regard the law of private nuisance by harassing telephone calls to be actionable only where the recipient has a freehold or leasehold interest in the premises at which they were received.

384 *Wilchick* v *Marks and Silverstone* [1934] 2 KB 56

Landlords who had let premises with a defective shutter, and had expressly reserved the right to enter the premises to do repairs, were *held* liable along with their tenant, to a passer-by injured by the shutter.

385 *Mint* v *Good* [1951] 1 KB 517

Landlords were *held* liable to the minor claimant who was injured when a wall on the premises, which they had let, collapsed on to the highway. They had not reserved the right to enter to do repairs, but the Court of Appeal stated that such a right must be implied, because the premises were let on weekly tenancies and it was usual to imply a right to enter to do repairs in such tenancies.

386 *Harris* v *James* (1876) 45 LJQB 545

A landlord was *held* liable for the nuisance created by his tenant's blasting operations at a quarry because he had let the property for that purpose. The tenant, therefore, inevitably created a nuisance.

Comment In *Tetley* v *Chitty* [1986] 1 All ER 663, a local authority granted a seven-year lease to a go-kart club. T and others, who were ratepayers living near the track, obtained an injunction against the Council to prevent the continuance of the nuisance by noise. Damages were an inadequate remedy.

387 *Smith* v *Scott* [1972] 3 All ER 645

The local authority had placed in an adjoining house to the claimant's a family which it knew was likely to cause a nuisance, but on conditions of tenancy which expressly prohibited the commission of such. These tenants had a large and unruly family and their conduct was, in the words of Pennycuick, V-C, 'altogether intolerable both in respect of physical damage and noise'. The claimant and his wife, an elderly couple, found it impossible to live next door and moved away. Notwithstanding protests on the part of the claimant, the local authority took no effective steps to control the unruly family or to evict them. It was *held* by Pennycuick, V-C, that, whatever the precise tests might be, it was impossible to apply the exception rendering a landlord liable for his tenants' acts in the present case. The exception was not based on cause and probable result apart from express or implied authority. The property had been let on conditions of tenancy which expressly forbade the commission of a nuisance, and it would not be legitimate to say that the local authority had authorised the nuisance.

It should also be noted that the court *held* that the rule in *Rylands* v *Fletcher* could not be applied and that the rights and liabilities of landowners had already been determined by the law and it was not open to the court to reshape those rights and liabilities by reference to the concept of duty of care. Thus the defendant was not liable in negligence. On the matter of *Rylands* v *Fletcher* liability, Pennycuick, V-C said:

> The rule in *Rylands* v *Fletcher* was applied in *Attorney-General* v *Corke* against a defendant who brought caravan dwellers on to his land as licensees but so far as counsel has been able to ascertain the rule has never been sought to be applied against a landlord who lets his property to undesirable tenants and I do not think it can be properly applied in such a case. The person liable under the rule in *Rylands* v *Fletcher* is the owner or controller of the dangerous 'thing', and this is normally the occupier and not the owner of the land. . . . A landlord parts with possession of the demised property in favour of his tenant and could not in any sense known to the law be regarded as controlling the tenant on property still occupied by himself. I should respectfully have thought that *Attorney-General* v *Corke* could equally well have been decided on the basis that the landowner there was in possession of the property and was himself liable in nuisance for the acts of his licensees.

Comment It should be noted that in *O'Leary* v *Islington London Borough Council*, *The Times*, 5 May 1983 it was

decided by the Court of Appeal that there was no implied term in a tenancy agreement obliging landlords to enforce a tenant's agreement not to cause nuisance to neighbours who were also their tenants, and the appropriate remedy for aggrieved tenants was to bring an action in tort against the tenant causing the nuisance.

388 *Brew Brothers* v *Snax (Ross)* [1969] 3 WLR 657

In June 1965, the freehold owners of premises leased them for a term of 14 years. The lease contained covenants by the tenants regarding repairs, payment of maintenance expenses and viewing by the landlords. In November 1966, one of the walls of the premises tilted towards the neighbouring premises which belonged to the claimant. It was shored up but caused an obstruction for 18 months. It appeared that the reason why the wall had tilted was the seeping of water from certain drains and the removal of a tree by the tenants. The claimant sued the landlords and the tenants, and the landlords contended that the responsibility fell entirely on the tenants under the lease.

Held – by the Court of Appeal:

(*a*) the tenants were responsible for repairing defects pointed out by the landlords but that the work required on the wall was not within the terms of the lease;
(*b*) the landlords must be presumed to know the state of the premises and were liable for nuisance in that they allowed the state of affairs to continue;
(*c*) the tenants were jointly liable in nuisance in that they failed to put the matter right – this liability was quite independent of their duties under the lease.

Nuisance: abatement

389 *Sedleigh-Denfield* v *O'Callaghan and Others* [1940] AC 880

One of the respondents (a college for training foreign missioners) was the owner of property adjoining the appellant's premises in Mill Hill. On the boundary of the property owned by the college there was a ditch and it was admitted that the ditch also belonged to the college. About 1934, when a block of flats was erected on the western side of the appellant's premises, the county council had laid a pipe and grating in the ditch but no permission was obtained and no steps were taken to inform the college authorities of the laying of the pipe. However, the presence of the pipe became known to a member of the college who was responsible for cleaning out the ditch twice a year. The Council had not put a guard at the entrance to the pipe to prevent its being blocked by debris. The pipe became blocked and the appellant's garden was flooded. He claimed damages from the college on the ground that the pipe was a nuisance.

Held – by the House of Lords – that the college was liable because it appeared that the college should have known about the pipe and realised the risk. Furthermore, it had adopted the nuisance by using the pipe to drain its land.

Comment (i) This case was applied in *Page Motors* v *Epsom and Ewell Borough Council* (1981) 80 LGR 337 where a site on an industrial estate was leased to a firm for the sale and repair of motor vehicles but was occupied by gypsies who caused a nuisance. The firm claimed damages against the Council for the nuisance in the years 1973 until 1978, by which time the authorised gypsy caravans had all left the site. It was held by the Court of Appeal that the Council was liable because it had adopted the nuisance by failing to take steps to move the gypsies on. Furthermore, the claimant could recover damages for loss of business. This was a foreseeable result of having a gypsy site nearby.

(ii) In this case Lord Wright said, '. . . it has been rightly established in the Court of Appeal that an occupier is not *prima facie* responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or *should have known* of the nuisance in time to correct it and obviate its mischievous effects.' The words in italics indicate that knowledge in private nuisance may be constructive, as it can also be in public nuisance (see *R* v *Shorrock* (*Peter*) [1993] 3 All ER 917).

Nuisance: the remedy of injunction

390 *Kennaway* v *Thompson* [1980] 3 All ER 329

The defendants represented a club at which motorboat racing and water-skiing were carried on. In 1972 the claimant moved into a house which she had had built near to the lake on which the above activities were carried out, as they had been since the early 1960s. After the claimant moved in the nature of the club's activities increased in frequency and noise because large powerboats took part in international meetings which were preceded by periods of noisy practice. The claimant sought damages for nuisance and an injunction but Mais, J awarded her damages only – £1,000 for the past nuisance and £15,000 in respect of future nuisance, since he regarded it as oppressive to issue an injunction to prevent the club from continuing its activities on the ground that this was contrary to public interest. The Court of Appeal allowed the claimant's appeal and awarded an injunction stating that the public interest should not prevail

over the private interest of a person affected by a continuing nuisance, and accordingly the claimant was entitled to an injunction under which the club was ordered to curtail its activities, restricting noisy meetings to a limited number of occasions.

Nuisance: defences: prescription

391 *Sturges* v *Bridgman* (1879) 11 Ch D 852

For more than 20 years the defendant, a confectioner, had used large pestles and mortars in his premises in Wigmore Street. Then the claimant, a physician in Wimpole Street, built a consulting room in his garden abutting on the confectioner's premises. The noise and vibration made by the confectioner's activities interfered materially with the claimant's practice. He sued for an injunction to prevent the offensive activities and the defence was that the defendant had acquired a prescriptive right to commit the nuisance.

Held – though it was possible to acquire a right, the defendant had not done so, because the nuisance only arose when the consulting room was built.

Negligence: liability for omissions

392 *Argy Trading Development Co Ltd* v *Lapid Developments Ltd* [1977] 1 WLR 444

In an under-lease for six years from 19 October 1971 the tenant agreed to insure against fire for the full value of the premises, including two years' rent, and in the event of loss or damage by fire to reinstate the premises. In fact, the landlords insured the premises under a block policy covering other property as well and the tenant paid the landlords the appropriate proportion of the premium. In 1973 there was a change in the control of the landlords and the landlords did not renew the block policy but failed to notify the tenant of its cancellation. In 1973, some months after the policy had lapsed, the premises were gutted by fire. Neither party wanted the premises, which were scheduled for redevelopment, to be reinstated. The landlords undertook not to enforce the covenant to reinstate but the tenant wished to recover damages from the landlords on the ground that it had been deprived of the insurance moneys, which it would otherwise have received, by the landlords' failure to continue the insurance or to notify the tenant of its cancellation so that it had no opportunity to take out the policy. It was *held* – by Croom-Johnson, J – that there was no implied term that the landlords would maintain their block policy or not cancel it without notifying the tenant. Nor was there any equitable estoppel such as was applied in the *High Trees* case (see Chapter 10), since there was no representation by the landlords intended to affect the legal relations of the parties. There was a special relationship between the parties which might have created a duty of care under the principle of *Hedley Byrne* (see Case **142**) but that duty was not to *give* negligent information. The *failure* to give information which amounted to an omission was not within the principle of *Hedley Byrne*.

Comment A further example, this time of liability by omission, occurred in *John D Wood & Co* v *Knatchbull* [2003] 08 EG 131. The claimants sued for their commission on a sale of the defendant's property. He counterclaimed for damages for the fact that the claimants had not, before sale, advised him of an increase in the selling prices of properties near to his in Notting Hill, London. The claimants advised an asking price of £1.5 million and the property was bought for that price 'subject to contract'. Before contracts were signed another property close to the defendant's was put on the market at £1.95 million. Sign boards were not allowed in the area so that the defendant was not aware of this attempt to sell. The claimants did, however, become aware of it but allowed the defendant to enter into a binding contract at £1.5 million. Damages for loss of a chance to sell at a higher price were awarded to the the defendant, i.e. £120,000 on the basis of a 66 per cent chance of finding a buyer at £1.7 million. Allowances were made and deducted for interim use by the defendant and the increased commission he would have had to pay. The judge said that it was an implied term of the of agency contract with a concurrent duty of care in tort that an estate agent should exercise the skill and care of a reasonably competent member of his or her profession. There was a continuing duty so long as the agency lasted to make relevant disclosures.

Negligence: economic loss recoverable by way of parasitical damages

393 *Weller & Co* v *Foot and Mouth Disease Research Institute* [1965] 3 All ER 560

The defendants carried out experiments on their land concerning foot and mouth disease. They imported an African virus which escaped and infected cattle in the vicinity. As a consequence, two cattle markets in the area had to be closed and the claimants, who were auctioneers, sued for damages for loss of business.

Held – by Widgery, J – so far as negligence was concerned, the defendants owed no duty of care to the claimants who were not cattle owners, and had no proprietary interest in anything which could be damaged by the virus. Furthermore, the defendants owed no absolute duty to the claimants under *Rylands* v *Fletcher* (1868) because the claimants had no interest in any land to which the virus could have escaped.

Comment Had a duty of care been found, the liability in this case would have been endless. The closing of the market no doubt affected also the takings of cafés, car parks, shops, and public houses, amongst others. It would not seem likely that the courts are yet ready to extend liability in this way.

394 *SCM (United Kingdom) Ltd* v *W J Whittall & Son Ltd* [1970] 3 All ER 245

A workman employed by the defendants carrying out construction work near the claimants' factory, cut into an underground electric cable so that the power to the claimants' factory failed. The claimants made typewriters and the lack of power caused molten materials to solidify in their machines which were *physically* damaged. The machines had to be stripped down and reassembled and production was brought to a halt for seven-and-a-half hours. In the Court of Appeal the claimants limited their claim to damages in respect of the physical damage to the machines and the financial loss *directly* resulting from that damage. This enabled the court to decide that the claimants' property had foreseeably been damaged by the defendants' act so that the claimants could recover for damage to the machines and the consequential financial loss flowing from it. Nevertheless, the court went on to consider economic loss in the context of negligence and dealt in effect with the position as it might have been if the power cut had stopped production without damaging the machines. The following aspects of the judgments are important:
Per Lord Denning, MR:

> In actions of negligence, when the [claimant] has suffered no damage to his person or property, but has only sustained economic loss, the law does not usually permit him to recover that loss. Although the defendants owed the [claimants] a duty of care, that did not mean that additional economic loss which was not consequent on the material damage suffered by the plaintiffs [claimants] would also be recoverable; in cases such as *Weller & Co* v *Foot and Mouth Disease Research Institute* (1965) [see above], and *Electrochrome Ltd* v *Welsh Plastics Ltd* (1968) [see above] the [claimants] did not recover for economic loss because it was too remote to be a head of damage, not because there was no duty owed to the [claimants] or because the loss suffered in each case was not caused by the negligence of the defendants.

Per Winn, LJ:

> Apart from the special case of imposition of liability for negligently uttered false statements, there is no liability for unintentional negligent infliction of any form of economic loss which is not itself consequential on foreseeable physical injury or damage to property.

Comment The power shut-off lasted for some time and during that time the claimants would normally have processed four more 'melts'; because they had been unable to do so, they had lost the profits they would have made on them. However, this was regarded as economic loss not consequent upon the physical damage and, therefore, what was recoverable was only the loss of profit on the melt which was actually interrupted by the failure of electrical supplies.

395 *Spartan Steel and Alloys Ltd* v *Martin & Co Ltd* [1972] 3 All ER 557

While digging up a road, the defendants' employees damaged a cable which the defendants knew supplied the claimants' factory. The cable belonged to the local electricity board and the resulting electrical power failure meant that the claimants' factory was deprived of electricity. The temperature of their furnace dropped and so metal that was in melt had to be poured away. Furthermore, while the cable was being repaired the factory received no electricity so it was unable to function for some 14 hours. The Court of Appeal, however, allowed only the claimants' damages for the spoilt metal and the loss of profit on one 'melt'. They refused to allow the claimants to recover their loss of profit which resulted from the factory being unable to function during the period when there was no electricity. Lord Denning, MR chose to base his decision on remoteness of damage rather than the absence of any duty of care to avoid causing economic loss. However, he did make it clear that public policy was involved. In the course of his judgment he said:

> At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do so as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the damages recoverable – saying that they are, or are not, too remote – they do it as a matter of policy so as to limit the liability of the defendant.

Negligence: economic loss: injury to person or property not always essential

396 *Junior Books Ltd* v *Veitchi Co Ltd* [1982] 3 All ER 201

Junior Books (J) owned a building. Veitchi (V) were flooring contractors working under a contract for the main contractor who was doing work on the building. There was no privity of contract between J and V. It

was alleged by J that faulty work by V left J with an unserviceable building and high maintenance costs so that J's business became unprofitable. The House of Lords decided in favour of J on the basis that there was a duty of care. V were in breach of a duty owed to J to take reasonable care to avoid acts or omissions, including laying an allegedly defective floor, which they ought to have known would be likely to cause the owners economic loss of profits caused by the high cost of maintaining the allegedly defective floor and, so far as J were required to mitigate the loss by replacing the floor itself, the cost of replacement was the appropriate measure of liability so far as this loss was concerned. The standard of care required is apparently the contractual duty, and so long as the work is up to contract standard, the defendant in a case such as this cannot be in breach of his duty. Lord Fraser of Tullybelton said:

> Where a building is erected under a contract with a purchaser, then provided the building, or part of it, is not dangerous to persons or to other property and subject to the law against misrepresentation, I can see no reason why the builder should not be free to make with the purchaser whatever contractual arrangements about the quality of the product the purchaser wishes. However jerry-built the product, the purchaser would not be entitled to damages from the builder if it came up to the contractual standards.

Comment (i) The effect of the decision in *Junior Books* was whittled away in *Simaan General Contracting Co* v *Pilkington Glass Ltd* [1988] 1 All ER 345. The claimant (S Ltd) was the main contractor to construct a building in Abu Dhabi for a sheikh. The erection of glass walling together with supplying the glass was subcontracted to an Italian company (Feal). Feal bought the glass from the defendant (P Ltd). The glass units should have been a uniform shade of green but some were various shades of green and some were red. The sheikh did not pay S Ltd. It chose to sue P Ltd in tort rather than Feal in contract for its loss, i.e. the money the sheikh was withholding.

Held – by the Court of Appeal – since there was no physical damage, this was purely a claim for economic loss and P Ltd had no duty of care. S Ltd's claim failed. Feal would have been liable under the Supply of Goods and Services Act 1982 (see Chapter 14) but for some reason was not sued. Economic loss can be recovered in contract.

Dillon, LJ said of *Junior Books* that it had 'been the subject of so much analysis and discussion that it cannot now be regarded as a useful pointer to any development of the law. It is difficult to see that future citation from *Junior Books* can ever serve any useful purpose.'

(ii) It is now possible to use the law of contract to deal with third-party claims under the Contracts (Rights of Third Parties) Act 1999. There is no problem about recovering economic loss in contract claims. A great many of them are precisely for that (see further Chapter 10).

Negligence: breach of duty; behaviour as a reasonable man

397 *Daniels* v *R White and Sons Ltd* [1938] 4 All ER 258

The claimants, who were husband and wife, sued the first defendants, who were manufacturers of mineral waters, in negligence. The claimants had been injured because a bottle of the first defendants' lemonade, which they had purchased from a public house in Battersea, contained carbolic acid, presumably from the bottle-washing plant. Evidence showed that the manufacturers took all possible care to see that no injurious matter got into the lemonade. It was *held* that the manufacturers were not liable in negligence because the duty was not one to ensure that the goods were in perfect condition but only to take reasonable care to see that no injury was caused to the eventual consumer. This duty had been fulfilled.

398 *Hill* v *J Crowe (Cases)*, *The Times*, 19 May 1977

The claimant was injured when he stood on a packing case whose boards collapsed causing him to fall. It was *held* – by MacKenna, J – that the case had been badly made and the manufacturers owed a duty of care to the claimant. They could not escape liability by showing that they had a good system of work and proper supervision. *Daniels* v *White and Sons* (1938), above, was not followed.

399 *Greaves & Co (Contractors)* v *Baynham Meikle & Partners* [1974] 3 All ER 666

The claimant, a builder, was instructed to build a warehouse and sub-contracted its structural design to the defendant firm of consultant structural engineers. B knew or, by reason of the relevant British Standard Code of Practice, ought to have known, that as the warehouse was to carry loaded trucks there was a danger of vibration. The design was competent but inadequate for the purpose of carrying the trucks and it was *held* – by Kilner Brown, J, allowing the claimant's claim for breach of duty of care and breach of an implied term of the contract – that the duty of the defendant firm was not simply to exercise the care and skill of a competent engineer which it had done, but to design a building fit for its purpose in the light of the knowledge which the firm had as to its proposed use.