# Legal Update

March 2016

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Admitted -October 1988
Solicitors Regulation Authority
No139699

## Neighbourly Love?

'Love Thy Neighbour' preaches the Bible. Yet disputes between Cricket Clubs and the Owners of Neighbouring Land have become one of the most prevalent issues brought to the attention of Conference. This Legal Update seeks to explain to Leagues and Clubs the present Legal Position in terms of the Laws of Nuisance and Negligence and is a "follow on" to that given to Conference in the Winter of 2008.

Since then for example the Media has reported on the case of an Oxfordshire Club Britwell Salome CC introducing a local Rule that a batsman who hits a ball out of the ground from one end will not be credited with the a six, following complaints from a neighbouring owner. Cricket has moved on, with heavier bats resulting in balls being hit further than in yesteryear. Moreover, not all neighbours equate with the now famous opening remark of Lord Denning in the 1977 cricket case of Miller v Jackson (involving a claim brought against the officers of Lintz Cricket Club in County Durham) " *in summer time village cricket is the delight of everyone"*. There are instances of neighbours having taken legal steps to stop cricket being played totally on a ground because of the intrusive effect that the game has had on their use and enjoyment of their own Property. In another example Rushden Town Cricket Club in Northamptonshire were initially blocked from putting up practice nets because the local council feared that "*the sound of leather on willow would annoy neighbours*". The Club had to pay £2,000 for a noise survey before its planning application could proceed.

This Update will conclude with a Useful Good Practice Guide to Clubs whose Ground abuts neighbouring properties, extracting Principles from a number of Legal Cases brought against Cricket Clubs in recent years to try to limit liability from neighbours who are not necessarily in love with either your Club or Cricket generally.

**This Update does not deal with injury suffered by people lawfully on the Ground.**

## Who is in the Firing Line?

The neighbouring land owner who is in the firing line of cricket balls dispatched from a near-by ground or from noise emanating from the same location may seek to 'return fire' against the named Club Officials. This is because most Cricket Clubs are not legal entities in their own right. Most Clubs are constituted on the basis that they are run by its Officers for the benefit of its members. The Officers are therefore in the Firing Line to the threat of litigation. Every Club Officer is putting his of her own livelihood on the line. Neighbours who bring tortious claims in nuisance and or negligence will be seeking either Damages for the loss that they have suffered and or an Injunction to stop Cricket being played totally.

## What Amounts To Nuisance?

1. Nuisance is a set of circumstances which exist on one person's land which causes undue interference with a neighbours use and enjoyment of his or her land. Nuisance is a **property related tort and what constitutes a nuisance is judged by the standard of the ordinary reasonable person.** Direct Interference is for example where a cricketing activity results in balls being hit more than just occasionally on to certain neighbour's property causing damage or the threat of damage to person or property or an interruption to the use of their property. Indirect Inference can be continual noise which prevents a neighbour from being able to relax in their own garden.

2. A Court of Appeal Judgement in a 2012 environmental case of Barrs v Biffa Waste Services provides a useful guide to determining whether an actionable nuisance has taken place
   - There is no absolute standard. It is a question of degree whether the interference is sufficiently serious to constitute a nuisance taking into account the following circumstances.
   - There must be real interference with the comfort and convenience of living according to the standards of the average man. One Victorian Judge called this being based upon "plain sober and simple notions among the English People". Reasonableness is not based on what the Cricket Club Officers think or the Neighbour thinks. It is entirely Objective.
   - The character of the area must be taken into account. Once more back to a Victorian Judge who said " *what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey*".

- The duration, frequency and intensity of the interference must be assessed. It is not however self serving. A temporary interference which is substantial can be an actionable nuisance. A one off totally unforeseen tortious act will seldom be a nuisance hence why in another famous cricketing case of Bolton v Stone 1951 (Cheetham CC) a claim was brought in Neglience (see below) when a Miss Stone was hit by a cricket ball, there having been no previous evidence that a ball had been hit so far out of a ground which has been used for cricket since 1864.

3. What is reasonable is assessed on the basis of what "objectively a normal person would find reasonable to have to put up with" (Weir on Tort 2006).

4. There is a fine line in what amounts to a Nuisance and "the line" is not always in the same place. Each case is fact specific. A Court in each instance has to balance the competing interests. Nuisance enables the owner of a parcel of land to bring proceedings against an owner of neighbouring land where the latter owner's use causes Direct or Indirect Interference.

5. It is not a defence for a Cricket Club to argue that the Neighbour must have known of the proximity of a cricket club when moving to their Property. This is often called "Coming to the Nuisance". Either an Activity is a Nuisance or it is not. So in Miller v Jackson the fact that the Claimants should have realised the likelihood that they could experience interference from the adjoining cricket ground, did not preclude their successful claim in damages and the Club incurring considerable additional expense in erecting additional protective cover. The Supreme Court considered this Issue 2014 Lawrence v Coventry Case where the Claimant had bought a Property called Fenland which was within 90 meters of the motor-cross track at Mildenhall Suffolk. The operators of the track could not use "Coming to the Nuisance" as a defence.

   In passing the Court did concede it *may* be possible to invoke a defence where it is the Claimant who has changed the use of his or her land. In Lawrence v Coventry, Lord Neuberger, President of the Supreme Court stated at Para 58 ***"it may well be a defence at least in some circumstances for a defendant to contend that 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 become a nuisance, the claim should fail"**
   This is an important statement which requires further analysis. The ingredients are -
   - It must be the Claimant who changes the use of his or her land,
   - Prior to the change of use the activity of the Defendant on their land must not have constituted a Nuisance to the Claimant's Land,
   - It is the change of use of the Claimant's Land which results in the Nuisance happening.

   Clearly this Defence will not assist the Cricket Club which is confronted by complaints from owners of neighbouring newly built or newly converted properties who suddenly find having moved in that they do not like the direct inference of cricket balls being hit on to their property and causing damage or the risk of damage or indirect interference of noise from the ground.

6. In a claim in Nuisance to what extent can a Defendant argue as a Defence that he or she has a Planning Permission for the activity carried out on their land? Lawrence v Fen Tigers (2014) (the precursor to the Lawrence v Coventry Case) the Track Operators had successive planning permissions authorising its use. There is a direct conflict between Public Law Rights (Planning Permission) and Private Law Rights (an owner of land should not have to tolerate a neighbour's activity which amounts to a nuisance). Courts have for a long period of time stated that " planning permission is not a licence to commit a nuisance". This was confirmed in Lawrence v Coventry, *"it seems wrong in principle that through the grant of a planning permission, a planning authority should be able to deprieve a property owner of a right to object to what would otherwise be a nuisance without providing her with compensation when there is no provision in the planning legislation which suggests such a possibility".*

7. It is questionable whether a Right to commit a Nuisance by reason of Prescription (an activity which has lasted at least 20 year) will succeed as a Defence? The Defence was considered by the Supreme Court in the 2014 Noise Nuisance case of Lawrence v Coventry (an indirect interference with someone else's land). For the basis of the Defence to apply the following three tests have to be satisfied (I have summarised in italics the problems as to proof that exist) -
   - The 20 year period only commences from the date that the activity amounts a Nuisance and the Owner of the adjoining land effected by this Nuisance acquieces - *This can be difficult to assess because where an activity is not yet a nuisance "the time clock" does not start to run. Likewise when can it be said that the neighbouring owner starts to acquiesce? Fundamental to success in a Prescription Claim is to show that the Complaining Landowner has been aware of the activity, and gives no permission for it to happen ('Nec Vie Nec Clam Nec Precario') .*
   - The level of noise may fluctuate over the 20 year period; so assessing the level of noise which qualifies 'as of right' can be problematic. *The same would apply in terms of Direct Interference in terms of the number and frequency of incidents that cricket balls are hit into a neighbour's garden.*
   - To what extent can an intensification of the Activity amounting to a Nuisance qualify 'as of right'. *Prescription is commonly claimed in Rights of Way Disputes where major doubts exist that a claimed right can cover a user considerably greater than during the previous twenty years. For example records showing that an owner of a neighbouring parcel of land has acquiesced over the previous twenty years to 20 balls a season ending up in the garden may be able to refute the Club's Defence, if it can be shown that 40 balls a season are now being hit on to his or her land. As stated at the outset the heavier cricket bats now in use are seeing balls hit ever longer distances.*

   Lord Neuberger stated at para 143: "In order to justify the establishment of a right to create a noise by prescription, *it is not enough to show that the activity which now creates the noise has been carried on for 20 years. It is not even enough to show that the activity has created a noise for 20 years. What has to be established is that the activity has or a combination of activities have created a nuisance over 20 years"*

The Supreme Court did not consider whether a Right to commit a nuisance could exist through an activity which has a direct interference on a neighbour's land. It is questionable therefore that where cricket balls have been hit regularly hit on to a neighbour's land without challenge, without secrecy and without permission that a Cricket Club could argue that it has acquired a Prescriptive Right.

8. 'The Character of the Locality' must be taken into account in a Nuisance Claim. In the Lawrence v Coventry case the activity of the Defendant holding speedway, stock car racing and motorcross could only be taken into account for the purposes of assessing Character of the Locality to the extent that the activity was **not** an actionable nuisance. "the fact that the nuisance is already being committed cannot make it part of the character of the locality".

9. Relief - The Supreme Court Decision in Lawrence v Coventry has introduced a refreshing approach to whether an Injunction should be the "default position" where Nuisance has been proved. The effect of an Injunction can be that a Cricket Club would not be allowed to continue playing on the ground where a nuisance activity has occurred. This had been the verdict at the first instance hearing of Miller v Jackson whereby an Injunction was issued stopping Lintz from playing on their home ground of years. The Court of Appeal overturned it.

   An award of damages in lieu of an Injunction traditionally could only be made by a Court where the fourfold "Shelfer Test" Requirements were met (this derived from the case of Shelfer v City of London Electric Lighting 1895)
   - The injury to the Claimant's legal rights is small
   - The injury is capable of being assessed in monetary terms
   - The injury can be compensated by a small money payment
   - It would be oppressive to grant an Injunction

   The Shelfer Test was based on the Court's objection to sanctioning a wrong by allowing a Defendant to pay for the right to go on doing.

   Lawrence v Coventry states that Courts should take a more flexible approach notwithstanding that all four of the proviso in the Shelfer Test cannot be met. The Defendant has the burden of proof that an injunction should not be issued. Recent Court Judgements have suggested that where a Defendant has been found to have committed an act of Nuisance for an activity for which it has planning permission that this could be a factor in a Court refusing to grant an Injunction but order Damages in lieu. A Court has an unfettered discretion however as to whether to make an order for Damages. Lord Neuberger stated at para 124 of the Lawrence Judgement "*the fact that a defendant's business may have to shut down if an injunction is granted should it seems to me, obviously be a relevant fact and it is hard to see why relevance should not extend to the fact that a number of the defendants employees would lose their livelihood although in many cases that may well NOT be sufficient to justify the refusal of an injunction*".

10. Where Damages are to be awarded, there remains the issue as to how they are calculated? The traditional approach has been to measure damages on the basis of the diminution in value of the Claimant's Land through being the victim of the neighbour's activity which has been shown to be an actionable nuisance. Courts in cases involving breach of Restrictive Covenants have developed "Gain Based Damages". This is based on an amount that a "wronged land owner" could extract from the guilty landowner to release the covenant. It would be a sum to compensate the wronged landowner for having to put up with the continuing wrong doing.

**What Amounts To Negligence?**

1. There are three elements which have to be proven:
   - One Landowner owes a duty of care to a Claimant,
   - The Landowner breaches the duty of care as assessed objectively ("the man on the Clapham Omnibus Test - should we now call it Transport for London!),
   - The breach of duty has resulted in reasonably foreseeable harm to the Claimant.

2. In the same way as Claims in Nuisance, cases are fact specific. Clubs have to consider the use of neighbouring land and the extent to which uses of such land whether it be roads, paths, or privately owned land could suffer loss or damage as a result of cricket being played.

3. In Bolton v Stone, the injuries suffered by a Miss Stone from a cricket ball hit out of the ground could not have been reasonably foreseen as she was over 91 meters away in a house on the far side of the road from the ground. Although it was foreseeable that a ball may be hit out of the ground and it was reasonably foreseeable that someone passing the ground may as a result be injured, the location of Miss Stone on the far side of the road being hit could not have been reasonably foreseen.

4. There must be a reasonable chance of the ball being hit out of the ground and a reasonably foreseeable risk of injury occurring to someone in the claimants position.

5. Faced with a claim in Negligence, a Defendant may wish to consider whether the Claimant has in any way contributed towards the injuries suffered. This is NOT a defence to a claim in Negligence buy may be used to reduce the level of damages paid. The Law Reform (Contributory Negligence) Act 1945 provides *" where any person suffers damage partly of his own fault and partly of the fault of any other person, a claim in damages shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court considers just and equitable having regard to the Claimant's share in the responsibility for the damage".*

**A Good Practice Guide For Clubs**

Lord Denning was a cricket fan that there can be little doubt. One cannot assume therefore that a Judge hearing a case will always understand the social importance that the game can offer. Indeed in the High Court Case of East Meon Forge and Cricket Protection Association v East Hampshire District Council, the Judge had to have explained to her what the cricket terminology of 'a four' and 'a six' meant. Lord Denning in the Miller v Jackson case stated there is a balancing test in each case.

*"a balance has to be made between on the one hand the rights of the individual to enjoy his house and garden without the threat of damage and on the other hand the rights of the public or a neighbour to engage in lawful pastimes".*

It is therefore important that Clubs places themselves on a "good wicket" if faced by a Neighbour's Claim to ensure wherever possible the balance is on their side. It is for the neighbour to show on 'a balance of probability' that the Club has committed a Nuisance or act of Negligence. So what should Clubs do?

1. All Clubs should have comprehensive
    - Public Liability Insurance of a Minimum of £5,000,000.00 (Five Millions Pounds) with Legal Expenses cover.
    - Adequate Directors and Officers (Management Liability) Cover.

    This would ensure that in the event of a claim for damages that there is Insurance to cover all or the majority of the expense. This is important IF we see a move towards Courts making higher awards in damages in lieu of granting an Injunction if for example a Club has been found on the balance of probabilities to have committed an actionable nuisance or been negligent. We live in a growingly litigious world with "no win no fee' Litigation Companies on hand "24 - 7" so it is vital that as a Cricket Club you are as fully insured as possible against such claims being bought.

2. Remembering the overarching duty of care which all of us as Landowners owe to our neighbour, ask yourselves as Clubs Officers this question

**ARE WE THE CLUB AWARE OF ANY CIRCUMSTANCE WHEREBY WE ARE EXPOSED BEYOND 'THE NORM' TO POTENTIAL CLAIMS AGAINST US?**

3. For each game played on your Ground keep a Record of the number of instances that a ball is hit out of the ground and the neighbouring Property which is effected (" the Record"). For example in Miller v Jackson 1977, Lord Denning remarked that in the 1975 Season 13,326 balls were bowled at Lintz Ground of which only six went over the protective fence into the neighbouring Brackenridge Housing Estate, whilst the figure in 1976 it was 15,696 deliveries and 9 sixes. In Bolton v Stone, 6 balls in the previous 28 years had been hit into the road fronting Mrs Stone's house.

    Although this Update does not cover injury or damage to persons or their cars which are lawfully on the ground, a Club would also be sensible if it kept a Record of incidents where persons or cars parked on the ground have been damaged. A Record could then be used for a Club when carrying out Risk Assessments.

4. Ensure your Club's Management Committee regularly monitor the Record and assess whether additional protective measures should be taken. By keeping a Record you have the ability to counter arguments put forward by a neighbour. This was successfully used in the recent case of Lacey v Parker by the Officials of Jordans, a village club in Buckinghamshire who were faced with an Injunction to stop cricket being played on their ground after a neighbour stated that 60 balls had landed in his garden in the previous five years. The County Judge in that case stated it would be "*highly damaging not only to members of the cricket club but to the interests of the village as a whole*" if an Injunction were to be granted.
    In the Bolton v Stone case which involved a claim in Negligence brought against the officers of Cheetham CC, the evidence suggested that there had not previously been a shot of such magnitude.

5. Try to get on with your Neighbours. Involve them in your Club. All Neighbours have to accept a degree of "give and take". Where practical invite the neighbours to club functions. Think of the famous remarks of the 26th President of America Theodore Roosevelt "*it is better to have me in the tent pissing out rather than outside the tent pissing in".*

6. Are your Club's preventative precautions adequate? A Club should carry out regular Risk Assessments of the condition, height and adequacy of any Preventative Boundary Structure- e.g. netting. Take Professional Advice.

7. Take an active role in checking Planning Applications to develop adjoining land abutting the ground. Making your Objections at the start of a Planning Process can avoid potential pain later. Submitting a request at the start of the Planning Consultation that the prospective developer should as a condition of Planning be required to erect protective fencing of a height and adequacy to limit cricket ball intrusion is essential. In the 2014 case of East Meon Forge and Cricket Ground Association v East Hampshire Council, the Council's grant of planning permission was quashed because the Council had paid insufficient regard to the Observations of the Club and Sports England. Here the Developer had on the site of the Old Forge proposed to provide living accommodation on the first floor and decking to the rear, the site being just 36 meters away from the cricket square.

    In the Miller v Jackson case, Lord Denning stated Planning Permission should never have been granted by the Local Authority for the building of the houses in a road called Brackenridge. That said a Planning Authority when considering an application, has to consider a number of factors only one of which is the effect that granting planning permission would have on occupiers of neighbouring land. Political or economic demands may outweigh the detrimental effect on a neighbouring owner. The detriment would have to be severe for a Club for example to claim that they have become the victim of "Planning Blight".

8. Where Planning Permission is granted for neighbouring land to be developed, take professional advice on whether you have Grounds of Appeal in grounds of procedural irregularity on the part of the Local Authority. Any Challenge must be brought within three months of the planning decision so you must act promptly. In the East Meon Case a Planning Officer with The South Downs National Park Authority remarked that the Development "*would increase the risk of claims for nuisance against the users of the adjoining cricket pitch which may adversely affect the playing of cricket and prejudice or disadvantage the enjoyment of recreation*".

   Consult with Sports England at an early stage where adjoining land is proposed for development

9. When confronted with a dispute with a neighbour, your conduct can be taken into account by a Court. Behaviour and attitude upon receiving a complaint is vital. Upon receipt of the first sniff of problems, contact your Insurers and check you have legal fees protection to ensure you are limited from an immediate costs exposure in terms of paying Solicitors, Barristers, other experts.

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