PRIVATE NUISANCE

John Page (BA Law) writes about the case of Spray v Ellesmere Port and Neston Borough Council.

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Introduction

In recent years there appears to have been a rethink in law about the tort of **Private Nuisance**.

Private Nuisance, to recap, is created by a situation where the plaintiff suffers a loss of enjoyment of his property. The situation must have gone on for a long time (eg the smell from a chemical works, smoke from factory chimneys). The normal defence against this is that the plaintiff came to the nuisance (ie the "nuisance" was there before the plaintiff).The case in the heading of this article is of great importance in this area of law, because it is an Appeal Court decision and, therefore, carries a lot of weight.

In my research on this article I have been in touch with Mr Spray, the plaintiff, and the Health and Safety Executive (HSE) in Bootle. I am extremely grateful for the help which these parties have given to me.

Case Details

The Plaintiff

Mr Spray is now 77 years old. He is a retired policeman with 30 year's service. His last 4 years were spent as Prosecution Inspector in the Magistrates Courts in Ellesmere Port. Following his retirement, he worked with a local firm of solicitors on criminal and civil matters and he became versed in the intricacies of insurance claims. In this case Mr Spray had a great amount of work to do. His Appeal Court Bundle consisted of 82 documents and his transcripts of evidence, including his cross examinations, consisted of 78 pages.

The Defendants

Ellesmere Port and Neston Borough Council is a local authority, which owns the golf course in the borough. They allow about 300 people to act as a "club". This is purely a courtesy title in order to allow those "members" to participate in competitions etc. under the aegis of the R&A. The "club" was not involved in this case.

The Facts

The estate on which Mr Spray lives, was built in 1959. He occupied the property from March/April 1972. The golf course was officially opened in June 1973.

(Author's note - I did not ascertain whether or not play started on the practice area before the official opening.)

Before that date it had been a public park for about 30 years.

The practice ground had been set out so that those using the facility would hit away from the houses towards an area of boggy ground. The distance to the boggy ground from the authorised tee was, in total, approximately 230 yards. There were signs stating that users of the practice area must not hit towards the houses. It would appear that golfers ignored these signs - most probably because of the boggy ground. The fact that balls were hit into houses showed that some persons ignored these signs.

About noon on 21st March 1996 Mr Spray was sitting in his front room when he heard the sound of a crack, like a rifle shot. He investigated and found that a window had been broken in the rear of his property. It had come from the practice ground of the municipal golf course. This was not the first time a golf ball had entered the premises but was, most probably the first that had caused damage.

Mr Spray took time and trouble to attempt to obtain evidence from his neighbours about complaints made to the council over the past 20 years. In the end one neighbour agreed to be a witness and two others passed on correspondence which they had had with the council and the council's insurers.

The council's case was taken over by their insurers, Zurich Municipal, who instructed the council not to make any admissions. (This is normal insurance procedure). In April 1996 Zurich Municipal wrote to Mr Spray stating the council was not liable for acts committed by the Public on the golf course.

Mr Spray brought an action for damages against the council in Rhyl County Court on 29th and 30th October 1996.

The Defence

The defence appeared to rely mainly on a cricket case, Bolton v Stone (1952 A C 850). In this case, which was brought as an action for **private nuisance** and **public nuisance** (since the ball bounced on a road), a cricket ball had been hit out of the ground and caused damage and distress to the plaintiff. The cricket club had erected a large fence, which was built on the top of a mound. The club argued that they had done everything possible to eliminate the nuisance and they could not reasonably foresee vague possibilities. Balls had gone out of the ground about 6 times in the past 30 years. The House of Lords ruled that it was reasonable to ignore such a small risk.

Judgment at the County Court

The judge was satisfied that the damage done to the plaintiff's property came from the practice ground. He was also satisfied that the defendants were aware that balls were being hit back to the teeing area (*note* - and, therefore towards the houses).

The questions to be posed were:

- Was it reasonable to say that the defendants should have closed down the practice area before the incident of the breaking of the window or re-sited it? The judge's answer was no. He stated that there was no evidence to show that they knew that what was happening was occurring on a regular basis. Anyone, in his view, who lives near to a golf course must expect from time to time to be subject to balls landing in their gardens.
- Have the defendants taken all reasonable steps to ensure that it happens as little as possible? The judge's view was yes. The signs they erected were quite clear. It was unreasonable, in the judge's view to man the area from morning to night. The golf professional and his two assistants monitored the area as best as they could.

The judge found for the defendants and ordered costs against the plaintiff. These came to an amount in the region of £6,000 + VAT.

Application for Leave to Appeal

Mr Spray, the appellant, had applied for leave to appeal out of time against the decision on liability and to bring forward evidence, which was not before the lower Court on 29th October. He included in his affidavit two letters from the Health and Safety Executive. One of the letters only came to his knowledge immediately prior to the hearing in the lower Court. The fact that a visit from the Health and Safety Executive had called for an investigation was known to the defendants. Ward L J, the judge in this application, stated that he was much troubled by certain information before him (the letter mentioned above and the knowledge of the Health and Safety visit), which had not been before the judge in the lower Court, and which appeared to suggest that the respondents' witnesses had given misleading impression of how matters stood between the respondents and the Health and Safety Executive. Ward L J granted the extension of time and leave to appeal and to apply to the Court to admit fresh evidence. He indicated the hope that "...when this appeal is heard, some full explanation will be given to the Court as to how the officer of the defendant came to give the misleading impression to the judge which he did."

Mr Spray based his appeal on the following grounds:

- The defendants gave evidence to the effect that the only way they could eliminate the risks arising from the misuse of the practice field was (a) by manning it at all times during use, which they could not afford or (b) closing it.
- The defendant's witness produced a contract issued to the course and security manager. This stipulated that two wardens be appointed, who would be employed 7 days a week. The practice area and the course would be patrolled every 30 minutes minimum. The witness also stated that he visited the course two or three days a week and had ensured that the security manager was complying with the terms of the contract.
- In evidence the security manager stated that he had read the terms of the contract and had complied with them. In cross examination he admitted that the two wardens were not appointed until 1st April 1996, ten days after the incident involving damage to the plaintiff's property; that they were part-time only; that one worked only at week-ends and

that he had no records of employment for these men as they were paid hourly at £2.50 per hour cash in hand.

- That in light of the foregoing evidence both the above witnesses had given evidence calculated to mislead the Court.
- That in cross examination the security manager stated that Health and Safety Executive had visited the practice field in October 1996 and had informed him that they were satisfied with the precautions taken by the defendants and that they did not have to close the practice field or take any more precautions. At the time he gave this evidence he knew it to be false and therefore deliberately misled the court.
- That in failing to have regard to the risk of harm from golf balls struck into the Plaintiff's and his neighbours' gardens, and, in looking only at the incidents of actual damage, the judge misdirected himself.
- That the plaintiff was informed by the Health and Safety Executive in a letter dated 24th February 1997 that the defendants have now given an undertaking to the Health and Safety Executive to take action to try and stop the dangerous misuse of the practice field and the inference of this being that failure to do so could result in a breach of the Health and Safety Act. The plaintiff submits that the defendants have conceded to a Statutory body that they could, and should have taken such action before now, which amounts to an admission of negligence, and it follows, therefore, that the defendants were negligent under Common Law in March 1996 when the plaintiff's property was damaged.

Mr Spray presented these grounds to the Court and also applied for stay of judgment of the lower Court. He was successful on both counts.

The Appeal

The appeal was heard in the Royal Courts of Justice in London on 2nd December 1997 before Lord Justice Simon Brown and Mrs Justice Hale.

Lord Justice Brown stated that, before the judge in the lower Court found that the defendants were not liable, he dealt with **four heads** of the plaintiff's damages claim as follows.

The **first head** of claim was for the damage to the window - which was an undisputed value of £150.40. The **second head** was a claim in respect of what was advanced as shock and extreme nervousness following the incident. This was rejected entirely by the judge on the basis that it fell short of a recognised illness for which damages are recoverable.

The **third head** was a claim for diminution of the appellant's property. The judge observed that no evidence had been called for on this head and rejected it.

The **fourth head** was for loss of enjoyment of the appellant's property, not least his garden. The judge said ".... he told me he was concerned .... about further incidents occurring in the future and that as a result ... he was unable to sit out in his garden." The judge stated that there was

evidence to suggest that the enjoyment of the property had been diminished and he would set a figure of £250 if liability against the respondents was established.

Lord Justice Brown went on to say that the respondents "no doubt wisely" decided to admit liability and submit to judgment upon the appeal. They wrote to the respondent a letter, which they said, if necessary, they would put to the Court at the end of the hearing (but which in the event the appellant put before the Court in advance) on the question of costs of the present appeal hearing, offering £700.

Lord Justice Brown then considered **head 2** of shock and extreme nervousness. He considered the fresh medical evidence and concluded that Ait is quite impossible to regard that the appellant was suffering from a mental condition such as, under the relevant legal authorities governing this area of law, gives rise to a recoverable claim for damages".

Lord Justice Brown rejected the documentary evidence concerning the diminution of the value of the property.

Since the respondents had admitted liability, Lord Justice Brown considered that the £250, mentioned in the lower Court was very modest and raised that amount to £500. The award for damages was £650.40 (the extra £150.40 was the cost of the broken window).

An order for costs was made in the following manner - there would be no order for costs in the Appeal Court or the lower Court with each party to pay their own costs. Lord Justice Brown then referred to the concern of Ward L.J. that the Appeal Court be given a full explanation of how the Recorder came to be given a misleading impression of the Health and Safety Executive's views about this case. He stated that "for present purposes say no more than that we now have before us a statement from the respondents' principal assistant leisure officer dated 12th November 1997, which I regard as an acceptable explanation of the matter, at least in this sense, that I think it quite unnecessary for this court to carry enquiries any further". Mrs Justice Hale concurred with the decision.

Commentary & Observations

The "Misleading Evidence"

I think it is important to give some account of this evidence, because it could, allegedly, form part of the tactics used in court in general. Law cases are based on the use of words, the interpretation of words and the manipulation of a question.

In the county court on 29th - 30th October 1996 Mr Spray questioned a council official about a visit from HSE to the practice area. The official answered that there had been a visit and the HSE had agreed with the precautions taken and there was no notification to close the ground or make any alterations.

After the decision went against Mr Spray and he had to find costs of approximately £6,000, he wrote to HSE on 13th November 1996 to ask if the HSE considered the matter closed. On 27th November he received a reply from HSE, in which the Inspector stated that he had instructed the

council to carry out a risk assessment to see if the council was doing all that was reasonably practical to safeguard the public and he expected the results of the assessment in January 1997.

A letter dated 24th February 1997 stated that the council had submitted a risk assessment and a review of the steps taken. On 5th March 1997 Mr Spray wrote to the Chief Constable of North Wales police referring to correspondence Mr Spray had had with his M P. This correspondence concerned allegations of perjury in the county court case. The Chief Constable replied on 21st March 1997 to say that an investigation had taken place and he was satisfied that no offences had been disclosed and the police file on the matter had been closed.

The final document was a statement from the council officer who gave evidence at the county court. This statement was made on 12th November 1997 - over 12 months after the first hearing. The official stated that he had given his original evidence in good faith and it was factually correct. His evidence that the HSE were satisfied with the precautions taken was his clear recollection of what had happened. He did recall, however, that the Borough Council Safety Officer had agreed to carry out a risk assessment. A letter bearing this out was received by the council on 30th October 1996 (it had been posted by the HSE on 25th October 1996). The letter stated that the safety officer had "agreed" to do a formal risk assessment. He stated that this was at odds with the letter from HSE to Mr Spray, which stated that the council had been "instructed" to carry out the formal risk assessment. The witness said that he did not know of all of this correspondence until two days after the hearing. He was not questioned in the court about the HSE visit. He would have been happy to amplify the situation, but he just answered the question asked openly and honestly. It did not occur to him that what he said was misleading and if others misinterpreted what he said he apologised sincerely.

It could be submitted that this is a hotch-potch of misleading statements with the various dates flying about. Mr Spray won his right to appeal because of this situation. It is possible to theorise on what the outcome of the first hearing would have been if all the relevant facts about the "instructions" to make a risk assessment as opposed to an "agreement" had been known. I am sure Mr Spray would have questioned the witness on this point, if he had known. Like the judge, however, he did not know until after the case.

Observations

It is difficult to believe that an incident, such as breaking a window with a golf ball, would cause as much trouble and strife.

Mr Spray appeared in three courts. He spent hours of his time interviewing neighbours, taking photographs and preparing his case - in the Appeal Court there were 82 documents and 78 pages of transcripts of evidence. He lost in the first court and was landed with a bill of approximately £6,000. He applied, at his own cost, to appeal against the decision of liability.

Lord Justice Brown, after deciding that it was unnecessary for the court to carry enquiries into the question raised by Ward L.J. any further, continued "In short there appears to have been some misunderstanding underlying evidence given. That, however, is nothing to the point, save

only to indicate why exceptionally this may thought to be a case where it was desirable for the respondents ... to attend an appeal hearing."

Further consideration should be given to the judgment in the lower Court. Was the judge correct in saying "Anyone ... who lives near to a golf course must expect from time to time to be subject to balls landing in their garden". In this instance the balls were not coming from the course but from the practice ground, where there were clear notices prohibiting people from hitting balls towards the houses. The Health and Safety Executive were involved (but, apparently, the judge was not aware of this). The judge also considered it unreasonable to expect the council to man the area from morning until night. This seems strange in view of the evidence of the council security officer about the appointment of two wardens and then his statement under cross examination.

It would appear that there was too much reliance on Bolton v Stone (see above in the defence case). In a later case, Miller v Jackson, (1977 QB 996). In this case cricket balls were hit out of the ground eight or nine times a year and damaged the plaintiff's property on a number of occasions. The Court of Appeal held that the risk of damage was so great that the defendants were negligent each time the ball was hit out of the ground and caused damage.

In the case under discussion Lord Justice Brown agreed that there had been loss of enjoyment of the property with the breaking of the window and the fear for the future.

It would appear, therefore, that golf clubs cannot rely any longer on the defence that the plaintiff came to the nuisance.
There is, however, a greater threat to clubs where golf balls go into the neighbouring property.

Protection from Harassment Act 1997
The sovereign purpose of the act was to fill a loophole in the law to catch stalkers and prevent molestation mainly of women.

However, its true effects are far reaching.

The Statute enacts:

- A person must not pursue a course of conduct-
  i. which amounts to harassment of another, and
  ii. which he knows or ought to know amounts to harassment of the other.
- For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
- A person who pursues a course of conduct in breach of section 1 is guilty of an offence.

- A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale or both.
- An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
- On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

This section goes on to say that an injunction can be awarded in the High Court or a County Court from restraining the defendant from "pursuing any conduct which amounts to harassment and the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction".

- A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.
- For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.
- We are back once more to "the man on the Clapham omnibus", the reasonable man.
- This section applies for the interpretation of sections 1 to 5.
- References to harassing a person include alarming the person or causing the person distress.
- A "course of conduct" must involve conduct on at least two occasions.
- "Conduct" includes speech.

Assessment

Section 7 is so wide ranging that it is impossible for the mind to grasp its full import and it will be very interesting when cases, other than Stalker cases, are brought under this Act.

I would submit that the case in the heading of this article would be a prime example, if the Act had been in force at the time. The incidents of golf balls entering gardens has occurred more than twice. The plaintiff, as Lord Justice Brown ruled, suffered alarm and distress and was awarded damages. Were words uttered in such a way to cause alarm and distress?

I can foresee cases in the future, which will basically supersede the plea of **private nuisance** under this act and it will involve golf balls going into gardens. The Spray case has shown that the Health and Safety Executive will become involved. The secretary will no longer be able to make ex gratia payments and disclaim liability, because the club will be judged as knowing or ought to have known that this course of conduct amounts to harassment of the plaintiff.

Mr Spray spent a lot of time, trouble and money over his case. It takes a great deal of courage regardless of how experienced a person may be (and Mr Spray was experienced) to fight on to the Court of Appeal to obtain some sort of justice. I would imagine that he was out of pocket, but he fought for what he believed in.

He also showed to golf clubs the sort of damages they might have to pay, if the judgment were to go against them:

- Compensation for structural damage to property
- Compensation for diminution of the value of the property
- Compensation for shock, fear and nervousness
- Compensation for loss of enjoyment of property

In addition to these there is now the possibility of an injunction and fine under the Protection from Harassment Act 1997. The Act also mentions the possibility of imprisonment, but I doubt if that remedy would apply in such cases.

All of the above does not affect the tort of **Public Nuisance**, which, in essence, is an act which prevents people from enjoying the Queen's highway - eg a golf ball bouncing on the road (Castle v St Augustine's Links - this will be found in an earlier article).

I recommend that those golf clubs who have areas where balls escape into neighbouring property have another look at the situation. It is best to be prepared for the worst and try to avoid it.

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