

 West Lothian Council	Environmental Health		SUBJECT: Statutory Nuisance Law
		Food Safety/Food Hygiene	NUMBER: PH07
REVISED: 13/10/2009		Health & Safety	
	✓	Public Health	KEYWORDS: Nuisance, EPA,
STATUS: PUBLIC ADVICE	✓	Pollution Control	
	✓	Pest Control/Dog Warden	

Information Sheet PH07 The law of Statutory Nuisance

We are often asked about what constitutes a Statutory Nuisance. In general, there is no quick, simple answer to this, with a few exceptions. These notes have been put together to help explain how decisions are made on whether a problem is a statutory nuisance.

Often, this has been decided in previous court cases and where this is the case, reference is made to the court case concerned. This is known as 'case law', which generally sets a precedent with which subsequent court cases must be consistent.

We acknowledge the Scottish Government guidance on Statutory Nuisance, from which these notes are adapted.

Nuisance in Scotland

There are two ways of addressing a problem of nuisance in Scotland: either through the common law (i.e. law made by the Courts in successive judgements) or, if applicable, through the statutory provisions in the Environmental Protection Act 1990 (EPA). (i.e. laws passed by Parliament).

Nuisance generally entails some form of damage to, or intolerable interference with a person's use or enjoyment of, property. There are consequently any number of situations that a court may consider to be a nuisance under common law. Under the EPA however, only certain matters may constitute a statutory nuisance. The various matters which may constitute a statutory nuisance are set down in section 79 of the EPA. In each case, the matter must either be a nuisance in its own right or be prejudicial to health, in order to be a statutory nuisance.

The Environmental Protection Act 1990

Part III of the EPA contains the main provisions on statutory nuisance. (Caution should be used as this has been updated and altered by other laws several times since it was first written). It enables local authorities and individuals to take action to secure the abatement of a statutory nuisance. Local authorities have a duty to inspect their areas to detect whether a nuisance exists or is likely to recur. An authority must also take such steps as are reasonably practicable to investigate any complaint of statutory nuisance from a person living in its area. Where the local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, it must serve an abatement notice on the person responsible. The notice should impose all or any of the following requirements:

- the abatement of the nuisance or prohibition or restriction of its occurrence or recurrence;
- the carrying out of such works and other steps necessary for any of those purposes.

Appeals

The person on whom the notice is served may appeal to the Sheriff within 21 days of the date on which he is served with the notice. The detail of the appeal procedure is included in Schedule 3 of the EPA and in the regulations made under the Schedule, the Statutory Nuisance (Appeals)(Scotland) Regulations 1996.

Failure to Comply with an Abatement Notice

Failure to comply with the terms of an abatement notice without reasonable excuse may result in prosecution in the Sheriff Court. On summary conviction a person may be liable to a fine not exceeding level five on the standard scale (presently £5000) plus an additional daily fine of an amount equal to one tenth of that level (i.e. £500) for each day on which the offence continues after conviction. Where the conviction is for an offence on industrial, trade or business premises, the maximum fine on summary conviction is £40,000.

Since early 2009 it is possible for Local Authorities to issue fixed penalty notices for failure to comply with an abatement notice.

It is a defence against liability for the failure to comply with (or contravention of) an abatement notice to prove that the best practicable means were used to prevent or counteract the effects of the nuisance. However this defence is not available in the case of certain nuisances and these are listed in section 80 of the EPA.

If an abatement notice is not complied with, the local authority may take the necessary steps to abate the nuisance itself (including in the case of noise nuisance, seizure of the equipment causing the noise) and may recover the costs which were reasonably incurred in doing this from the responsible person.

Private Actions

The EPA also makes provision for any person (i.e. a member of the public or a business) aggrieved by the existence of a statutory nuisance to make an application to the Sheriff who, if satisfied that a nuisance exists, shall make an order requiring the abatement of the nuisance and/or the prevention of its recurrence.

Statutory Nuisance Provisions

Introduction

1. The statutory nuisance regime has its roots in 19th century public health protection legislation. During the 19th century, legislation was implemented to address the growing concerns around communicable infectious diseases such as cholera and typhoid. The Public Health Act 1875 (enacted in England) was the result of a cholera pandemic between 1863 and 1875. The improved sanitary conditions that ensued led to a change of focus, with nuisance provisions being used specifically to deal with conditions that pose a risk to human health or harm to the amenities of a neighbourhood.

Prior to the amendments set out in the 2008 Act, section 79(1) of the EPA established that the matters which could constitute statutory nuisances were as follows:-

- i) the state of premises
- ii) smoke emitted from premises
- iii) fumes or gases emitted from premises
- iv) dust, steam, smell or other effluvia from industrial, trade or business premises

v) accumulations or deposits

vi) animals

vii) noise from premises

viii) noise from vehicles or equipment in a road

ix) any other matter declared to be a statutory nuisance by an enactment.

As noted in above, in every case, the matter must be either a 'prejudice to health' or a 'nuisance' to be a statutory nuisance under the EPA.

As the principle of statutory nuisance has been in existence for more than 100 years there has been a significant amount of case law relating to specific interpretation of the legislation. Whilst a lot of this case law is based on English law it serves as a guide to previous interpretation of the law and should be considered when reviewing possible statutory nuisance conditions in Scotland. There is significant weight put on the meaning of nuisance in common law when interpreting the term statutory nuisance.

'Prejudicial to Health'

2. The term 'prejudicial to health' is defined in section 79(7) of the EPA as 'injurious, or likely to cause injury, to health'. However determination of what in fact are conditions prejudicial to health is more a judgement based upon a balance of common sense and the experience of public health professionals. The use of the term 'injury to health' is central to this consideration – it has been held (*Coventry City Council v Cartwright 1975*) that it is not sufficient that there is the risk of personal injury or accident (such as from broken glass) but there must be an underlying threat to health from disease. However it has been held that the impact on health may be indirect (such as sleeplessness).

The determination of likelihood of injury to health does not require evidence from medical experts (*London Borough of Southwark v. Simpson 1999*) and indeed the expertise of environmental health officers and building surveyors in evaluating likelihood of injury to health has been recognised. Also the risk of injury to health does not relate to the risk to a particular person but to the potential impact on health (*Cunningham v Birmingham City Council 1998*).

Nuisance

3. Nuisance is not defined in the Act but can be regarded as interference that ordinary people would consider unreasonable with the personal comfort or enjoyment or amenity of neighbours or the community. This concept was further considered in a recent case (*Baxter v London Borough of Camden 2000*) when it was equated to the principle of reciprocity – a person must show the same consideration to his neighbours as he would expect them to show for him. This case went further as it established that the normal, everyday use of premises would not constitute a common law nuisance; therefore there can be no statutory nuisance. Lord Hoffmann (*Baxter v London Borough of Camden 2000*) stated "I do not think that the normal use of a residential flat can possibly be a nuisance to the neighbours. If it were, we would have the absurd position that each, behaving normally and reasonably, was a nuisance to the other." However this does not address the issue that what is normal and everyday for one person may not be for another because of the differing lifestyles of neighbours.

The distinction recognised in England between public and private nuisance is not a classification used in Scots law. In England a private nuisance is some unlawful interference with a person's use or enjoyment of land or some right over or in connection with it, and the measure of damages is the reduction in land value. In Scotland, the liable party must be at (legal) fault, and *the behaviour more than can be reasonably tolerated*.

In England there is precedent that fundamentally a nuisance cannot exist where only the person at the place where the nuisance exists is affected. However in Scotland this principle

has been questioned (*Robb v Dundee City Council* 2002) when it was held that the word “nuisance” in section 79 does not infer culpa but refers to a set of physical circumstances more than reasonably tolerable.

Differences between Statutory Nuisance and Common Law

4. However there are three significant differences between common law nuisance and statutory nuisance:
- a) for a statutory nuisance to occur there must be a common law nuisance ; however not all common law nuisances would amount to a statutory nuisance (*NCB v Thorne* 1976).
 - b) the statutory nuisance regime, unlike common law nuisance does not deal with harm to property; a statutory nuisance must interfere with personal comfort in a manner that affects their wellbeing for example dust affecting cars would not be nuisance but the same dust in a persons eyes or hair would interfere with personal comfort even if there were adverse health impact (*Wivenhoe Port Ltd v Colchester Borough Council* 1985).
 - c) there is no requirement for a person to have any property rights as for a common law private nuisance – a statutory nuisance protects people not property (*Hunter v Canary Wharf Ltd* 1997).

What Constitutes a Nuisance?

5. There is no clear objective definition as to what constitutes a nuisance. It has been said that there is a scale between mildly irritating and intolerable and in each case the determination of whether a nuisance exists is a matter of judgement (*Budd v Colchester BC* 1997).

In addition, the determination is based upon the test of what ordinary, decent people would find unacceptable and unreasonable. In cases that have been considered, courts have not taken regard of the particular sensitivities of an individual (*Heath v Brighton Corporation* 1908). Indeed the concept was clearly stated in 1872 in respect of noise:-

'...a nervous, or anxious, or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance, originating within himself, sounds which at other times would have been passively heard and not regarded' (*Gaunt v Fynney* 1872).

Therefore a person with a particularly sensitive olfactory or auditory response is not given any higher standard of protection than a person with 'normal' response. However, although there are powers under section 82 of the EPA for an individual to take action, the primary enforcement method relies on the local authority taking action. The local authority must be of the opinion that either substantial personal discomfort or a health effect must exist. There are eight key issues to consider when evaluating whether a nuisance exists:-

- **IMPACT:** This is a measure of the impact of the alleged nuisance on the receptor. In some cases assessment of the impact can be supported by objective measurements (such as noise) but in many cases it will be the objective view of the local authority as to the degree of health risk or interference. In addition to the impact on individuals the authority should consider the extent of the impact (how many persons, how far from the source etc.)
- **LOCALITY:** The potential for amenity interference is largely related to the character of the neighbourhood. It was famously summarised as 'what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey' (*Sturges v Bridgman* 1879). Many odour and noise nuisances are due to the proximity of the receptor to a source that is generally out of character with the area (for example a factory or a waste water treatment works adjacent to a housing estate). The number of persons affected and the degree of intrusion will depend upon the proximity of the source and receptor and the sensitivity of the receptors.

- **TIME:** Many nuisances have a significant impact because of the time at which the nuisance occurs and the degree of impact changes depending upon the time of occurrence. For example noise from an entertainment facility would be less acceptable after 23.00 hours. Also odours are often subjectively more annoying during periods when members of the public are outdoors (for example daytime periods during summer months).
- **FREQUENCY:** Nuisances that occur frequently or continuously are more likely to be determined to be a nuisance (depending to some degree on the impact). For example dust emissions from a quarry once per month would be regarded very differently to emissions four days per week for 6 weeks a year. Restriction of the frequency of an activity may be method of abatement (a farm was limited to spreading manure for 15 days per year – *Wealden DC v Hollings* 1992). However, in some circumstances odours that are released periodically can be more intrusive and in this case the odour frequency is often assessed in conjunction with the odour's persistence in the environment.
- **DURATION:** In general short-term events would be regarded differently to longer period or continuous impact. For example a person practicing a musical instrument for one hour would be assessed differently to a four-hour practice session. However the duration would have to be considered alongside the time and frequency – practice for one-hour at 23.00 hours or every day may constitute a nuisance. Similarly a fixed period temporary noise source (such as construction works) may not constitute a nuisance (*Gosnell v Aerated Bread Co Ltd* 1894).
- **CONVENTION:** Convention is important when determining what a reasonable person would find objectionable. For example whilst some persons may find the noise of garden equipment on a Sunday morning objectionable – however such practice is widespread and accepted and would be unlikely to be held as a nuisance. Therefore the existence of a widespread practice or common usage in an area is an important factor (*Leeman v Montagu* 1936).
- **IMPORTANCE:** The importance of an activity in respect of the community is a key consideration. For example major road improvements that will improve the air quality and noise environment for many may cause some disturbance to a few persons – this is a balance that should be considered. However, there is a point when even a socially beneficial activity creates such an effect that it becomes unacceptable and hence a nuisance (*Dennis v Ministry of Defence* 2003). This needs to also be considered along with the avoidability of the impact and also the principle of best practicable means.
- **AVOIDABILITY:** Even though an activity may have social importance there should be a balance as to whether reasonable steps have been taken to minimise the impact. For example it would be difficult to control noise from a children's playground during the day but there are many methods available to reduce the impact of dust from the extraction equipment at a woodworking factory.

The standard cannot be defined precisely and much will depend on the view taken by the court of the seriousness of the harm, the health impact and a balance of the key issues outlined above.

Categories of Statutory Nuisance – Section 79(1)

6. *Any premises in such a state as to be prejudicial to health or a nuisance:*

This category of nuisance was developed to largely deal with conditions at dwellings but because premises is defined in section 79(7) it also includes land and vessels. It covers industrial, trade and business premises but in this case there is a statutory defence that the 'best practicable means' have been used (see **x**).

It is important to note that:

- it is the condition of the premises as a whole, not individual defects that confer a nuisance but a premises may be a statutory nuisance as a result of the cumulative impact of a number of minor defects or of one major defect;
- it is the physical condition of the premises and not the way the premises are being or have been used that is relevant *Birmingham DC v Kelly* 1985);
- the design or layout of a premises alone cannot render the premises a nuisance (*Birmingham CC v Oakley* 1998);
- the presence of inadequate sound insulation that permits external noise to penetrate has been held not to be a nuisance under this limb (*Vella v Lambeth* 2005); and
- it has been held that a nuisance existed where a landslip occurred affecting adjacent houses (*Leakey v National Trust*) – therefore the natural condition of land can itself constitute a nuisance.

7. *Smoke emitted from premises so as to be prejudicial to health or a nuisance:*

This provision sits alongside many other legislative controls over smoke. Smoke is defined in section 79(7) as including soot, ash, grit and gritty particles emitted in smoke and has been held to include the smell of smoke (*Griffiths v Pembrookshire CC* 2000).

There are number of exemptions from this provision as they are covered by other legislation. These are:

- Premises occupied on behalf of the Crown or a visiting force for naval, military or air force purposes or for the purposes of the department of the Secretary of State having responsibility for defence; and
- Smoke emitted from a chimney of a private dwelling within a smoke control area
- Dark smoke emitted from a chimney of a building or a chimney serving the furnace of a boiler or industrial plant attached to a building or for the time being fixed to or installed on any land
- Smoke emitted from a railway locomotive steam engine
- Dark smoke emitted otherwise than as mentioned above from industrial or trade premises. The term 'industrial or trade premises' occurs at several points in the nuisance provisions and is defined in section 79(7) as, '*premises used for any industrial, trade or business purposes or premises not so used on which matter is burnt in connection with any industrial, trade or business process, and premises are used for industrial purposes where they are used for the purposes of any treatment or process as well as where they are used for the purposes of manufacturing.*'

In effect this section mainly covers smoke from domestic premises (other than from chimneys in a smoke control area) and smoke other than dark smoke from industrial and trade premises. The smoke could either be such that it threatens or injures health or is a nuisance due to interference with enjoyment of property or quality of life.

There is another restriction under this section that a local authority cannot take action without Government consent where action could be taken under regulations made under section 2 of the Pollution Prevention and Control Act 1999. This effectively means that local authorities cannot take action on a matter which SEPA regulates.

There is a statutory defence that the 'best practicable means' have been used (see **x**) where smoke is emitted from a chimney.

8. *Fumes or gases emitted from premises so as to be prejudicial to health or a nuisance:*

This section only applies to private dwellings. Fumes and gases are defined in section 79(7) as, '*"fumes" means any airborne solid matter smaller than dust; and "gas" includes vapour and moisture precipitated from vapour.*' The definition of fumes includes solids that are smaller than dust (dust can be taken as solids suspended in air with a particle size between 1 and 76 microns) and the in the definition of gas, a vapour includes liquid suspended in air.

Perhaps the most common use of this section would be to deal with exhaust fumes from heating equipment affecting a neighbouring property. It could also be used to control somebody respraying cars at home causing nuisance from vapour carry-over.

There is also the consideration that although smells are not specifically included, smell is caused by either liquid or solid droplets carried in air and hence fall within this description. Whilst there is specific provision for odour in section 79(1)(d) this only applies to industrial and trade premises. The provisions for fumes and gases could therefore be used to deal with odours produced from private dwellings such as cooking smells. The nuisance provisions provide a number of methods for dealing with smell from domestic premises:

- Section 79(1)(a) caused by the state of the premises;
- Section 79(1)(b) when associated with smoke;
- Section 79(1)(e) when associated with accumulations or deposits; or
- Section 79(1)(c) as fumes or gases.

9. *Any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance.*

This section only applies to industrial and trade premises, but is not restricted to emissions but to arisings at the premises and hence could be used where health of persons at the premises is affected.

Dust does not include dust from a chimney as an ingredient of smoke and also by virtue of section 79(5) does not apply to steam emitted from a railway locomotive engine.

Whilst the majority of the terms used are self-explanatory the term 'effluvia' is not in common usage. In earlier legislation this term had been held to include smell (*Malton Board of Health v Malton Manure Co 1879*) but the term is wider than this. 'Effluvia' suggests something being emitted and a common dictionary definition is, 'a slight or invisible exhalation or vapour, especially one that is disagreeable or noxious'.

There is a statutory defence that the 'best practicable means' have been used. Again a local authority cannot take action without Government consent where action could be taken by SEPA under section 2 of the Pollution Prevention and Control Act 1999.

10. *Any accumulation or deposit which is prejudicial to health or a nuisance.*

The terms used in this section are not defined but deposit suggests individual instances whereas accumulation suggests the result of a number of deposits. This section can be used where health of persons at the premises where the accumulation or deposit occurs is affected.

It is a wide-ranging provision and has been subject to much previous case law:

- The accumulation of inert materials cannot be prejudicial to health because of the risk of physical injury (*Coventry City Council v Cartwright 1975*) but there must be an underlying threat to health from disease. However in this case had the accumulation been a nuisance action could still have been taken.
- Action under section 82 can be taken by a member of the public where the land is owned by a local authority (*R v Epping (Waltham Abbey) 1947*) and can also be used even if the accumulation is not permanent and where the person on whom the notice is served was not the first cause.
- The fact that an accumulation has existed for a period of time does not give a right for continuance (*Flight v Thomas 1839*). It has been held that an accumulation of soil against the wall of a house causing dampness in an adjacent house is a nuisance (*Hardman v North Eastern Rye 1878*).

There is a statutory defence that the 'best practicable means' have been used where the accumulation or deposit occurs on industrial or trade premises.

Again a local authority cannot take action without Government consent where action could be taken by SEPA under regulations made under section 2 of the Pollution Prevention and Control Act 1999.

11. Any animal kept in such a place or manner as to be prejudicial to health or a nuisance:

In this section the term animal has a wide meaning and has been held to include poultry (*R v Brown* 1889). The term 'kept' is also important – it is likely that this implies a positive action whereby there is intent for the animal to be present rather than just animals gaining access to a place (such as feral pigeons entering buildings).

The animals do not have to be permanently at a premises (*Steers v Manton* 1893) but may be there for a short time.

In this section the reference is to a 'place' which is a wide term and could include any type of premises or public place and it has been held that sheep droppings in a market are a nuisance (*Draper v Sperring* 1861).

There is uncertainty in previous cases as to whether this section can be used for noise from animals but it is recommended that for noisy animals the provisions of section 79(1)(g) are more appropriate.

There is a key issue in respect of this section as to the extent that this section applies where the animals are away from the immediate control of their keeper. It has been held that where a premises were such that cats strayed from it and caused nuisance to neighbours, it was a nuisance falling within this section (*R v Walden-Jones ex parte Coton* 1963).

There is a statutory defence that the 'best practicable means' have been used where the nuisance occurs on industrial or trade premises.

12. Noise emitted from premises so as to be prejudicial to health or a nuisance and noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a road:

This is one of the most common causes for nuisance complaint. The definition of noise includes vibration but does not apply to noise caused by aircraft other than model aircraft.

The provisions relating to noise in a road does not apply to noise by traffic, by any naval, military or air force of the Crown or by a visiting force or by a political demonstration or a demonstration supporting or opposing a cause or campaign.

This section includes the term 'emitted from premises' and hence must affect premises other than those at which the noise is generated. However it has been held that noise is emitted from premises even if it passes through them having been produced elsewhere (*Network Housing Association v Westminster CC* 1995).

There is a statutory defence that the 'best practicable means' have been used where the noise occurs on industrial or trade premises (see 3.35).

Again a local authority cannot take action without Government consent where action could be taken by SEPA under regulations made under section 2 of the Pollution Prevention and Control Act 1999.

13. Any other matter declared by any enactment to be a statutory nuisance:

This section primarily incorporates into the nuisance provisions a number of instances where nuisances were conferred through other statutory provisions. The majority of these were found in the (English) Public Health Act 1936 and therefore do not apply in Scotland.

There is however one category provided under section 151 of the Mines and Quarries Act 1954 that applies in Scotland. This Act places a duty on the owner (the person entitled to work the mine) of every abandoned mine (and mines that have not been worked for twelve months) to secure that the surface entrance to every shaft or outlet thereof is provided with a properly maintained and efficient enclosure, barrier, plug or other device so designed and constructed

as to prevent any person from accidentally falling down the shaft or from accidentally entering the outlet. This provision does not apply to mines which have not been worked since 1872 unless they are mines for coal, stratified ironstone, shale or fireclay.

Under the Public Health (Scotland) Act 2008, the following nuisances were added:

- Artificial light nuisance
- Insect nuisance
- Water covering land or land covered with water

This section therefore also places a duty on local authorities to survey their area for such nuisances. It has been determined that the authority would not be liable to manslaughter charges if somebody was killed due to a fall into an unfenced quarry (R v Clerk of Assize of Oxford Circuit 1807) but the authority may be in breach of its statutory duty and the government may declare the local authority in default under the provisions of Schedule 3 of the EPA 1990.

Contaminated Land Exemption

14. There is one general exemption under Part III of the EPA 1990 and that is that a matter cannot constitute a statutory nuisance if it consists of, or is caused by, any land being in a contaminated state. This is land where significant harm is being caused or there is a significant possibility of such harm being caused or significant pollution of the water environment is being caused or there is a significant possibility of such pollution being caused.

Abatement Notices

15. If a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, they must serve an abatement notice.

This notice can require the abatement of the nuisance or prohibit or restrict its occurrence or recurrence and may also specify works or other steps to meet this objective. The notice must specify the time by which the requirements are to be complied with and also a statement giving details of the right of appeal to the sheriff (Schedule 3 paragraph 6) and it may include a statement to prevent suspension on appeal (see **x**).

16. There are a number of issues for a local authority to consider in formulating a notice:

- The requirements of an abatement notice should be carefully and clearly drafted to make it clear how these will be fulfilled by the recipient but should not be so precise as to leave the recipient with no discretion as to how to comply. The terms of the abatement notice must be both precise and practicable in its terms (Strathclyde Regional Council v Tudhope 1983).
- There is significant precedent in relation to whether a notice should specify exact works or merely require that the nuisance be remedied. It was held (Kirkless MBC v Field 1998) that where works are required as a matter of fact and where there would be any doubt as to what is required they should be specified. However, the Court of Appeal held that a notice need not specify the works but leave the choice of means of abatement to the person on whom the notice is served (R v Falmouth and Truro Port Health Authority ex parte South West Water Services 2000).
- If the abatement notice simply requires the recipient to, 'take steps' to abate the nuisance in question, the requisite steps need not be specified since the notice could be complied with by taking passive action- (Sevenoaks DC v Brands Hatch 2001).
- Abatement notices should make clear whether the execution of works or other measures is required and in some respect the most effective method of formulation is to require the person responsible for the nuisance simply to abate it or prohibit its recurrence unless there is some good reason why further measures should be specified. However it should be

considered that it might be easier to demonstrate non-compliance where the requirements of the notice are more specific.

- The notice does not need to specify whether the problem concerned is prejudicial to health or a nuisance. It is enough that the conditions that constitute the nuisance are sufficiently specified to the extent that the person who is served with the notice knows what is required to abate the nuisance.

17. The abatement notice shall be served on the person responsible for the nuisance (the person to whose act, default or sufferance the nuisance is attributable).

'Act' is straightforward as this is a deliberate action, 'default' is the failure to perform a reasonable duty and 'sufferance' is where either permission is granted leading to a nuisance or a nuisance is allowed to continue where the occupier or owner had, or should have had knowledge of its existence (*Sedleigh- Denfield v O'Callaghan* 1940).

More than one person can be responsible for the nuisance, so more than one person can be served with the notice.

In the case of a nuisance arising from any defect of a structural character it shall be served on the owner of the premises.

Where either the person responsible cannot be found or the nuisance has not yet occurred it should be served on the owner or occupier of the premises. (The term 'owner' is defined in section 81A of the EPA 1990 but this section does not apply in Scotland). The Court of Appeal decided that for the purposes of the EPA 1990 the owner of premises was the person entitled to receive the rack rent (*Camden LB v Gunby* (1999)). Consequently the "owner" may be the freeholder in a purpose-built block of flats, or a long leaseholder, or the head leaseholder or simply the managing agent who collects the rent. More than one person can be responsible for the nuisance, so more than one person can be served with the notice.

Appeals

18. The Act provides that a person served with an abatement notice may appeal against the notice to the sheriff within the period of twenty-one days beginning with the date on which he was served with the notice.

The grounds for appealing the notice need to be specified and are set down in the Statutory Nuisance (Appeals)(Scotland) Regulations 1996. The local authority will also have to consider whether the abatement notice should be suspended whilst an appeal is pending. The sheriff may quash or vary the notice or dismiss the appeal.

19. The grounds for appeal can be summarised as:

- that the abatement notice is not justified;
- that there has been some informality, defect or error with the abatement notice;
- that the authority has refused unreasonably to accept compliance with alternative requirements, or that the requirements of the abatement notice are unnecessary or otherwise unreasonable in character or extent;
- that the time specified for compliance is not reasonably sufficient,
- where the nuisance to which the notice relates falls within the definitions of section 80(7) that the best practicable means were used to prevent or to counteract the effects of the nuisance;
- for noise emitted from premises that the requirements of the abatement notice are more onerous than the requirements of any notice, consent or determination under sections 60 – 67 of the Control of Pollution Act 1974;
- for noise emitted from or caused by vehicles, machinery or equipment that the requirements of the abatement notice are more onerous than a consent given under

paragraph 1 of Schedule 2 to the Noise and Statutory Nuisance Act 1993 relating to loudspeakers in streets or roads); or

- that the abatement notice should have been served on some other person either instead of or in addition to the appellant.

20. Where a notice is subject to appeal and either compliance would involve expenditure before the hearing of the appeal or it relates to noise caused by the performance of a duty imposed by law, the notice is suspended until the appeal has been determined.

However the notice is not suspended if the nuisance is injurious to health or of a limited duration and suspension of the notice would render it of no practical effect or the expenditure incurred would not be disproportionate to the public benefit from compliance and the notice includes a statement to that effect.

Private Action

21. Section 82 permits any person aggrieved by the existence of a nuisance to seek an order from the sheriff after giving the person against whom the order is sought 21 days notice. This order can require the defender to abate the nuisance or to prohibit a recurrence of the nuisance.

In cases of premises is such as state as to be unfit for human habitation to sheriff may prohibit the use of the premises until rendered fit. Contravention of an order of the sheriff is an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale together with a further fine of an amount equal to one tenth of that level for each day on which the offence continues after the conviction.

Enforcement

22. There are three methods of enforcement of an abatement notice. The local authority can:

- Serve a Fixed Penalty Notice (£150 for homes, £400 for everything else)
- Report the matter to the Procurator Fiscal with a view to prosecution as a criminal offence,
- Seek an interdict from the High Court, or
- Carry out the works required in default and recover the costs. Where an abatement notice has not been complied with, the local authority may abate the nuisance and do whatever may be necessary in execution of the abatement notice including to seize and remove any equipment which it appears to the authority is being or has been used in the emission of noise. Any expenses reasonably incurred by a local authority in carrying out works in default may be recovered by them from the person by whose act or default the nuisance was caused and the sheriff may apportion the expenses between persons by whose acts or defaults the nuisance is caused in such manner as the sheriff considers fair and reasonable.

The decision to prosecute is discretionary.

If a person without reasonable excuse contravenes or fails to comply with a notice they are guilty of an offence and are liable on summary conviction to:

- A fine not exceeding level 5 on the standard scale, together with
- A further fine of an amount equal to one-tenth of that level for each day on which the offence continues after the conviction.

If the offence relates to industrial, trade or business premises the fine shall not exceed £40,000.

Defences

23. There are effectively two main defences available in proceedings for non-compliance with an abatement notice. The first is the existence of a reasonable excuse and the second that the best practicable means has been used.

The concept of reasonable excuse is not defined in the legislation. . It may be that reasonable excuse could be proved where contravention occurred in an emergency or in circumstances beyond the control of the defender but would not be available where there was deliberate and intentional breach or even an argument that loud music formed part of a person's culture (Wellingborough BC v Gordon 1990).

The concept of best practicable means is outlined in paragraph 24 below.

It has been held that inability to meet the costs for works did not constitute a reasonable excuse (Saddleworth UDC v Aggregate and Sand Ltd 1970) although the sheriff may take account of financial difficulties in mitigation (Wellingborough BC v Gordon 1993).

Where a defender relies on a statutory defence, the burden of proof lies with the defender (O'Brien v Hertsmere BC 1998).

24. Best Practicable Means Defence.

The defence that best practicable means (bpm) were used to prevent or counteract the effects of a nuisance is available for prosecutions involving a breach of an abatement notice for certain types of nuisance involving:-

- smoke from a chimneys, or
- premises, dust, steam ,smell, effluvia, accumulations, deposits, animals or noise from industrial, trade or business premises.

The term is defined in section 80(7) and can be summarised as:-

- 'reasonably practicable': having regard to local conditions and circumstances, the current state of technical knowledge and to the financial implications;
- 'Means' the means to be employed include the design, installation, maintenance and operation of plant and machinery, and the design, construction and maintenance of buildings and structures;

The test is to apply only so far as compatible with any duty imposed by law and safe working conditions, and with the exigencies of any emergency or unforeseeable circumstances. Other considerations are:

- The means to be used are the best available not only those currently accepted in the business concerned (Scholefield v Schmunck 1855).
- The costs of compliance are an important but not over-ruling principle.
- The lack of finance available to the person served with the notice is not the only factor in cost assessment (Saddleworth UDC v Aggregate and Sand Ltd 1970) nor is the increased cost and impact on profitability (Wivenhoe Port v Colchetser BC 1985).
- The location of a nuisance is also of importance as it has been held that the test should be applied to the existing location of an activity and cannot require the relocation to another site as this was too onerous (Manley v New Forest DC 2000).

The key issue when determining BPM usually relates to the interpretation of 'practicable'. It should be noted that definition of 'practicable' is not exhaustive as the legislation details issues that 'among other things' should be taken into account. The definition includes cost consideration but clearly cost is not necessarily the decisive factor. It is finally a matter for the Courts to determine whether in a particular instance the controls adopted are reasonable or the costs are excessive taking account of local conditions and characteristics of the nuisance. Finally, it is important to note that it is for the person relying on the defence to establish that BPM has been used.

More Information

For further information and advice, contact Environmental Health at County Buildings, High Street, Linlithgow, EH49 7EZ. Telephone 01506 282500, Fax 01506 282448, e-mail environmentalhealth@westlothian.gov.uk.