13. Litigation

This section comprises 9 sub-sections:

13.1 Judicial Review
13.2 The Wildlife and Countryside Act 1981
13.3 The Countryside and Rights of Way Act 2000
13.4 The European Union Habitats Directives
13.5 The Bern Convention
13.6 The Environmental Protection Act 1990 (Part 3)
13.7 Nuisance, Liability in Tort & Human Rights

13.1 Judicial Review (Culpability: LPA)

13.1.1 A Judicial Review cannot challenge a decision made by a Local Planning Authority (LPA). It can, however, challenge the way the decision was reached. If successful, the challenge would mean that the planning application would have to be reconsidered.

13.1.2 Judicial Review can be sought where the LPA's interpretation of policy is at variance with those of the objectors or the LPA has not demonstrated that it has adequately considered specific objections. It can be sought if a legal error has been made in the determination or if the decision is unintelligible. It can also be sought when Councillors have made a decision whilst not in full possession of all the available facts or where evidence can be brought forward to show predetermination, which would be the case if any officer of the council were to be found to be predisposed to one side or the other (see paragraph 1.5.6).

13.1.3 Following the implementation of the Human Rights Act courts are taking a much more rigorous approach to fact-finding, evidence and discovery on applications for judicial review. Decision-makers are required to justify interferences and the courts have to examine the justification more closely. Previously, it was sufficient for the court to consider whether the decision was reasonable, ie a decision must not be so unreasonable that no reasonable decision-maker could have come to it.

13.1.4 If TDC rejects a policy analysis made by DTOG but does not fully explain the reasons for that rejection, then a legal challenge could be successful.

13.2 The Wildlife and Countryside Act 1981 (Culpability: Developer, Landowner)

13.2.1 This Act makes it an offence (subject to exceptions) to intentionally kill, injure, or take, possess, or trade in any wild animal listed in Schedule 5 and prohibits interference with places used for shelter or protection, or intentionally disturbing animals occupying such places. The Act also prohibits certain methods of killing, injuring, or taking wild animals.

13.2.2 The following species are all known to be present and active at the proposed Dunsland Cross Wind Farm site: Bats (protected in Schedule 5), Dormice (Schedule 5), Song Thrush (appears in Schedule 3) and Barn Owls (in Schedules 1 and 9). All will be threatened if this application is approved.

13.2.2 The Marsh Fritillary butterfly, last seen in the adjacent Whiteleigh Meadow in 2005, is also given full protection under Schedule 5.

13.3 The Countryside and Rights of Way Act 2000 (Culpability: Developer, Landowner)

13.3.1 Bats are protected under this Act.

13.4 The European Union Habitats Directives (Culpability: Developer, Landowner)

13.4.1 The European Union Habitats Directives comprise the EU Council Directive on The Conservation of Natural Habitats of Wild Fauna and Flora (1992) & The Conservation (Natural Habitats, &c.) Regulations 1994 & The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007 - S.I. 2007/1843.

13.4.2 Bats are protected under these directives, as are Barn Owls (in the EC Birds directive), Dormice (in Annex IVa) and the Marsh Fritillary butterfly (in Annex II).

13.5 The Bern Convention (Culpability: Developer, Landowner)

13.5.1 The Convention on the Conservation of European Wildlife and Natural Habitats was adopted in Bern, Switzerland in 1979 and came into force in 1982. All member States of the Council of Europe are signatories to it.

13.5.2 To implement the Bern Convention in Europe, the European Community adopted Council Directive 79/409/EEC on the Conservation of Wild Birds (the EC Birds Directive) in 1979, and Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (the EC Habitats Directive) in 1992. Among other things the Directives provide for the establishment of a European network of protected areas (Natura 2000), to tackle the continuing losses of European biodiversity on land, at the coast and in the sea to human activities.

13.5.3 The UK ratified the Bern Convention in 1982. The Convention was implemented in UK law by the Wildlife and Countryside Act (1981 and as amended). As the inspiration for the EC Birds and Habitats Directives, the Convention had an influence on the Conservation (Natural Habitats &c.) Regulations (1994), and the Conservation (Natural Habitats, &c.) Regulations (Northern Ireland) 1995, which were introduced to implement those parts of the Habitats Directive not already covered in national legislation.

13.5.4 Barn Owls, known to overfly and forage on the proposed wind turbine site, and Marsh Fritillary Butterflies are both species protected by this Convention and are listed in Appendix II.

13.5.5 Bats, which forage within the site boundary and along the hedgerows on the perimeter, and Dormice, which inhabit the hedgerows, are listed in Appendix III.

13.5.6 Section 4: Impact on Wildlife, Ecology and Biodiversity, paragraphs 4.2.2 to 4.2.24 has shown exactly how and where bats will be killed by wind turbines at Dunsland Cross. Since Bats have appeared in all of the sections 13.2 to 13.5, the special note relating to Bats and the Law, taken from the Bat Conservation Trust Website (http://www.bats.org.uk/pages/bats_and_the_law.html) and first set out in Section 4 of this DTOG report, paragraph 4.2.1, is repeated here:

Bats and the Law

All UK bats and their roosts are protected by law. Since the first legislation, introduced in 1981, that gave strong legal protection to all bat species and their roosts in England, Scotland and Wales, additional legislation and amendments have been implemented in all countries within the UK. For all countries of the UK therefore, the legal protection for bats and their roosts may be summarised as follows:

You will be committing a criminal offence if you:

1. Deliberately capture, injure or kill a bat*

2. Intentionally or recklessly disturb a bat in its roost or deliberately disturb a group of bats

3. Damage or destroy a bat roosting place (even if bats are not occupying the roost at the time)

4. Possess or advertise/sell/exchange a bat (dead or alive) or any part of a bat

5. Intentionally or recklessly obstruct access to a bat roost

*(*In a court, 'deliberately' will probably be interpreted as someone who, although not intending to capture/injure or kill a bat, performed the relevant action, being sufficiently informed and aware of the consequence his/her action will most likely have.)*

Penalties on conviction - the maximum fine is £5,000 per incident or per bat (some roosts contain several hundred bats), up to six months in prison, and forfeiture of items used to commit the offence, eg vehicles, plant, machinery.

Which legislation is relevant for bats and roosts?

The Wildlife & Countryside Act 1981 (WCA) was the first legislation to provide protection for all bats and their roosts in England, Scotland and Wales. (Earlier legislation gave protection to horseshoe bats only.) It was amended several times with significant amendments being made by the Countryside and Rights of Way Act 2000 in England and Wales, and by the Nature Conservation (Scotland) Act 2004 in Scotland. These acts strengthened the WCA by adding the word 'recklessly' to the offences of intentional damage, destruction or obstruction of a roost, and to disturbance of a bat. The Scottish legislation went a step further in 2004 by also adding recklessly to the offence of intentionally killing, injuring or taking a bat.

In 1992 the European Union's Council Directive on The Conservation of Natural Habitats of Wild Fauna and Flora (better known as the Habitats Directive) came into being, covering a range of plant and animal species, and all EU countries had to implement this. This Directive gave rise to stronger protection for all UK bats, roosts, and the wider habitats of some bat species too. In England, Scotland and Wales this Directive was implemented by The Conservation (Natural Habitats, &c.) Regulations 1994 (better known as the Habitats Regulations), and in Northern Ireland by the 1995 Northern Ireland Regulations.

The Habitats Regulations have been amended several times since 1994, most recently in 2007. The title (and wording) of the amendments is slightly different for each country because of each country's previous legislation and because of the differing legal systems (England and Wales have the same legal system, but Scotland and Northern Ireland differ). The amendments to the Habitats

Regulations are implemented by the following statutory instruments for each country:-

- *For England and Wales - The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007 - S.I. 2007/1843*
- *For Scotland - The Conservation (Natural Habitats, &c.) Amendment (No.2) (Scotland) Regulations 2007 - S.I. 2007/80*
- *For Northern Ireland - The Conservation (Natural Habitats, &c.) (Amendment) Regulations (Northern Ireland) 2007 - S.R. 2007/345.*

Despite the slightly different wording, the protection is virtually the same in all UK countries, with all bats and their roosts covered by strong legal protection. The Habitats Regulations amendments in 2007 had the effect of removing bats from all the provisions of the Wildlife & Countryside Act in Scotland and Northern Ireland, and from most of the provisions of this Act in England and Wales. The protection of bats and roosts therefore now rests mostly with the amended Habitats Regulations.

(The 2007 Habitats Regulations amendments strengthened the Regulations by removing the Agriculture and Animal Health Act defences, the dwelling house defence, the 'incidental result of an otherwise lawful operation' defence, and the defence that enabled certain actions to take place to prevent serious damage. These defences were removed to bring the Habitats Regulations more into line with the EU Habitats Directive. It also made non-compliance with a derogation licence a criminal offence.)

13.6 The Environmental Protection Act 1990 (Part 3) (Culpability: Developer, Landowner)

13.6.1 Repeated here is paragraph 5.5.3 from Section 5: Noise and Health Concerns. The Environmental Protection Act 1990, Part III: Statutory Nuisances and Clean Air states:

79 Statutory nuisances and inspections therefor

(1) Subject to subsections (2) to (6) below, the following matters constitute "statutory nuisances" for the purposes of this Part, that is to say—

(g) noise emitted from premises so as to be prejudicial to health or a nuisance;

Subsections (2) to (6) do not apply to criterion (g) above. A prosecution under this Act would be linked to Liability in Tort (see below).

13.7 Nuisance, Liability in Tort & Human Rights

13.7.1 In the preparation of this section DTOG has contacted Richard Buxton Solicitors and also Mr. Kevin Bodley LL.B(Hons); LL.M; M.Sc, Solicitor-Advocate & Notary Public. Richard Buxton Solicitors was contacted on the recommendation of leading acoustician Mr. Mike Stigwood (see paragraph 5.2.61) as this company has successfully judicially reviewed a number of LPA and Planning Inspectorate decisions on windfarms. Richard Buxton Solicitors are also the Environmental Health lawyers who acted for the (Torridge) Higher Darracott ECtHR case, the Den Brook Court of Appeal (win), and Dennis and Dennis v MOD. Mr. Bodley has specialist knowledge in Human Rights. Mr. Bodley has provided the following summary of the law relating to Nuisance, Liability in Tort and Human Rights:

The legal principles behind the law of Nuisance and Human Rights which this proposed development will engage.

Executive Summary

There appears to be a common misconception that planning permission in some way renders lawful activities that would otherwise be unlawful and actionable. Clearly, under English law, that is not correct.

Should planning permission be granted for the wind turbines it is inevitable that there will be widespread disruption caused to local areas and residents by the construction of the turbines and their infrastructure as well as by their ongoing existence and operation. Those actions will most likely generate tortious interferences with the use and enjoyment of a large number of homes and residents; damage to roads and verges; traffic congestion by the huge vehicles needed to transport parts and equipment for construction as well as noise, dust, and visual intrusion. The actions will constitute both public and private nuisances and breach the provisions of the Environmental Protection Act 1990. Issues arising under the Human Rights Act 1998 will also be relevant.

Once the construction is completed, the operation and siting of the turbines themselves will cause further and ongoing widespread disruption to wildlife and human occupation over a wide area, including the immediate vicinity of each turbine and far beyond for the reasons set out elsewhere in this document. The risk of danger to surrounding inhabitants will remain. The construction of turbines would amount to a non-natural user of land and create a risk of accident; mechanical failure and ongoing pollution. The impact to wildlife is very significant.

The implication of these interruptions will generate legal causes of action and encourage applications by many individuals to the Courts seeking appropriate relief from the unlawful activities that will inevitably generate serious interference with their legal rights, primarily by way of injurious interference with their use and enjoyment of their homes.

1 The Legal Basis of Objection to Wind Turbines

English law provides protection and remedies in various forms to persons adversely affected by the wrongful acts of others. The Law of Torts which is primarily common law based and specific statutory provisions collectively form a comprehensive and developed body of jurisprudence capable of enforcement by action in the Courts. Remedies can include injunctive relief and awards of compensatory damages.

Examples of legal restrictions include Trespass, Public and Private Nuisance; the Doctrine of Rylands & Fletcher, the law of negligence and various statutory restrictions, including the Environmental Protection Act 1990.

Under the Human Rights Act 1998 the principles enunciated in the European Convention on Human Rights were also incorporated into English law and provide further protection and restriction on the exercise of certain activities. In effect, public bodies and the Courts have a duty to recognise human rights and to interpret legislation in conformity with those fundamental principles.

The public has the right to an effective remedy guaranteed by Article 13 ECtHR (though not contained in the HRA98) this is guaranteed by the ECtHR to which the UK government remains a signatory.

2 Nuisance

The term 'nuisance' as used in law is not capable of exact definition. Although most nuisances arise from a long continuing condition, a single isolated happening is sufficient if it arises from a continuing condition on land in the control of the defendant. [1]

Nuisances may be broadly divided into (1) acts not warranted by law or omissions to discharge a legal duty, which obstruct or cause inconvenience or damage to the public in the exercise of rights common to all the Queen's subjects; (2) acts or omissions which have been designated or treated by statute as nuisances; and (3) acts or omissions generally connected with the user or occupation of land which cause damage to another

[1] Halsbury's Laws of England/NUISANCE (VOLUME 34 (REISSUE))/2008.

person in connection with that other's user of land or interference with the enjoyment of land or of some right connected with the land.

3 Trespass, Nuisance & Negligence

Some varieties of nuisance closely resemble acts classed under the head of trespass. The distinction between the two is that in trespass the immediate act which constitutes the wrong causes an injury to the sufferer's person or damage to his property or amounts to dispossession, whereas in nuisance the act itself often does not directly affect the person or property of another, but has consequences which become or are prejudicial to his person or property. Nuisance must also be distinguished from negligence although many acts which constitute a nuisance involve an element of negligence and may also be actionable as such.

4 Common law and statutory nuisances

Nuisances are divisible into common law and statutory nuisances. A common law nuisance is one which, apart from statute, violates the principles which the common law lays down for the protection of the public and of individuals in the exercise and enjoyment of their rights. A statutory nuisance is one which, whether or not it constitutes a nuisance at common law,[2] is made a nuisance by statute either in express terms or by implication.[3]

5 Public nuisance

Nuisances may be divided into those which are public and those which are private. A public nuisance is one which inflicts damage, injury or inconvenience on all the Queen's subjects or on all members of a class who come within the sphere or neighbourhood of

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[2] In order to constitute a statutory nuisance under the Environmental Protection Act 1990, the matter complained of may be either a nuisance or prejudicial to health: see the Environmental Protection Act 1990 s 79 (as amended); and para 15 post. Thus something may be a statutory nuisance on the ground of prejudice to health, although it is not a nuisance in the common law sense. It has been suggested that even something falling within the 'nuisance' head of statutory nuisance must come within the spirit of the Act: see *Coventry City Council v Cartwright* [1975] 2 All ER 99, [1975] 1 WLR 845, DC, which was decided under identical wording in the Public Health Act 1936 s 92(1)(c) (repealed). If this is so, the use of the same wording in the wider context of environmental protection may lead to broader interpretation of 'nuisance' than in the former context of public health

[3] See eg the Environmental Protection Act 1990 s 79 (as amended)

its operation. It may, however, affect some to a greater extent than others. The question whether the number of persons affected is sufficient to constitute a class is one of fact.[4]

The character of the neighbourhood is relevant to determination of the question whether a particular activity constitutes a public nuisance, and it has been held that the grant of planning permission for a change of use does not authorise an otherwise unlawful act. [5]

There is no requirement that an activity must in itself be unlawful to constitute a public nuisance, and disturbance caused by lawful use of the highway may constitute such a nuisance in an appropriate case.[6]

6 Private nuisance

A private nuisance is one which interferes with a person's use or enjoyment of land or of some right connected with land. It is thus a violation of a person's private rights as opposed to a violation of rights which he enjoys in common with all members of the public. The ground of the responsibility is ordinarily the possession and control of land from which the nuisance proceeds; but the original creator of a nuisance remains liable even if he no longer has occupation or control.[7]

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[4] See *A-G v PYA Quarries Ltd* [1957] 2 QB 169 at 184, [1957] 1 All ER 894 at 902, CA, per Romer LJ. A public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that proceedings should be taken on the responsibility of the community at large: *A-G v PYA Quarries Ltd* supra at 191 and at 908 per Denning LJ

[5] *Wheeler v JJ Saunders Ltd* [1996] Ch 19, [1995] 2 All ER 697, CA. See also *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426, [1997] 2 WLR 684, HL

[6] *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343 at 358, [1992] 3 All ER 923 at 933 per Buckley J; see also *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145, [1961] 1 WLR 683

[7] Several dicta lend support to the view that an action for private nuisance may be maintained for an interference which is unconnected with any use of land by the defendant: see eg *Sedleigh Denfield v O'Callaghan* [1940] AC 880 at 903, [1940] 3 All ER 349 at 364, HL, per Lord Wright; *Cunard v Antifyre Ltd* [1933] 1 KB 551 at 557, DC, per Talbot J. See also *Esso Petroleum Co Ltd v Southport Corpn* [1956] AC 218 at 224-225, sub nom *Southport Corpn v Esso Petroleum Co Ltd* [1953] 2 All ER 1204 at 1207-1208 per Devlin J; but cf on appeal sub nom *Southport Corpn v Esso Petroleum Co Ltd* [1954] 2 QB 182 at 196, [1954] 2 All ER 561 at 570, CA, per Denning LJ (affd sub nom *Esso Petroleum Co Ltd v Southport Corpn* [1956] AC 218 at 242, [1955] 3 All ER 864 at 871, HL, per Lord Radcliffe). In the Court of Appeal, Denning LJ cited the statement by Lord Wright in *Sedleigh-Denfield v O'Callaghan* supra at 903 and at 364, without including the possibility of the exceptions mentioned by Lord Wright

7 Distinctions between remedies and defences for public and private nuisance

The importance of the division of nuisances into public and private lies partly in the difference of the remedies and defences applicable to each, and partly in the fact that a private individual has no right of action in respect of a public nuisance unless he can show that he has sustained some special damage over and above that inflicted on the community at large.

Whereas a private nuisance may be justified on the ground that the right to commit it has been acquired by prescription, no amount of time will afford a like defence to an allegation of a public nuisance. Moreover, the Crown cannot grant to a person a right to commit a public nuisance.

8 Damage alone does not necessarily constitute a nuisance

Damage alone, whether actual or presumed, gives no right of action; the mere fact that an act causes loss to another does not make that act a nuisance. There must also be an act or omission which interferes with a person's use or enjoyment of land or some right over or in connection with land, commonly referred to as an 'unlawful act', although the activity complained of need not necessarily be unlawful of itself and whether or not it constitutes a nuisance depends on the circumstances. [8]

9 Surrounding circumstances must be considered

An act which in some circumstances does not constitute a nuisance may in others become actionable as such. Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself but by reference to all the circumstances of the particular case, including, for example, the time of commission of the act complained of, the place of its commission, the manner of committing it, that is, whether it is done wantonly or in the reasonable exercise of rights, and the effects of its commission, that is, whether those effects are transitory or permanent, occasional or continuous. Thus the question of nuisance or no nuisance is one of fact. [9]

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[8] See eg *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145, [1961] 1 WLR 683;

[9] *Watson v Croft Promosport Ltd* [2008] EWHC 759 (QB), [2008] 3 All ER 1171

10 Damage essential

Damage, actual, prospective or presumed, is one of the essentials of nuisance. Its existence must be proved, except in those cases in which it is presumed by law to exist.

The damage need not consist of pecuniary loss, but it must be material or substantial, that is, it must not be merely sentimental, speculative or trifling, or merely temporary, fleeting or evanescent. However, nothing can be deemed fleeting or evanescent if it results in substantial damage, and therefore regard is to be had not merely to the duration of the thing complained of but to the effect of the act or omission upon the plaintiff.

11 Presumption of damage

Where an absolute legal right of the plaintiff is infringed, the law presumes damage even though no actual loss can be proved. Moreover, in proceedings by the Attorney General for an injunction to restrain acts that are unauthorised by law and interfere with public rights or acts contrary to a statute, it is not necessary to prove actual damage to the public where the acts tend to injure the public. However, an injunction is a discretionary remedy and may be withheld in a proper case in the absence of public injury, even though there have been repeated minor contraventions of a statute.

12 Acts of others

Where the collective effect of the independent acts of others is a nuisance, the court will restrain each person contributing to the nuisance, even though the act of any one of them would result only in an inappreciable inconvenience or damage and would be insufficient in itself to constitute a nuisance in law. [10] So, where the discharge of chemicals into a sewer or stream is innocuous until they combine with other chemicals in the sewer or stream, the persons guilty of each such discharge are nevertheless severally guilty of committing a nuisance.

[10] A similar principle applies in the case of criminal responsibility for statutory nuisance: see the Environmental Protection Act 1990 s 81(1) (as amended);

13 Matters that constitute statutory nuisances

For the purposes of Part III of the Environmental Protection Act 1990, the following matters constitute statutory nuisances:[11]

(1) any premises [12]in such a state as to be prejudicial to health [13]or a nuisance;[14]

(2) smoke emitted from premises so as to be prejudicial to health or a nuisance;

(3) fumes or gases emitted from premises so as to be prejudicial to health or a nuisance;

(4) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;

(5) any accumulation or deposit which is prejudicial to health or a nuisance;

(6) any animal kept in such place or manner as to be prejudicial to health or a nuisance;

(7) noise [15]emitted from premises so as to be prejudicial to health or a nuisance;

(8) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street;

(9) any other matter declared by any enactment to be a statutory nuisance.[16]

Artificial light emitted from premises so as to be prejudicial to health or a nuisance also constitute statutory nuisances. [17]

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[11] Environmental Protection Act 1990 Pt III (ss 79-84) (as amended):

[12] 'Premises' ***includes land*** and any vessel: ibid s 79(7) (amended by the Noise and Statutory Nuisance Act 1993 s 10(1)).

[13] 'Prejudicial to health' means injurious, or likely to cause injury, to health: Environmental Protection Act 1990 s 79(7). The test in assessing whether or not something is prejudicial to health is, like that for nuisance, objective: *Cunningham v Birmingham City Council* (1997) Times, 9 June, DC

[14] Environmental Protection Act 1990 s 79(1)(a).

[15] 'Noise' includes vibration: ibid s 79(7).

[16] Environmental Protection Act 1990 s 79(1)(h). As to other matters declared to be a statutory nuisance see eg the Public Health Act 1936 s 141 (as amended) (wells, tanks, cisterns, water-butts); the Public Health Act 1936 s 259(1) (as amended) (and see the Transport Act 1968 s 108 (as amended)) (ponds, pools, ditches, gutters, watercourses); the Public Health Act 1936 s 268(2) (as amended) (tents, vans, sheds, etc); and the Mines and Quarries Act 1954 s 151(2) (as amended) (unfenced shafts of discontinued or abandoned mines and unfenced quarries)

[17] 1990 Act s 79(1)(fb) (added by the 2005 Act s 102(2))).

A noise may constitute a statutory nuisance even if it does not rise above ambient noise levels: [18]

14 Acts beyond ordinary user

As a general rule, no act can be justified as an ordinary user of premises which in fact results in substantial interference with the ordinary use and enjoyment of property by other persons.[19] Also a person who injures the property of another or disturbs him in his legitimate enjoyment of it cannot justify that injury or disturbance as being the natural result of the exercise of his own rights of enjoyment, if he exercises his rights in an excessive and extravagant manner, or, it seems, if the inconvenience or injury resulting from the exercise of rights might easily be avoided. An owner of land adjoining a highway owes a duty to prevent it from becoming a nuisance to those using the highway.[20] A useful test whether lawful activities constitute a nuisance is what is reasonable according to the ordinary usages of mankind living in a particular society.

15 Extraordinary and unreasonable user

A person is not entitled by applying his property to extraordinary or unreasonable uses or purposes to impose upon his neighbours burdens which, in the ordinary course of things, they are not called upon to bear. Examples of such extraordinary or unreasonable user are interference with the course of natural agencies or conditions, use of premises for unusual and unsuitable purposes and use of premises for dangerous purposes or purposes which involve the escape of noxious fumes or vapours.

16 Interference with natural conditions

If an owner or occupier interferes with natural agencies or conditions and thereby imposes a heavier burden upon his neighbour he may be liable in an action for nuisance at the suit of the neighbour for damage occasioned thereby to the neighbour.

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[18] *Godfrey v Conwy CBC* [2001] EHLR 160, DC

[19] *Knight v Isle of Wight Electric Light and Power Co* (1904) 73 LJ Ch 299 (interference with ordinary comfort by vibration etc). I

[20] *A-G v Tod Heatley* [1897] 1 Ch 560, CA; *Barker v Herbert* [1911] 2 KB 633, CA; *Stewart v Adams* 1920 SC 129

17 Liability for damage to property caused by noxious fumes or vapours

Where fumes or vapours which are intrinsically noxious escape and damage the property of a neighbour, then, in the absence of an easement, it is an actionable nuisance if the effect is to diminish the value of the property and the comfort and enjoyment of it.

18 General principles

Apart from any limit to the enjoyment of his property which may have been acquired against him by contract, grant or prescription, every person is entitled, as against his neighbour, to the comfortable and healthful enjoyment of the premises owned or occupied by him whether for pleasure or business. In deciding whether in any particular case this right has been invaded and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions. It is also necessary to take into account the circumstances and character of the locality in which the complainant is living and any similar annoyances which exist or previously existed there.[21]

19 Noise and vibration

The making, or causing to be made, of such a noise or vibration as materially interferes with the ordinary comfort of the neighbouring inhabitants, when judged by the standard previously stated, is an actionable nuisance and one for which an injunction may be granted. It is no excuse that the place where it is made is in a noisy neighbourhood if the nuisance complained of is a material addition to the noise already existing, or that the best known means have been taken to prevent or reduce the noise, or that the cause of the nuisance is the exercise of a trade in a reasonable and proper manner and in a reasonable place. Operations on land which are a normal use of land for temporary constructional purposes according to the technical developments of the day do not

[21] *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642; *Polsue and Alfieri Ltd v Rushmer* [1907] AC 121, HL. However, the establishment of an industrial process may amount to a nuisance notwithstanding that similar processes are characteristic of the neighbourhood: *Maguire v Charles M'Neil Ltd* 1922 SC 174; *M'Ewen v Steedman and M'Alister* 1912 SC 156. See further *Leeman v Montagu* [1936] 2 All ER 1677

amount to a nuisance if they are conducted with all reasonable skill, and if all reasonable precautions not to cause annoyance to neighbours are taken; but where such precautions are not taken, damages attributable to the unreasonable use constituting the nuisance may be recovered.

The question of nuisance by noise (assuming the absence of malice) is one of degree and depends on the circumstances of the case.[22]

In addition to civil proceedings for an injunction or damages, there are many statutory remedies for the control of excessive noise and vibration.

20 Smoke, fumes and smells

Smoke, fumes or smells, [23]either together or singly, which materially interfere with the ordinary physical comfort of human existence, when judged by the standard previously stated, constitute a nuisance in law. They need not be actually noxious or injurious to health; and it is immaterial that there are other sources of discomfort in the neighbourhood, if the one complained of is a material addition to it. The fact that the nuisance existed long before the complainant occupied his premises does not relieve the offender, unless he can show that, as against the complainant, he has acquired the right to commit the annoyance complained of. If a nuisance exists, it cannot be justified on the ground that the place is a suitable or convenient one; or that it arises from the defendant's use of his own property in a common and useful manner and for his own convenience; or that the benefit to the public in the neighbourhood far exceeds the inconvenience to the plaintiff; or that the defendant has been granted the right to carry on the trade if it is not proved that the trade cannot be carried on without causing inconvenience; or that others in the vicinity do not complain.[24]

In these cases the question of nuisance or no nuisance is pre-eminently one of degree, and no specific rules can be laid down. Circumstances and the locality must also be

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[22] Public interest is no defence to the existence of a private nuisance, but is relevant to the appropriate remedy: *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), [2003] 19 EG 118 (CS) (military aircraft).

[23] As to statutory nuisances concerning smoke, fumes, smells etc see the Environmental Protection Act 1990 s 79 (as amended);

[24] *Bamford v Turnley* (1862) 3 B & S 66, Ex Ch; *Cavey v Ledbitter* (1863) 13 CBNS 470; *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642

considered, for that which would be a nuisance in one district may be tolerated in another.

21 Fumes etc from commercial operations

Apart from fumes and smells arising from trades held to be offensive, the vitiation of the atmosphere may be held to be a nuisance and capable of being restrained by injunction when it arises from the burning of bricks, manure works, sewage works, glass works, cement works, chemical works, smoke from railway engine sheds, the staleing of horses left standing in a street opposite business premises for an unreasonable time, gasworks, the smelting of ore, a blacksmith's shoeing-forge, smoke from factory engines, the discharge and deposit of manure at a railway siding or of night soil and other waste matter, the burning of mineral refuse, coke-ovens, stables, the deposit of house and street refuse, a cooking stove, the manufacture of fish guano and fish oil, or a fried fish shop.

22 Interference with prospect, view or television reception

Where there is no infringement of a right to light, and where the act complained of is otherwise lawful, no action lies for the invasion of privacy by the opening of windows, or for the obstruction of a view or prospect, even though the value of a house or premises may be diminished thereby.

It has been held that the ability to receive television transmissions free from occasional, even if recurrent and severe, electrical interference was an important part of an ordinary householder's enjoyment of his property as to make such interference an actionable nuisance. [25]

23 Dangerous operations

The use of property for dangerous purposes or operations so as to cause, or be likely to cause, injury or damage to the persons or property of others may amount to a public or a private nuisance according to circumstances.

[25] See *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch 436, [1965] 1 All ER 264; disapproved in *Nor-Video Services Ltd v Ontario Hydro* (1978) 84 DLR (3d) 221, Ont HC, on the ground that television viewing is now an important incident of the ordinary enjoyment of property since it is a source of information, education and entertainment

24 The rule in Rylands v Fletcher

The rule in Rylands v Fletcher [26]is closely related to the law of nuisance. [27]By this rule a person who, for his own purposes, brings onto his land and collects and keeps there anything likely to do mischief if it escapes [28]must keep it in at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. Liability under the rule is strict, and it is no defence that the thing escaped without the defendant's wilful act, default or neglect. It is, however, necessary that the occurrence of damage as a result of the escape should have been reasonably foreseeable before liability can be imposed.

The rule applies only to non-natural user of the land. It does not apply (1) to things naturally on the land; (2) where the escape is due to an act of God, the act of a stranger or the default of the plaintiff; (3) where the thing which escapes is present by consent of the person injured; or (4) in certain cases where there is statutory authority. The rule cannot be applied at the suit of a plaintiff who has no interest in the land menaced by the escape and whose only damage is financial loss.

As to the relevance of the fact that health and safety regulations are applicable to the activity and that the defendant is insured see *LMS International Ltd v Styrene Packaging and Insulation Ltd* [2005] EWHC 2065 (TCC), [2006] BLR 50.

An application to strike out a claimant's action for damages under the rule in *Rylands v Fletcher* on the ground that he has no proprietary interest in the land in question may be dismissed where the claimant can establish an arguable case that the right to bring such an action should be extended in light of the Human Rights Act 1998: *McKenna v British Aluminum Ltd* (2002) Times, 25 April.

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[26] *Rylands v Fletcher* (1868) LR 3 HL 330.

[27] See *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264 at 297, [1994] 1 All ER 53 at 69, HL, per Lord Goff.

[28] It has been accepted in several cases that under this rule damages can be recovered in respect of personal injuries: see *Miles v Forest Rock Granite Co (Leicestershire) Ltd* (1918) 34 TLR 500, CA; *Shiffman v Venerable Order of the Hospital of St John of Jerusalem* [1936] 1 All ER 557; *Hale v Jennings Bros* [1938] 1 All ER 579, CA; *Perry v Kendricks Transport Ltd* [1956] 1 All ER 154, [1956] 1 WLR 85, CA; *Wing v London General Omnibus Co* [1909] 2 KB 652 at 665, CA, per Fletcher Moulton LJ; *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145, [1961] 1 WLR 683; *British Celanese Ltd v AH Hunt (Capacitors) Ltd* [1969] 2 All ER 1252, [1969] 1 WLR 959.

25 Non-natural user and things naturally on land

The rule in Rylands v Fletcher only applies where the user of the land is non-natural. It is not possible to give a precise definition of the term 'non-natural' for this purpose; the concept has undergone development and change over the years and is lacking in precision. While the provision of the ordinary domestic water supply in a building will not constitute non-natural use, the storage of substantial quantities of chemicals on industrial premises will do so notwithstanding that it takes place within an industrial community in which such activity is far from unusual. The fact that an activity is in some sense for the general benefit of the community at large is therefore not in itself an objection to its being classified as non-natural for the purposes of the rule. In particular, the fact that the activity provides employment in the area in which it is situated does not make it a natural user so as to render the rule in Rylands v Fletcher inapplicable.

The rule does not apply to a thing which is naturally on the land from which it escapes. Such a thing may be on the land as the result of natural growth or may have been brought on to the land in the course of natural use of the land.

26 Things likely to do mischief

The rule in Rylands v Fletcher applies only to things likely to do mischief if they escape. A wide variety of things have been held to come within the rule, for example water, sewage, fires deliberately made or brought on to the land or arising accidentally in a dangerous object which is likely to catch fire easily or to do damage if it escapes, gas, electricity, gas oil, acid smuts, fumes, explosives, decayed wire rope, colliery spoil, trees, vibrations, a flagpole and a chair-o-plane. Caravan dwellers who committed nuisances have also been held to come within the rule.

In view of the dangers inherent in the production or use of atomic energy, nuclear installations and liability in respect of radiations emitting or waste discharged from them are regulated by statute.

27 Escape

The rule in Rylands v Fetcher only applies where the thing which does the damage has escaped. For the purposes of the rule, escape means escape from a place where the defendant has occupation or control over land to a place which is outside his occupation or control. It appears that the escape need not be accidental provided that any intentional release was not deliberately aimed at the plaintiff, in which case it would be remediable in trespass.

28 Statutory authority

Where a thing is brought onto the land under the authority of a statute it is generally necessary to prove negligence in order to establish liability. If this can be established there may be liability for an escape but, at least in cases involving statutory duties, there cannot be liability under the rule in Rylands v Fletcher as such. In exceptional cases involving statutory powers, as opposed to duties, there may be liability under the rule without negligence if the statute preserves liability for nuisance. It has, however, been held that for a statute conferring a power to impose strict liability for nuisance clear terms must be used.

29 Claims for damages

A person may sue in nuisance only if he has an interest in the land affected; and he may bring an action and claim damages for the injury alone or together with a claim for an injunction.

30 General rule of liability

Any person is liable for a nuisance who either creates or causes it, or continues or adopts it, or who authorises its creation or continuance. [29]The liability applies whether or not that person is in occupation of the land on which the nuisance is committed.

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[29] . It may be important whether the defendant created or merely continued the nuisance, for if he merely continued it the plaintiff must prove want of care on the defendant's part, whereas if the defendant created the nuisance the burden is on him to exculpate himself: *Radstock Co-operative and Industrial Society Ltd v Norton-Radstock UDC* [1968] Ch 605, [1968] 2 All ER 59, CA, where, because of scouring by the stream over the years, a sewer which had been properly laid in a stream 60 years earlier caused eddies which undermined the piles of the plaintiff's bridge, and it was held that the creator of the nuisance, but not he who continued it, was liable without proof of negligence

However, an occupier will not be liable for a nuisance created by a trespasser without his knowledge, actual or constructive, or consent. A person is liable as having caused or continued a nuisance when he is guilty of an act or omission which directly gives rise to the nuisance; when he authorises such an act or omission; when inadvertently he does or authorises an act from which a nuisance arises as a natural and probable consequence; or when, being an owner or occupier of property, he grants a licence or gives an order to another to do acts upon it which are likely to cause a nuisance, and that licensee or person receiving the order in so acting commits a nuisance. [30] It is a prerequisite of the recovery of damages in both private and public nuisance that the harm for which compensation is sought should have been foreseeable.

It is the degree of control that a person has to prevent the nuisance in question and not his occupation of the land that determines liability: *L E Jones (Insurance Brokers) Ltd v Portsmouth CC* [2002] EWCA Civ 1723, [2003] 1 WLR 427.

There is no rule of law which will prevent an owner-occupier of land from being held liable for the tort of nuisance by reason of the activities of his licensees which took place off his land: *Lippiatt v South Gloucestershire Council* [1999] 4 All ER 149, CA.

A person's right to respect for his private and family life, under the European Convention on Human Rights art 8, does not affect the need for authorisation in order to establish a third party's liability: *Mowan v Wandsworth LBC* (2000) 33 HLR 616, CA.

31 Continuance or adoption of nuisance

An occupier of land is liable for a nuisance, even though he has not created it, if he has continued it while he is in occupation. Further, the occupier will be liable for a nuisance

[30] See *Tetley v Chitty* [1986] 1 All ER 663 (council letting land for use as a go-kart track). See also *Draper v Sperring* (1861) 10 CBNS 113 (owner of market held liable for nuisance from sheep droppings in pens let to third persons); *White v Jameson* (1874) LR 18 Eq 303 (permission to burn bricks on defendant's land); *Harris v James* (1876) 45 LJQB 545; *Jenkins v Jackson* (1888) 40 ChD 71 (letting room over offices for dancing); *Phillips v Thomas* (1890) 62 LT 793; *Howland v Dover Harbour Board* (1898) 14 TLR 355, CA; *Metropolitan Properties v Jones* [1939] 2 All ER 202 (landlord liable for nuisance from apparatus which he installed and not tenant who only used it as was intended). If the licensor is not in occupation, it must be proved that he had notice of the nuisance and refused to terminate the licence (*Cornford v Havant and Waterloo UDC* (1933) 97 JP 137); but if the licence is irrevocable or he grants a lease, he parts with control over the user of the land and he therefore is not liable (*White v Jameson* supra). Cf *Atkinson v King* (1878) 2 LR Ir 320, Ir CA;

created after he became the occupier if he had knowledge, actual or constructive, of its existence. An occupier of land continues a nuisance if, with knowledge (actual or constructive) of its existence, he fails to take reasonable steps to bring it to an end; and, if he makes use of the building or other artificial contrivance which constitutes the nuisance, he adopts it.

An occupier also has a common law duty to prevent his land from continuing to be the site of a public nuisance, even though he has not created the nuisance.

To establish liability for continuing a nuisance by failing to prevent it, the person so failing must generally be in a position to take effective steps to that end. However, a person is liable for the continuance of a nuisance when he has originally created a nuisance which in the nature of things is likely to be continued and is continued, even though he has ceased to be in possession of or interested in the land on which the nuisance exists, and has no power to remove it without being guilty of a trespass; or when he purchases the reversion of premises let to a tenant upon which there exists a nuisance for which the original reversioner would have been liable, even though he has no opportunity of putting an end to the existing tenancy or of abating the nuisance.

32 Liability under the rule in Rylands v Fletcher

The person liable under the rule in Rylands v Fletcher is the person who has accumulated on his land, and exercises control over, the thing that escapes. He is liable if his independent contractor causes the escape. Further, the occupier of the land from which the thing escapes is also liable if it is brought or collected on his land with his authority.

An owner out of possession of the land at the time the escape takes place and who has not authorised the accumulation on his land is not liable under this rule.

33 Private action on public nuisance

A private individual or a public authority may bring an action in his or its own name in respect of a public nuisance when, and only when, he or it can show that he or it has

suffered some particular, foreseeable and substantial damage over and above that sustained by the public at large, or when the interference with the public right involves a violation of some private right of his or its own.

34 Statutory authority

Although the Crown cannot grant to a person a right to commit a public nuisance, an act or omission may have been specifically authorised by statute, and may, therefore, not be actionable either as a public or as a private nuisance. For the defence of statutory authority to be successfully raised, however, it must be shown that the act was within the powers conferred by the statute. A local highway authority or the conservators of a navigable river can therefore legalise an obstruction or encroachment to the public right of passage providing they are authorised by statute to give their consent to what would amount to a nuisance in the absence of such statutory powers.

If the statute authorises a particular act only if no nuisance is caused, statutory authority will be no defence to a claim in nuisance. [31]

A grant of planning permission under statutory powers must not be confused with statutory authority, since such a grant cannot license nuisances. [32]

35 Ineffectual defences

Where, after taking all the circumstances into consideration, an annoyance is such as to amount to a nuisance, it cannot be justified on the ground that the place is a suitable or convenient one for the performance of the act which occasions the nuisance; or that it arises from the carrying on of a trade, lawful in itself and properly conducted, for purposes necessary and beneficial to the community; or that it arises from the defendant's use of his own property in a common and useful manner and for his own convenience; or that the character of the neighbourhood has changed since the trade giving rise to the nuisance was established; or that the nuisance, being a public one, has

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[31] *Manchester Corpn v Farnworth* [1930] AC 171, HL; *Buley v British Railways Board* [1975] CLY 2458, CA.

[32] *Wheeler v JJ Saunders Ltd* [1996] Ch 19, [1995] 2 All ER 697, CA. See also *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426, [1997] 2 WLR 684, HL.

been authorised by the Crown or by a local authority, unless it has statutory powers to authorise it; or that a prescriptive right has been acquired to commit a public nuisance; or that the benefit to the public far exceeds the disadvantage to the plaintiff; or that the plaintiff has come to the nuisance; or that similar nuisances already exist in the locality when it is shown that the defendant materially increases the existing nuisance; or that the plaintiff himself has committed a nuisance; or that the nuisance complained of was done to prevent the plaintiff from reaping the benefit of a wrong which he had done to the defendant; or that the defendant's act was in itself harmless until combined with the acts of others; or that others were at fault in not having done their duty; or that the plaintiff's predecessor in title brought and compromised a previous action against the defendant to restrain the nuisance.

36 Local authority inspections, investigations and powers of entry

It is the duty of every local authority (1) to cause its area to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under the provisions relating to abatement notices; and (2) where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint.[33]

37 Remedies in Tort

Claims for damages for compensation for loss and damage occasioned are clearly available. However it is the equitable (or discretionary) interim injunction that would be of greater assistance to those persons directly affected by any nuisance, Rylands v Fletcher damage or trespass. Once development begins the actual damage would become immediately apparent and could enable a Court to grant a suitable restraining order preventing the continuation or recurrence of any offensive behaviour. However, even before any development begins a Court can still grant appropriate relief in the form of a *quia timet* [34]injunction based upon the threat of proposed offensive action so that it can be prevented even before it begins. *The Civil Procedure Rules 1998 ("CPR") Part*

[33] Ie under the Environmental Protection Act 1990 s 80 (as amended) or ss 80 (as amended) and 80A (as added): see s 79(1) (as amended)

[34] "that which is feared" *Fletcher v. Bealey* (1884) [28 Ch.D. 688 at p.698]

25 enables a Court in appropriate circumstances to restrain future conduct. Such applications can be made ex parte without notice to the proposed defendant in cases of urgency.

38 Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms, is a Treaty of the Council of Europe adopted on 4 November 1950 and which entered into force in 1953 (" the Convention").

39 The Nature of Convention Rights

Convention rights are not all of equal status as the protection which the Convention and the HRA provide, vary according to each specific right. There are three broad categories of rights:

Absolute Rights, which are strongly protected and not capable of restriction or derogation, even in times of war or public emergency. These include the right to life under Article 2, the prohibition on torture in Article 3; the prohibition of slavery under Article 4 (1), and the prevention of punishment without law under Article 7. The ECtHR has held that nothing can justify interference with absolute rights, even in the most difficult of circumstances, including the fight against terrorism or organised crime.[35]

Special Rights are less strongly protected and can be restricted in times of war or public emergency. These include the prohibition of forced labour afforded by Article 4 (2) and (3); the right to liberty and security under Article 5; the right to a fair trial under Article 6; the freedom of conscience, thought and religion under Article 9,[36] the right to marry under Article 12; the right to education under Article 2 of Protocol 1; the right to free elections under Article 3 of Protocol 1; and the abolition of the death penalty under Article 1 of Protocol 6.

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[35] Selmouni v France (1999) 29 EHRR 403, ECtHR at para 95. See also, R v DPP,ex parte Kebilene [1999] 3 WLR 175 at pp189D-G, per Lord Bingham, regarding the nature of Article 6 rights to a fair trial being a special rather than a qualified right.

[36] But excluding the freedom to manifest religion or belief which is a qualified right.

Thus, public interest qualification is available for special rights, but only within the express provisions in the text of the relevant Article. In the absence of such provision, there can be no such lawful public interest interference.[37]

Qualified Rights are, by comparison, to be balanced against the public interest and may be restricted in times of war or other public emergency. These include the Article 8 right to respect for privacy and family life; the Article 9 right to manifest religion or belief; freedom of expression protected by Article 10; the freedom of assembly and association under Article 11; the Article 14 prohibition of discrimination, and the protection of property recognised by Article 1 of Protocol 1.

40 The Human Rights Act 1998

Section 2 provides that, in the determination of any question arising in connection with a Convention Right, a court or tribunal must take into account any judgment, decision, declaration or advisory opinion of the ECtHR; or opinion or decision of the Commission or Committee of Ministers. Thus Strasbourg jurisprudence, regardless of the identity of the respondent state, must be taken into account "so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen," whenever the judgment, decision or opinion to be taken into account was handed down.[38]

Although the requirement to "take into account" falls short of "treat as binding precedent", it is likely that relevant jurisprudence will be considered, if only because the Act does intend to provide that disputes be resolved in domestic courts rather than require further applications to Strasbourg, although this will still remain available as a "long stop" appeal. The ECtHR does not claim to develop a system of binding judicial precedent as understood by common law systems. Instead, through teleological or purposive construction of the Convention, itself seen as a dynamic organic entity which is constantly evolving, it enables its decisions to reflect constantly changing social attitudes. Since the implementation of the 11th Protocol in 1999, the fusion of the Strasbourg organs into the full-time Court of 41 Judges, is reflected in the increasing

[37] Starmer,et al,(2000a) at page 2.

[38] section 2 (1).

volume of decided cases now being reported.

Section 3 creates a general statutory requirement that all past and future primary and subordinate legislation shall, wherever possible, be read and given effect in a way which is compatible with the Convention. It is therefore now no longer necessary to find ambiguity to trigger the application of the Convention as an interpretative tool. [39] Thus, courts must now strive to find a construction consistent with the intentions of Parliament and the wording of the legislation which is nearest to the Convention rights, and should proceed on the basis that Parliament is deemed to have intended statutes to be compatible, unless, as a last resort, it is impossible to do so.[40] As the Lord Chancellor has enthusiastically observed, the courts will not be bound by previous interpretations and will be free to develop a fresh body of case law taking into account Convention rights.[41] He also considered that in almost all cases, declarations of incompatibility should be unnecessary.[42]

The 1998 Act itself must also, as far as possible, be interpreted in compatible fashion with the Convention, suggesting *"...a generous interpretation, avoiding the 'austerity of tabulated legalism', suitable to give individuals the full measure of the fundamental rights and freedoms referred to."* [43]

The traditional methods of interpretation adopted by English common law judges may therefore no longer be appropriate. The European civil law approach to purposive interpretation is likely to be preferred. For Bennion (2000), the effect of section 3(1) is that, as the Act explicitly connects British law to the requirements of the Convention, these "*powerful influences*" need to be, and are reflected in the methods our courts must

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[39] Ibid.

[40] see, Starmer et al, (2001a) op cit, at pp 9-11.

[41] "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights" [1998] Public Law 221 at p.228, and Cm.3782, para 228. See Starmer,et al (2001a) op cit at p. 10.

[42] HL. 5 February 1998, Hansard col 840. R v Offen [2002] 2 All ER 154 provides an early example, cited by Starmer, et al (2001a) op cit at p 10.

[43] Minister for Home Affairs v Fisher [1979] 3 All ER 21 PC, per Lord Wilberforce regarding the interpretation of the Bermuda Constitution. See also Matadeen v Pointu and others [1998] 3 WLR 18 per Lord Hoffman and the Mauritius Constitution, and A-G of the Gambia v Momodou Jobe [1984] AC 689, A-G of Hong Kong v Lee Kwong-Kut [1993] AC 51; and Vasquez v The Queen [1994] 1 WLR 1304 as cited and detailed by Starmer ,et al, (2001a) op cit at p.11.

adopt for construing legislation and arriving at the meaning it is found to have in law. The *"increasing osmosis between common law and civil law*" adds new interpretative criteria to English judges in seeking to arrive at the meaning of an enactment. She describes a "global method" as being necessary, by which the court takes an overall view and weighs all the relevant interpretative factors to arrive at a balanced conclusion.[44] This "dynamic or evolutive"[45] method of interpretation reflects the teleological or purposive approach which is the touchstone of the European Court of Justice, which it applies to Treaties and other Community legislation so as to give effect to the spirit rather than the letter of the instrument. The Court is always prepared to depart from the text if it deems this necessary.[46] This Developmental method also recognises the Communities as evolutionary living and expanding organisms whose Treaty interpretations change to match their growth.[47] Such broader views of what orderly development is required by the Community in such a system, therefore prevail over strictly legal considerations.[48]

Section 4 enables a Court in determining the compatibility of a provision of primary legislation, if satisfied that it is not compatible, to make a declaration of incompatibility.[49] Only the High Court and above may make such a declaration.[50]
Such a declaration does not affect the validity of the provision in issue, and nor does it bind the parties to the proceedings in which it is made.[51] Section 5 entitles the Crown to receive notice of any such consideration and, subject to rules of court, to intervene in those proceedings.[52]

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[44] Bennion , F., What Interpretation is "possible" under section 3 (1) of the Human Rights Act 1998? Public Law [2000] 77.

[45] D.J.Harris, M. O'Boyle and C.Warbrick,1995. Law of the European Convention on Human Rights, London: Butterworths, at p 7.

[46] See, for example, Pinna v Caisse d'allocations familialies de la Savoie (Case 359/87) [1989] E.C.R. 585, per Advocate-General Lenz 605-606 at para 23.

[47] Henn and Darby v DPP [1981] A.C. 850 at p 905.

[48] Customs & Excise Commsrs v ApS Samex [1983] 1 All ER 1042, per Bingham. J, at p 1056.

[49] sections 4 (1) and 4 (2).

[50] Section 4 (5).

[51] Sections 4 (6) (a) and (b).

[52] sections 5 (1) and (2).

Under s. 6 (1), unless it is required to do so by primary legislation which cannot be interpreted compatibly with the Convention, it is unlawful for a public authority to act in a way which is incompatible with a Convention right.[53] Thus the Act applies to public authorities which, although not a term which is expressly defined in the Act, includes within its meaning under section 6 (3)(a), Courts and tribunals, while s.6(3)(b) includes police within the expression *" any person certain of whose functions are functions of a public nature",* which also extends to all individuals or bodies for whom the state would be responsible in proceedings before the ECtHR.[54]

In considering the extent of the liability of public authorities, the ECtHR has held in a series of cases that the mere fact that a public authority has acted ultra vires does not necessarily exclude its liability under the Convention,[55] and that such authority cannot avoid the application of the Convention by delegating their public functions to private individuals or entities.[56] Even where the authority colludes in or otherwise facilitates the acts or omissions of private bodies or individuals, it may still engage the duty to act in accordance with Convention rights. [57]

Section 7 (1) (a) permits a "victim" [58] of an act by a Public Authority which infringes a Convention right, to issue proceedings in the 'appropriate court or tribunal'.[59] This right is subject to the provisions of section 9 as to the proceedings which may be pursued in the exercise thereof, being mainly either by appeal or judicial review. There is a limitation period of one year.[60] Under section 7 (1) (b), a victim may also rely upon such a right which is concerned in any proceedings against a public authority. Only

[53] Section 6 (2) (a).

[54] Starmer et al (2000a), op cit, at p 34, citing the Home Secretary at HC Debs, col 775, 16 November 1998.

[55] Ireland v UK (1978) 2 EHRR 25, ECtHR at para 159.

[56] Van der Mussele v Belgium (1983) 6 EHRR 163, EctHR.

[57] Lopez Ostra v Spain (1994) 20 EHRR 277, EctHR.

[58] As defined in section 7(7) and Article 34 of the Convention. In judicial review actions under section 7 (3) a claimant will have sufficient locus standi, only if he is, or would be , a victim.

[59] As prescribed in the Civil Procedure (Amendment No 4) Rules 2000 (SI 200, No. 2092) (L. 16), Rule 6.

[60] Section 7 (5) (a), or such further period as the court or tribunal considers equitable, section 7 (5) (b).

those directly affected,[61] or at risk thereof, [62] can claim to be a victim, but there is no need to prove actual loss.[63] Companies are also included.[64]

Section 8 (1) gives the court wide powers to grant such relief, remedies or orders as it considers just and appropriate, provided that they are within its existing powers, which may be enlarged by order granted under section 7 (11). An effective remedy is required which will be determined by case law under Article 13.[65] Under section 8(4), damages may, however, only be awarded in civil proceedings by a court which has power to order the payment of compensation in such actions,[66] and where necessary to afford "just satisfaction",[67] taking into account as regards the suitability of damages and the quantum thereof, the principles applied by the ECtHR under Article 41 of the Convention.[68] These include, putting the victim in the position he would have enjoyed but for the breach [69] ; including pecuniary loss, [70] loss of income,[71] and loss of opportunity; [72] non-pecuniary loss including anxiety,[73] confusion and neglect, [74] frustration, [75] harassment, humiliation and stress.[76]

Section 10 provides for the making of Remedial Orders for the proposed amendment by

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[61] Lindsay v UK (1997) 24 EHRR 199,ECtHR.

[62] Campbell and Cosans v UK (1982) 4 EHRR 293,ECtHR

[63] Johnston & Others v Ireland (1986) 9 EHRR 203,ECtHR; Eckle v Germany (1982) 5 EHRR 1,ECtHR.

[64] Agrotexim v Greece (1996) 21 EHRR 250, ECtHR; and see R v Broadcasting Standards Commission, ex parte BBC (6 April 2000), CA..

[65] Starmer,et al, (2001a) , op cit, at p 38.

[66] section 8 (2).

[67] Section 8 (3).

[68] Section 8 (4).

[69] Piersack v Belgium (1984) 7 ERHRR 251, ECtHR at para 12.

[70] Young, James & Webster v UK (1982) 5 EHRR 201, ECtHR.

[71] Open Door and Dublin Well Womens Clinic v Ireland (1992) 15 EHRR 244, ECtHR.

[72] Allenet de Ribemont v France (1995) 20 EHRR 557, ECtHR.

[73] Konig v Germany (1980) 2 EHRR 468,ECtHR.

[74] Artico v Italy (1980) 3 EHRR 1, ECtHR.

[75] Weeks v UK (1988) 13 EHRR 435, ECtHR.

[76] Young, James & Webster v UK (1982) 5 EHRR 201, ECtHR.

the Crown of any legislation which has been the subject of a declaration of incompatibility under *section 4.*

Section 11 provides a safeguard for existing rights and declares that (for the avoidance of doubt) a person's reliance upon a Convention right, does not affect any other right or freedom under any law[77] or his right to take any other legal proceedings.[78]

Sections 14 and 15 respectively provide for *designated derogations* and *designated reservations* which the Government has implemented in respect to any specific Article or Protocol of the Convention by order of the Secretary of State, and which has been designated for the purposes of the Act. [79]

The effects of the Act will not make Convention rights directly enforceable against private litigants. Unlike many rights provided by EC law, the horizontal effect of Convention rights is limited, and it is the vertical effect which triggers the availability of the rights against public authorities as organs of the state.

However, the right of appeal to the Court in Strasbourg remains after the 1998 Act.[80]

41 Planning Authorities & Applications

As the authority discharges a public function it must be regarded as a 'public authority' under section 6 (3).

Accordingly, the principles of the Convention as applied by the 1998 Act must be respected.

In particular, the following Convention rights fall to be considered:

Article 6 Right to a Fair Hearing

Article 8 Respect for Private Home

[77] Section 11 (a).

[78] Section 11 (b).

[79] see, for example, Brogan v UK, 1989) and s.1(1) and Schedule 3 Pt.1.

[80] Hatton v UK (Application 36022/97) section 76(1) Civil Aviation Act 1982.

Article 13 Availability of Adequate Remedy

Article 1 of Protocol 1 Respect for Peaceful Enjoyment of **Property** [81]

Planning restrictions amount to control on the use of property and therefore must be justified under article 1 of Protocol 1, so that they must have a legitimate aim and proportionate. It follows that the exercise of such rights affecting adjoining rights must trigger the application of the same provisions. These include the availability of a fair hearing in planning disputes. [82]

Article 6

This Convention right requires the opportunity for affected parties to be heard by an independent and impartial tribunal. It is understood that, whilst written objection procedures are afforded in the case of opposition to planning applications such as this, there is only a very limited opportunity to make oral submissions, limited to 5 minutes only. The latter arbitrary limit appears to raise Convention-rights issues rendering the authority potentially liable to proceedings in default for breach of Article 6.

The absence of an adversarial procedure suggests non-compliance with Article 6.[83]

Article 8

This right guarantees individuals the right to peaceful enjoyment of their homes.

Restrictions must be legitimate, necessary and proportionate.[84]

Lifestyle is also capable of protection.[85]

Excessive noise, harassment and/or pollution can interfere with this right and, as a result, the relevant authorities may come under a duty to protect individuals from such

[81] Allan Jacobsen v Sweden (1989) 12 EHHR 56.

[82] Bryan v UK (1995) 21 EHRR 342. Albert & Le Compte v Belgium A/58 (1983) 5 EHHR 533; W v UK (1987) 10 EHHR 29.

[83] Krcmar v Czech Republic 3 March 2000, E Ct Hr at para 40.

[84] Article 8 (1).

[85] G & E v Norway (1983) 35 DR 30, ECT HR.

interference. [86] This creates a positive obligation on the authority. to refrain from restricting such rights and to adopt positive measures to protect those rights.[87] This includes the creation of legal frameworks to provide effective protection for Convention rights. [88]

There is no need to show actual damage to health.[89]

The duty to protect individuals form pollution and serious health risks is most acute when authorities themselves have created the threat.[90] But it also extends to circumstances where others are responsible for the pollution.[91]

Severe pollution (by whatever means including noise, vibration, visual impairment and environmental issues,) is likely to breach this right. [92]

Article 8 also raise issues of procedural fairness in that any restriction placed upon Article 8 rights must be 'in accordance with law' and also 'necessary' and 'proportionate'.

The Court has recognised the need for protection to individual's under Article 8 from noise nuisance in *Powell & Rayner v UK* [93]and also the absence of an effective remedy triggered liability under **Article 13**.

In **Buckley v UK** [94]the Court emphasised the following general principle:

Whenever discretion capable of interfering with the enjoyment of a Convention right such as [an individual's right to respect for his/her private home] is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed, it is settled

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[86] Lopez Ostra v Spain (1994) 20 EHHR 277, E Ct HR

[87] Plattform Arte fur das Leben v Austria (1988) 13 EHHR 204.

[88] X & Y v Netherlands (1985) 8 EHHR 235, ECtHR at para 27.

[89] Lopez Ostra v Spain ibid.

[90] McGinley & Egan v UK (1998) 27 EHHR 1, ECt HR at para 101.

[91] Guerra & others v Italy (1998) 26 EHHR 357, ECtHR at para 51.

[92] Fredin v Swedes, (1991) 13 EHHR 784, ECt HR.

[93] (1990) 12 EHHR 355.

[94] (1996) 23 EHHR 101.

case law that, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8."

The Right to the peaceful enjoyment of the home was also recognised in **Sporrong & Lonnroth v Sweden** [95]where the Court emphasised its jurisdiction in cases of planning control, particularly under Article 1 of the First Protocol and the respect for peaceful enjoyment of property.

Article 1 of Protocol 1

This Convention right protects peaceful enjoyment of property and in effect amounts to a right of property.[96] This means that the State can only control such use within strictly defined circumstances. These include where the circumstances are lawful; in the public interest or aimed at securing the payment of taxes or other contributions or penalties and deemed necessary by the state. [97]

Includes the control of the use of property short of deprivation, such as by planning restriction or control as to its user.[98]

Section 6 (1) makes it unlawful for a public authority to act in a way which is incompatible with Convention rights.

Remedies

The remedies available to an individual who claims that a public authority has acted (or proposes to act) in a way which is incompatible with Convention rights may either bring proceedings against the authority in the appropriate court or tribunal, or reply on his or her Convention rights in any legal proceedings. **(section 7(1)**).

These include judicial review proceedings (**section 7 (3**))

[95] (1982) 5 EHHR 35.

[96] Marckx v Belgium (1979) 2 EHHR 330, ECtHR.

[97] Starmer ,K, and I Byrne, Blackstone's Human Rights Digest :2000, London:Blackstone Press (Starmer, et al, 2001a) at 36.3.1

[98] Pine Valley Development Ltd & Others v Ireland (1991) 14 EHRR 319, ECtHR.

Potential Defendants

Actions for nuisance, Rylands v Fletcher, negligence or trespass could be maintained against the owner or occupier of the land from which the acts complained of originate. This would be the position regardless of any contractual arrangement between the owner/occupier and any developer or turbine operator. Any indemnity would not affect the parties to any action.

Prosecutions under the Environmental Protection Act would be against either the owner, occupier or other person causing the unlawful act complained of.

Failure by a public authority to adhere to the requirements of the Human Rights Act 1998 could result in legal proceedings against them at the instance of a victim being an individual (or company) who is affected by such omission.

Conclusions

It is plainly not possible to construct, develop and operate wind turbines in close proximity to existing homes without creating devastating adverse consequences for the large number of individuals whose homes and use and enjoyment of their land would be directly affected. The value of homes and land would be significantly reduced, particularly at a time when economic uncertainty and the property market have already reached an all time low. To risk further impediment to the ability to sell or realise the investment by home owners is entirely unnecessary and unacceptable. Any reasonable balance of competing Convention rights considerations must fall in favour of the existing inhabitants rather then the commercial opportunistic attempts by outside entities to cash in to the detriment of local families. The legitimate expectations of the people affected by such development must prevail. The approval of planning consent for the construction and operation of wind turbines would inevitably result in the occurrence of various actionable torts directly affecting the local community. Private, public and statutory nuisance would seem unavoidable having regard to the overwhelming body of expert and empirical evidence supporting the unavoidable intrusion that such development would cause to the local community.

If the planning authority were to grant approval, in so doing, it must disregard the fundamental Convention rights of the individuals affected by the construction, development and operation of turbines. The nuisance and disastrous impact such development must generate to local wildlife; the continuing nuisance by noise, visual intrusion, vibration, sonic damage and interference with television, radio and telephone reception would devastate the quality of life and the use and enjoyment of the many homes and communities affected.

The attempt by the developers to clothe such unlawful actions by the respectability of planning consent would do no more that lead the planning authority into a situation where it takes the brunt of the subsequent adverse publicity and likely legal action, thereby attracting responsibility for encouraging a continuing nuisance.

Human Rights Bibliography

Starmer, K European Human Rights Law, 2000, London : LAG.(**Starmer 2000**).

Wadham, J. and H. Mountfield ,2000. Blackstone's Human Rights Act 1998.2nd ed. London: Blackstone Press.

Starmer ,K, and I Byrne, Blackstone's Human Rights Digest :2000, London:Blackstone Press (**Starmer, et al, 2001a**)

13.7.2 Further notes relating to Articles 8, 1 and 6 of the Human Rights Act 1998 are given below.:

Article 8

13.7.3 Article 8 is a Qualified right, which means that it can be interfered with if the interference is justified. Interference would be justified if the following 3 conditions are satisfied:

i) The interference is lawful (e.g. allowed by planning acts)
ii) The interference serves one of the legitimate aims in Article 8 (2)
iii) The interference is proportionate.

13.7.4 If this planning application is approved by the LPA then the LPA must have determined to its own satisfaction that condition i) is satisfied.

13.7.5 The six legitimate aims in Article 8 (2) are:

i) National Security
ii) Economic well-being
iii) Prevention of disorder or crime
iv) Protection of health or morals
v) Protection of rights and freedoms of others
vi) Protection of the environment and the interests of the community.

13.7.6 Each of these legitimate aims is considered below to show that condition ii) in paragraph 13.7.3 is **not** satisfied:

i) National Security

The National Security of a country is not going to be impacted if an onshore wind farm is not built. In fact, it may be argued that because the flow of electricity from a wind farm to the National Grid is not in the control of the Nation, but subject to the control of the weather, in a National emergency the supply of electricity from an onshore wind farm can never be relied upon. Furthermore, electricity flowing to the National Grid from a wind farm is neither secure nor reliable in delivery.

ii) Economic well-being

The viability of the National Economy will not be impacted if an onshore wind farm is not built. The National Audit Office have questioned the viability of the ROC (Renewable Obligation Certificate), introduced by the State, which provides the attractive financial investment returns to onshore wind farm developers; moreover, the system is not providing value for money to the consumer. [National Audit Office, Auditor General, HC624 Session 2002-2003. The New Electricity Trading Arrangements in England and Wales, 9 May 2003; also NAO HC 210 session, 2004-2005, 11 Feb 2003]. Many argue the introduction of ROCs has been an important influence in stimulating rising electricity prices to consumers, which in turn contributes to increasing inflation which is not in the economic well-being of the country. [Refer also to Renewable Energy Foundation (REF) The Oswald Research, 2006; also REF submission to the Yelland Wind Farm, Devon, Planning Appeal, 2 April 2006]

In 2006, Professor James Lovelock captured the attention of the international community with his book on global warming, 'The Revenge of Gaia'. On page 83, he comments:

> *'According to the Royal Society of Engineers' 2004 report, onshore European wind energy is 2 – 5 times, and offshore wind energy over 3 times, more expensive per kilowatt hour than gas or nuclear energy. No sensible community would ever support so outrageously expensive and unreliable an energy source were it not that the true costs have been hidden from the public by subsidies and the distortion of market forces through legislation.'* [Lovelock J. The Revenge of Gaia: Why the Earth is Fighting Back – and How We Can Still Save Humanity. Allen Lane (Penguin), 2006]

The DTI Report *"Our Energy Challenge 2006"* refers to the work of Professor David Simpson in his April 2004 report for the David Hume Institute. The Paper: *"Tilting at Windmills: The Economics of Wind Power" (No. 65)*, states:

> *'At the present time the cost of generating electricity from wind power is approximately twice that of the cheapest alternative conventional cost.'*
>
> *'But projections by Government advisers, using relatively optimistic assumptions, show that even by the year 2020 a generation portfolio containing 20% wind power will still be more expensive than a conventionally fuelled alternative.'*

'No matter how large the amount of wind power capacity installed, the unpredictably variable nature of its output means that it can make no significant contribution to the security of energy supplies.'

There is no evidence to show that onshore wind power makes any real contribution to the economic well being of the UK. If all the onshore wind turbines in the UK were shut down, there is no evidence that this shut down would have any impact on the National economy.

iii) Prevention of disorder or crime

This is not influenced by wind farm developments.

iv) Protection of health and morals

Wind farms built too close to peoples' homes are unlikely to have any impact on peoples' morals, but they do create very real health problems as set out in Section 5: Noise and Health Concerns.

The use of guidance ETSU-R-97 fails to protect families where wind turbines have been built too close to their homes. The World Health Organisation's upper limit for bedroom noise at night offers greater protection to people, family life, and amenity. In considering whether a scheme will be a violation of the Human Rights Act, it is necessary for the decision-maker to seriously consider the advice of The World Health Organisation on standards for Community Noise, as its maximum noise levels are designed to limit noise impact on health.
The WHO limits bedroom noise at night to a combined (total) noise level of 30dB, and the level is reduced when low frequency content is present and reduced even further when pulsating noise is present. On windy nights, it is the total noise, including background noise, that enters the bedroom, and that should not exceed the maximum level. The difference in approach between ETSU and WHO probably accounts for much of the sleep deprivation problems experienced by wind farm neighbours.

In deciding the status of ETSU-R-97 in terms of the Human Rights Act, it is important to remember that the membership of the Committee that produced the ETSU report in 1997, appeared weighted towards members working in or for the wind industry. This may account for the Committee's recommendation of the high level of environmental noise pollution that would have to be suffered by neighbouring families. While admitting the importance of preventing sleep deprivation, the ETSU Committee recommendation was instead weighted at a level that the Committee felt would not restrict the development of wind energy. As a result, it would seem that the Committee tipped the balance disproportionately in favour of wind farm developers over the impact on community quality of life and the protection of the health of people living nearby.

Case law has shown that the violation is the key factor; and if the State has a 'bylaw' that fails to provide adequate protection, then the State remains liable.

The Minutes of the new ETSU-R-97 Noise Working Group, (Committee formed by the State and chaired by the State), dated 02 August 2006, fails to mention any discussion on:

1) The need to comply with The Human Rights Act
2) The World Health Organisation *'Guidelines for Community Noise 1999'*
3) The Report from the National Academy of Medicine, France (March 2006)
4) The Report by the UK Noise Association *'Location, Location, Location'* (Aug 2006).

Evidence shows that families suffer sleep deprivation and other health problems when wind turbines are built too close to dwellings; this is indicative of the State failing to provide adequate health protection. Interference to this extent is not justified.

v) Protection of rights and freedom of others

Clearly, the site owner has the right to develop his land in accordance with the provisions of the County and Local Development Plans under the Town Planning Acts.

However, apart from arguments of a Town Planning nature, the landowner has to recognise that the neighbours also have rights. The development of land that creates an environmental noise pollution, which escapes onto a neighbour's land, may create a violation of the Human Rights Act 1998, as well as an infringement of The Environmental Protection Act, and the nuisance might be classed as a strict liability in Tort (Rylands v Fletcher).

Regarding a wind farm, it is incumbent on the site owner to produce a layout design that prevents or limits to reasonable levels the environmental pollution entering the neighbours' properties, which is most likely achieved by ensuring a suitable distance between the noise source and the neighbours' properties.

The landowner may argue that the State has set Guidance on the level of noise pollution that the State believes is at an acceptable level to neighbours. However, compliance with these Guidance levels may not satisfy the Human Rights Act. The status of the Guidance, first mentioned in Section 5: Noise and Health Concerns, is repeated here and is worth considering:

Planning Policy PPG24: Planning & Noise – General principles (2), states:

> *'The Planning system has the task of guiding development to the most appropriate locations. It will be hard to reconcile some land uses, such as housing, hospitals and schools, with other activities which generate high levels of noise but the Planning system should ensure that, wherever practicable, noise sensitive developments are separated from major sources of noise (such as road ... and certain types of industrial development). It is equally important that new development involving noisy activities should, if possible, be sited away from noise sensitive land uses.'*

Planning Policy Statement 22 (2004) S.22 'Noise', states:

> *'Renewable technologies may generate small increases in noise levels … Local Planning authorities should ensure that renewable energy developments have been located and designed in such a way to minimize increases in ambient noise levels … The 1997 report by ETSU for the DTI should be used to assess and rate noise from wind energy developments"'.*

The use of the word "should" – rather than the phrase 'will be used' – allows the decision maker to use ETSU-R-97 together with any other relevant considerations.

vi) Protection of the environment and the interests of the community.

The attempt to reduce one form of pollution (carbon) by the creation of a new pollution (noise pollution) and visual pollution is not credible. (Visual pollution is mentioned because many will argue that a fixed, motionless, wind turbine standing in a field is unlikely to provoke much interest. The moment the blades start to rotate, the structure captures the eye and it has the ability to mesmerise or distract some people.)

A wind farm does not create new jobs, as one engineer can service a number of wind farms. Rural areas depend mainly on agriculture and tourism as the key employment. Countryside Tourism, by its very title, is supported by people seeking solitude, walking, and a contrast to urban and suburban living. Tourism customers will not find solitude and unspoilt rural landscape

where wind farms have industrialised the area. Although some wind farm developers make a token financial contribution to a community, this is *'de minimus'* compared with the potential loss in property values resulting from the environmental pollution and industrialisation created by the wind turbines (see Section 7 Tourism and Section 9: House Prices).

Referring again to the Report from The David Hume Institute, Professor Simpson commented:

> *'Because of the cost of providing additional stand-by generating capacity, it is unlikely that wind power will ever account for more than 20% of electricity generation through the National Grid. That being the case, its development can make no substantial contribution to an overall reduction in carbon emissions.'*

The DTI acknowledges that wind turbines require separate balancing power provided by conventional power stations, in order to balance the flow of electricity to the National Grid. Nuclear power is not suitable because of its slow response time. Conventional power, therefore, provides balancing power in the form of gas, oil, or coal. In the UK, it is normally gas (methane). The construction of onshore wind farms with high volatility in supply of electricity require near similar (MW) balancing power. This has the effect of increasing demand for methane. The transportation of methane has inherent issues, since the leakage is about 4% by volume. Methane is 24 times more destructive as a greenhouse gas than carbon dioxide. [Lovelock J. The Revenge of Gaia, 2006, pp 74-5]

Having in mind the similar MW capacity 'balancing power' will be constantly fired up, demanding methane gas of which about 4% by volume will disperse into the atmosphere, it is difficult to comprehend how onshore wind farms can be considered as protecting the environment – especially when the noise pollution is added to the equation.

Many local communities support the production of renewable energy, but they do not support the creation of environmental pollution as an acceptable consequence. Onshore wind turbines built in sparsely populated, wide-open spaces, around the world, cause few noise problems. However, schemes proposed in well-populated areas are those most likely to evoke a huge swell of community objection. In the final equation, the excessive environmental noise pollution escaping onto neighbouring property, plus the visual pollution from the constant rotation of the blades nearby, plus the reliance on back-up balancing power fuelled by methane gas, balanced against a small saving in carbon (using the National power balance rather than coal as the carbon measure), shows the cost imposed on neighbouring families is not justifiable.

13.7.7 To show if the interference is proportionate, the following must be considered:

i) Is the interference the minimum necessary to achieve the legitimate aims being pursued?
ii) Has a fair balance been struck?
iii) Interference with a human right must go no further than is strictly necessary in a pluralistic society to achieve its permitted purpose; or more succinctly, must be appropriate to its legislative aims.

13.7.8 When a wind farm is built so close to occupied dwellings, as is the case with Bolsterstone's proposal for Dunsland Cross, there is a very strong case to show that the interference is ***not*** proportionate to achieve the legitimate aims being pursued. Other sites are available where the same aims could be achieved without the same degree of nuisance to neighbours, but the developer has provided no evidence with regard to other sites examined in Devon, nor have reasons been given as to why they were discarded in favour of the Dunsland Cross site.

Article 1

13.7.9 Article 1 of the First Protocol, Protection of Property, is also a Qualified right. It states:

> *a) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *b) The preceding provisions shall not in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

13.7.10 In the above, five conditions can be inferred:

i) *Property and possessions* include land, rights, planning permissions, licences and business goodwill
ii) Everyone is entitled to peaceful enjoyment of his possessions
iii) Prevention of development may infringe the right
iv) Diminution in value of property may be relevant
v) Justification for the interference must be lawful, serve one of the legitimate aims in the Article and be proportionate.

13.7.11 Section 5: Noise and Health Concerns of this DTOG report has highlighted the likelihood of infringement of condition ii). Section 9: House Prices, has highlighted the likelihood of infringement of condition iv) and proportionality is considered in paragraph 13.7.8 above.

Article 6

13.7.12 Article 6 ensures that, in the determination of any civil right or obligation a person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This is a key feature of a democratic society and includes access to a court or tribunal. Access to a court might include access to the financial means to bring a case to court. **It allows people to challenge decisions taken by a public authority whose procedures fail to satisfy Article 6.** The European Court of Human Rights is the final arbiter of challenges made under The Human Rights Act 1998.

13.7.13 Torridge District Council will be mindful that it already has a European Court of Human Rights case underway with The Higher Darracott Wind Farm proposal near Torrington, submitted in 2004. That action has been brought by residents of a property which will be just 500 metres from the proposed site. The claim is against the landowner, the Secretary of State (who approved the plans at appeal) and Torridge District Council. This case is being brought under Article 1 only of the Human Rights Act, with a separate challenge being made in the High Court under Section 288 of the Town and Country Planning Act 1990. Since TDC had refused the initial planning application it will not be threatened with a financial claim when the verdict is announced. That could still be years away. The turbines proposed for the site are now very small by present day comparisons.

General

13.7.14 The weakness of the Human Rights Act is exposed by the fact that decision makers of the State rely on the argument 'balance in favour of the State', to justify serious violations of family to the right of respect for private and family life. Yet applying the dictum of Justice Buckley (**Dennis & Dennis v MOD** (2003) where the judge held that a fair balance would not be struck unless the Dennis' were financially compensated), if the State considers wind turbines are public policy, then the 'minority' interest should be compensated. If the wind turbines are not State policy, the decision makers may be challenged when they use the 'balance in favour of the State' to justify giving an approval that risks a violation of basic Human Rights.

13.7.15 The UK Lord Chancellor has said that:

> *'We in Government will campaign passionately and defiantly for human rights for everyone in Britain. Because we believe it is the foundation of both our security and our prosperity.' (Lord Falconer of Thornton in a speech to the Human Rights Lawyers Association in London on 29th September 2006.)*

13.7.16 On 10th May, 2006, The British Consulate, New York, sent an email entitled, "UK Elected to UN Human Rights Council". The last paragraph states:

> *'The UK remains committed to striving for the highest standards of human rights both at home and around the world. We are committed to fulfilling the detailed pledges we made as part of our election campaign to promote and protect human rights in the UK and globally. We will play the fullest part in making the new Human Rights Council a success.'*