PROVING THE ELEMENTS OF LIABILITY: EPA PROSECUTIONS

Iris Ferber and Andrew Carter
020 7831 0222
iris.ferber@42br.com andrew.carter@42br.com

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The Elements of Liability: A Summary

(1) Are the premises in such a condition as to be a statutory nuisance: that is, **injurious, or likely to cause injury, to health**?

(2) Is the defendant the **person responsible** for the condition of the premises (that is, the person to whose act, default, or sufferance, the nuisance is attributable)?

(3) Is the prosecutor the **person aggrieved** by the condition of the premises?

(4) Are the premises still in that condition (injurious, or likely to cause injury, to health) on the **date of the hearing**?

(5) Was a **notice of intended prosecution** (NIP) served on the defendant stating the prosecutor's intention to institute proceedings, which was sufficiently clear that it enabled the defendant to clearly identify the issue?

(6) Was the application to the Magistrates' Court made not less than **21 days** after service of the NIP?

The Statutory Nuisance

- Section 79 of the EPA lists various types of statutory nuisance.
- By far the commonest, particularly in private prosecutions, is section 79(a): "*any premises in such a state as to be prejudicial to health or a nuisance*".

- "Prejudicial to health" means actually injuring someone, or likely to injure someone.
- Applies both to the health of a normal healthy person, and to the likelihood of making a sick person worse.
- Most common type of prosecution is damp and mould: such conditions may be "prejudicial to health", and therefore a statutory nuisance, even if caused by condensation and not by any disrepair, so long as the defendant landlord is responsible by failing to take remedial action (such as the installation of ventilation / insulation / heating): *Dover DC v Farrar* (1980) 2 HLR 32 and *Greater London Council v Tower Hamlets LBC* (1983) 15 HLR 54.
- Pest infestations (such as ants, cockroaches, mice) can be "prejudicial to health": *McGuigan v Southwark LBC* and *Clark v Wandsworth LBC* [1996] CLY 3721.
- BUT other circumstances have been held not to be statutory nuisances:
  - Lack of adequate sound insulation: *Vella v Lambeth LBC* [2005] EWHC 2473.
  - Being housed too close to a railway line, with continual noise: *R (Wakie) v Haringey Magistrates' Court* [2003] EWHC 2217 (Admin).
  - A steep internal staircase, leading to risk of injury: *R (Everett) v Bristol CC* [1999] 2 All ER 193.
  - Potentially unhygienic internal layout (toilet on one side of the kitchen, and sink in bathroom on other side): *Oakley v Birmingham CC* [2001] 1 AC 617.
- The burden of proving that the condition of the premises is prejudicial to health falls on the prosecutor, and because these are criminal proceedings, it is the criminal burden of proof: beyond reasonable doubt.
- Whether the condition of the premises is prejudicial to health has to be objectively determined by the Magistrates, and that requires expert evidence; in the absence of expert evidence, the Magistrates are not in a position to decide the case: *Southwark LBC v Simpson* (1999) 31 HLR 725.
- The expert does *not* have to be a medical expert; in fact, it has been held to be an error of law for the Magistrates to dismiss the expert evidence of an Environmental Health Officer that premises were prejudicial to health, and instead demand additional medical proof: *R (O'Toole) v Knowsley MBC* [1999] 22 LS Gaz R 36.

The Person Responsible

- Section 82(4)(a) of the EPA requires the proceedings to be brought against the "person responsible for the nuisance".
- A question of fact for the trial, and very fact-sensitive.
- e.g. *Network Housing Association v Westminster CC* (1995) 27 HLR 189, is a good example of how the question of fact is assessed:
    - N acquired the freehold of a building which had been converted into flats, and undertook refurbishment, including laying sound insulation board between flats;
    - Two of the flats were let on 99-year leases, with one flat directly above the other; the tenant of the flat below complained about noise from the flat above, caused by everyday living;
    - The Council served a noise abatement notice on N, under the EPA (which has the same "person responsible" test);
    - N appealed against the notice, on the basis that N was not the person responsible, having no right of entry either to the premises from which the noise emanated, or to the premises where the noise was having an effect;
    - The Divisional Court held that N was the only person to whose "acts, default or sufferance" the nuisance could be attributed; N was therefore the "person responsible".
- Common scenarios:
    - If something outside the defendant's control has prevented it from abating the nuisance by the time of the trial (even if it was initially the person responsible), the defendant will not be convicted at trial: *Carr v Hackney LBC* (1996) 28 HLR 747.
    - Where a defendant landlord has attempted to decant the tenant in order to carry out works to rectify the nuisance, but the tenant refuses to decant, that is a good defence, because the landlord is no longer the person responsible for the nuisance: *Quigley v Liverpool Housing Trust* [2000] EHLR 130.

The Person Aggrieved

- A private individual can bring a prosecution, under section 82(1) of the EPA.
- That can be any occupant of the premises, whose health has been affected for the worse – or is likely to be affected for the worse – in consequence of the nuisance: the test is whether the person "has use of the land".
- That could include a child of the tenant.

The Date of the Hearing

- Criminal liability can only attach to the defendant if the statutory nuisance still exists on the date of the hearing: *R (Knowsley MBC) v Williams* [2001] Env LR 28 and *R (Cooke) v Liverpool Crown Court* [1997] 1 WLR 700.
- Because the definition of a statutory nuisance includes a condition of premises which is likely to cause injury, the statutory nuisance will also "exist" on the date of the hearing if it has been abated, but the Magistrates are satisfied on the evidence that it is likely to recur.

The Notice of Intended Prosecution

- Service of a NIP is a statutory condition for conviction: section 82(6) of the EPA
- There is no prescribed form, but the NIP **must** state:
  - That it is giving notice of an intention to prosecute under the EPA;
  - The nature of the statutory nuisance (which will usually need to include the address of the premises, and what their condition is said to be); and
  - The effect of the statutory nuisance on the complainant.
- The NIP **should also include**:
  - The name and address of both parties;
  - A reference to section 82 of the EPA being the section under which the prosecution is proposed to be commenced; and
  - The date after which proceedings may be started against the person on whom the notice is served.
- If an expert report has already been obtained, it should be attached to the NIP.

The Time for Commencement of the Prosecution

- Proceedings cannot be commenced until **21 days** have passed after service of the NIP on the intended defendant.
- NOTE: there is an exception for complaints about **noise**, which can be commenced once **3 days** have passed after service of the NIP.

Some Technical Defences

- If the application to the Magistrates' Court is made within 21 days after service of the NIP, that is a complete defence to the prosecution, as well as any costs associated with its commencement (although of course the complainant can then make a new application, once the 21 days have passed).
- A private prosecutor has a duty of candour in applying to the Magistrates' Court for a summons, because of the summary nature of the Court's decision to issue the summons; this means the prosecutor must give full and frank disclosure in their application of matters which may be relevant to the decision whether to issue a summons (e.g. proper and sufficient particulars of the alleged offence, the contents of any substantive response to the NIP received from the proposed defendant, or any previous disrepair settlement which might cover the same issues as the intended prosecution): *R (Siddiqui) v Westminster Magistrates' Court* [2021] EWHC 1648 (Admin).
- The making of an application to the Magistrates' Court to commence legal proceedings amounts to "conduct of litigation" under schedule 2 to the Legal Services Act 2007, and is a "reserved legal activity" within the meaning of section 12 of that Act, so if proceedings are commenced on behalf of a private prosecutor by someone acting as their agent, the proceedings are void if the agent is not a solicitor, a barrister authorised to conduct litigation, or another person authorised to conduct litigation: *Media Protection Services Ltd v Crawford* [2012] EWHC 2373 (Admin).

Evidence in the Magistrates' Court

- Proceedings under section 82(2) of the EPA are criminal in nature: *Botross v Hammersmith and Fulham LBC* (1995) 27 HLR 179.
- The Criminal Procedure Rules 2020 (as amended) ("the Rules") therefore apply to such proceedings.
- Civil practitioners should be particularly careful to consider the Rules in respect of hearsay evidence and expert opinion evidence.
- The scope for hearsay evidence in criminal proceedings is much more restricted than in civil proceedings: the Rules set out the requirements for giving notice of intention to introduce such evidence, and the procedure under which the other party may object.
- Part 19 of the Rules applies where a party wants to introduce expert evidence.
- Part 19 (together with its Practice Direction – see below) is a complete procedural code for experts; the following differences from civil proceedings are of particular note:
    - Parties do not need the Court's permission to rely on expert evidence, so long as certain procedural steps are complied with.
    - A party who wants to introduce expert evidence must serve the report on the other parties and the Court as soon as practicable; the expert must also be informed of the service of the report.
    - Notice of anything which might reasonably be thought capable of detracting substantially from the credibility of the expert must be served with the report.
    - If another party so requires, that party must be given a copy of, or a reasonable opportunity to inspect, the records on which the expert's findings are based, and anything (such as any instrument) on which examination, measurement etc. was carried out.
    - The permission of the Court must be obtained, if a party wishes to rely on an expert's report without calling that expert to give oral evidence: section 30 of the Criminal Justice Act 1988.
    - If the expert does not give oral evidence, then each relevant part of the report must be read or summarised aloud to the Magistrates at trial.
    - The Court can compel two or more co-defendants to instruct a single joint expert, but there is no power for the Court to direct the prosecutor and defendant to instruct a single joint expert.

- The Court can give permission to extend a time limit under Part 19 (even after it has expired), but a party applying for any extension of time must do so when serving the document for which that extension is required, and must explain the delay.

- Part 19 is supplemented by the Practice Direction CPD V Evidence 19A: Expert Evidence.
- The Practice Direction makes it clear that expert opinion evidence can be admissible in criminal proceedings, but only if:
  - it is relevant to a matter in issue in the proceedings;
  - it is needed to provide the Court with information likely to be outside the Court's own knowledge and expertise; and
  - the witness is competent to give that opinion.

- The competence of the expert is therefore critical: in EPA cases, a medical qualification is not required in order to give expert evidence on the issue of whether or not premises are in such a state as to be prejudicial to health.
- What is necessary is that the witness has some experience or expertise, so an experienced surveyor can be a proper person to give such evidence, so long as he has "*in the course of his duties as a surveyor taken the trouble to consider and deal with the relationship between damp and mould and injury to health*": *Southwark LBC v Simpson* (1999) 31 HLR 725.
- It is not necessary for an Environmental Health Officer to possess medical qualifications in order to express an opinion as to whether or not premises are prejudicial to health: *R (O'Toole) v Knowsley MBC*, above.
- Accordingly, any EHO or surveyor with appropriate knowledge and expertise can properly testify.
- But a prosecutor who relies on an expert with insufficient knowledge and experience of assessing prejudice to health will not be able to discharge the criminal burden of proof in relation to the condition of the premises, and they will fail to secure a conviction.
- A party proposing to rely on an expert must ensure that that expert is familiar with Part 19 and the Practice Direction generally, and in particular:
  - the expert's various duties to the Court, set out in rule 19.2; and
  - the detailed requirements relating to the contents of the expert's report, set out in rule 19.4.