This is the neutral citation that is used by all British courts nowadays. Published reports include their own citation at the top of the opinion.

Do not cite to this number – which is the number assigned to the dispute by the court – unless the opinion is unpublished.

Case No: A2/2000/2855

Neutral Citation Number: [2001] EWCA Civ 1236
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MR JUSTICE GIBBS

This indicates which court heard the case and how the case has come to be before the court.

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday 30th July,2001

This is the date that the opinion was handed down.

B e f o r e :

LORD JUSTICE KENNEDY
LORD JUSTICE CHADWICK
and
MR JUSTICE ROUGIER

- -

This is the panel that heard the case. Although Kennedy, LJ, is listed first, don't assume that his is the leading opinion. In this instance, that turns out to be true, since Chadwick, LJ, has very little to add and Rougier, LJ, simply agrees with the other two, but sometimes you have to work a bit harder to find the leading opinion, as described in the FAQs on this website.

This is where the parties are listed. Be careful. The first party listed is the appellant, or the party doing the appealing (i.e., the loser below). The appellant may not be the original claimant.

The party responding to the appellant is the respondent, or, sometimes the 'appellee'. Again, a respondent may be either the claimant or the defendant below.

Railtrack plc — Appellant
- and -
Mayor & Burgesses of London Borough of Wandsworth — Respondent

The case lists the full names of the parties, as well as any additional parties, if there are more than one on either side. Typically you do not list more than the first party on either side in your citation. You also can abbreviate party names in accordance with the guidelines published in research manuals such as OSCOLA (see Footnotes, Endnotes and Citations Generally, elsewhere on this website).

London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)
- -

Timothy Dutton QC & Giles Wheeler (instructed by Kennedys for the appellant)
Anthony Porten QC & Ranjit Bhose (instructed by Judge & Priestley for the respondent)

- -

Here, we find out who the barristers were and which solicitors instructed them. This is useful information if you wanted to contact the lawyers to find out if an appeal was going to be taken on the case or if you were looking for someone to assist with a similar case.

In a published opinion, you would often find head notes summarizing both legal and factual elements of the case here. The head notes would indicate whether any of the justices were in dissent, though the head notes would not indicate which opinion might eventually be considered the leading opinion. Head notes can help you know whether a case might be useful to your argument, but you should never rely exclusively on the head notes. If you decide to use a case, you should always read it in the original.

Some older opinions also include summaries of counsels' arguments before providing the judgment itself. As mentioned in the book, reading the arguments of counsel can be very educational and can show you how an experienced lawyer manipulates the law in support of his or her case.

Judgment

LORD JUSTICE KENNEDY:

This is the author of this particular opinion.

The neutral citation system began in January 2001. From then on, all cases have included numbered paragraphs, though previous cases did not.

1 This is a defendant's appeal from a decision of Gibbs J reported at [2001] 1WLR 368. It concerns the problem caused by pigeons roosting on the underside of the railway bridge which crosses Balham High Street in south London. Their droppings foul the pavement, and at times the pedestrians as well, and in this action the local authority has brought proceedings alleging public nuisance, private nuisance and negligence. They have sought a declaration that the defendants were liable to abate the nuisance and an injunction requiring the defendants to abate it by clearing the bridge of pigeons and nests,

cleansing it, and thereafter placing netting to prevent their return. The local authority has also claimed damages limited to £10,000.

Facts

Some, but not all, judges are good enough to break down the various sections of their opinion for you.

2 At the trial there was evidence about pigeon behaviour which I need not rehearse for the purposes of this appeal. Suffice to say that wild pigeons are attracted to urban areas where there is food, and there were at the material time 89 food outlets within 500 metres of the bridge in addition to those that members of the population who deliberately feed pigeons. The droppings not only soil clothing, bodies and pavements. They also make pavements slippery, and can cause disease. On behalf of the local authority it was accepted by Mr Porten QC that the risk of injury to health represented by the Balham pigeons was not in itself sufficient to constitute an actionable nuisance, but it was and is a facet of the problem.

3 Although the present substantial bridge has been in position since 1929, when it replaced an earlier bridge so the road could be widened, complaints about pigeon droppings did not begin to be expressed and recorded until about 20 years ago. Whether that is because previously people were less inclined to register complaints, or because with the increasing number of food outlets the problem has worsened is not clear, and for present purposes it does not matter.

4 In April 1990 the local authority, with the permission of British Rail, the predecessor of Railtrack as bridge owners, installed netting and panels to prevent pigeons from getting into the structure from above. That was quite successful, but some pigeons did get in, got trapped and died, and that led to the removal of the netting in March 1995. That resulted in a renewal of complaints about fouling, and a petition. The local authority's stance was that it was for Railtrack to prevent the pigeons from roosting. Meanwhile the local authority arranged for the pavements to be cleaned every day. Railtrack offered to let the local authority re-pigeon-proof the bridge, but only at the local authority's own expense. By the time of trial that would have cost £9000, but the cleaning cost was £12000 a year. As the judge found, the roosting places beneath the bridge can be effectively sealed off by fixing permanent netting or mesh across them, and that finding has not be challenged before us. The pigeons will move on, but they are unlikely to be such a problem for pedestrians.

Litigation

Some people call this the 'procedural posture' of the case, i.e., how the dispute came to be before this court.

5 These proceedings began in 1998, and the emphasis of the local authority as claimants has throughout been on public nuisance. When there is such a nuisance which affects the public right to use and enjoy the highway the highway authority is empowered by section 130 of the Highways Act 1980 to bring legal proceedings to protect the public's

rights. Similarly section 222(1) of the Local Government Act 1972 enables a local authority to institute civil legal proceedings in its own name where it considers it expedient to do so for the promotion or protection of the interests of the inhabitants of its area, and it was those two statutory provisions upon which the local authority relied in this case.

6 Public nuisance is also a crime, and a person is said to be guilty if he does an act not warranted by law or omits to discharge a legal duty if the effect of the act is to endanger the life, health, property, morals or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all (see Archbold Criminal Pleadings, Evidence and Practice 2001 at paragraph 31-40). Private nuisance is different. It is the wrongful interference with another's use of enjoyment of land, or of some right over or in connection therewith, and negligence arises where the relationship between the parties is such as to give rise to a duty of care. Having found in favour of the claimant on the basis of public nuisance the judge did not find it necessary to reach a final conclusion in relation to private nuisance or negligence, and in my judgment he was right to take that stance.

Authorities

This is the equivalent of the 'R' section of your IRAC essays.

A 'skeleton argument' is a brief written submission provided by a barrister to the court in advance of the hearing. The skeleton argument identifies the legal authorities the barrister will rely upon at the hearing and sketches the basic outline of the barrister's argument.

NOTE: Barristers and courts do, in fact, rely on ancient precedent. Therefore, don't disregard a case in your studies just because it is old.

7 In skeleton arguments and in submissions our attention has been invited to a large number of decided cases, but I need only refer to some of them, and I can begin, as Mr Porten did, with Attorney General v Tod Heatley [1897] 1 Ch. 560. In that case the defendant was the owner and occupier of a vacant piece of land in London. He surrounded it with a hoarding, but people threw filth and refuse over the hoarding and broke it down, so that the condition of the land and the use to which it was put constituted a public nuisance. The Attorney General, representing the public, brought proceedings, and at 566 Lindley L J said -

> "It is no defence to say 'I did not put the filth on but somebody else did'. He must provide against this if he can. His business is to prevent his land from being a public nuisance."

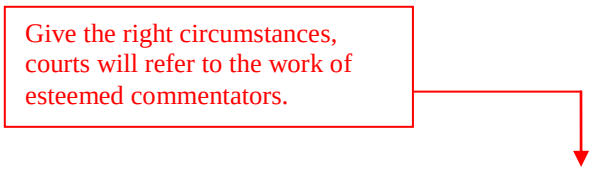
At 567 he continued -

> "The mere fact that it puts the wrongdoer to expense, or that it is difficult for him to get rid of it, is no defence in point of law, or any reason at all why the rights of the public should not be enforced."

Lindley LJ accepted that by statute the vestry could have cleaned the land at the expense of the rate payers, and at 568 he said -

> "But upon what principle of justice can the expense of keeping this place clean be thrown upon the rate payers? It is the common law duty of the owner to prevent this piece of land from being a nuisance. Why should the ratepayers pay for it?"

8 Mr Porten submits that whatever may have been the nineteenth century position in relation to private nuisance and negligence, so far as public nuisance was concerned the law was as stated in Tod Heatley and it has not changed.



9 In an important article in 4 Cambridge Law Journal in 1930 Professor A. L. Goodhart considered liability for things naturally on the land. He therefore looked at both public and private nuisance, and at page 30 he said -

> "The correct principle seems to be that an occupier of land is liable for a nuisance of which he knows, or ought to know, whether that nuisance is caused by himself, his predecessor in title, a third person or by nature. Whether a natural condition is or is not a nuisance is, of course, a question of fact. Is the injury caused by the natural condition more than a reasonable neighbour can be asked to bear under the rule of 'live and let live'? In other words, the ordinary rules of nuisance apply in the case of natural conditions. As we must all bear with our neighbour's piano-playing so we must also submit to his thistle down. This does not mean that we have no remedy if he introduces a large orchestra, or if he allows his tree, even of natural growth, to remain in a dangerous condition along the highway."

10 That approach was applied by the House of Lords in Sedleigh-Denfield v O'Callaghan [1940] AC 880 where a pipe laid by a trespasser on the respondent's land, but of which the respondent was aware, became clogged with leaves so that water over-flowed on to the appellant's premises and caused damage. The claim was won in private nuisance, but Tod-Heatley was referred to with approval as representing the law in relation to public nuisance, and at 894 Viscount Maugham said -

"In my opinion an occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He 'adopts' it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance."

Here the court is demonstrating how the law has developed over time. While you may not want to use this kind of evolutionary approach in your problem questions, this method is highly appropriate in response to pure essay questions on legal history.

TIP: Problem questions typically want you to focus on recent and developing case law, so be careful about delving too deeply into the history of some area of the law. When answering problem questions, also remember that you're supposed to analyse a dispute, not simply repeat information learned in class. If you're going to include a history lesson in your essay, make sure it makes sense as a matter of tactics.

11 He went on to hold that the respondents had both continued and adopted the nuisance. Similarly, at 899, Lord Atkin said -

"In my opinion the defendants clearly continued the nuisance for they come clearly within the terms I have mentioned above, they knew the danger, they were able to prevent it and they omitted to prevent it. In this respect at least there seems to me to be no difference between the case of a public nuisance and a private nuisance, and the case of Attorney-General v Tod-Heatley is conclusive to show that where the occupier has knowledge of a public nuisance, has the means of remedying it and fails to do so he may be enjoined from allowing it to continue. I cannot think that the obligation not to 'continue' can have a different meaning in 'public' and in 'private' nuisances."

12 Slater v Worthington's Cash Stores (1930) Ltd [1941] 1 KB 488 was another decision of the Court of Appeal in relation to public nuisance. The plaintiff was on the pavement looking in the window of the defendants' shop when she was injured by a mass of snow which fell on her from the roof. The defendants were aware of its existence and could have removed it over the preceding four days, but they did not do so, nor did they give any warning of the danger. Oliver J found that the overhanging snow was a public nuisance and that because the defendants knew of it and did nothing to abate it they were liable in damages to the plaintiff. That conclusion was upheld by the Court of Appeal.

13 Goldman v Hargrave [1967] AC 645 was an appeal to the Privy Council from the High Court of Australia. A fire in a red gum tree, which the appellant had left to burn out, spread across his paddock to the respondent's property. At 657 Lord Wilberforce said -

"…the tort on nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive. The present case is one where liability, if it exists, rests upon negligence and nothing else; whether it falls within or overlaps

the boundaries of nuisance is a question of classification which need not here be resolved. "

Having looked at the authorities Lord Wilberforce continued at 663 -

"One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. And in many cases, as, for example, Scrutton L J's hypothetical case of stamping out a fire, or the present case, where the hazard could have been removed with

little effort and no expenditure, no problem arises. But other cases may not be so simple. In such situations the standard ought to be to require of the occupier what is reasonable to expect of him in his individual circumstances."

NOTE: In this sequence of cases, Kennedy, LJ, is simply setting out the relevant legal standard. That's precisely what you want to do in the 'R' section of your IRAC essay. Although it can seem a bit dry (more so because this 'R' section isn't comparing and contrasting too many competing principles of law), Kennedy, LJ, will use these principles later, in his application of the law (rules) to the facts of this particular dispute. Notice also the extensive use of quotes (though they are a bit long at times) and the limited discussion of the facts of each of the cases cited. Try to do the same in your essays.

14 In Leakey v National Trust [1980] 1 QB 485 the plaintiff owned land adjacent to that owned by the Trust on which there was, as the Trust knew, an unstable mound, which eventually fell and caused damage to the plaintiff's property. As Megaw L J pointed out at 523, even before the fall the plaintiff could arguably have entered the Trust's land to abate the nuisance, and if that right of abatement existed it could only do so because the Trust owed to the plaintiff a duty. Having referred to Tod-Heatley, Sedleigh-Denfield and Goldman he continued at 524 -

"The duty is a duty to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property. The considerations with which the law is familiar are all to be taken into account when deciding if there has been a breach of duty, and, if so, what that breach is, and whether it is causative of the damage in respect of which the claim is made. Thus, there will fall to be considered the extent of the risk; what, so far as reasonably can be foreseen, are the chances that anything untoward will happen or that any damage will be caused? What is to be foreseen as to the possible extent of the damage if the risk becomes a reality? Is it practicable to prevent, or to minimise, the happening of any damage? If it is practicable, how simple or how difficult are the measures which could be

> taken, how much and how lengthy work do they involve, and what is the probable cost of such work? Was there sufficient time for preventive action to have been taken, by persons acting reasonably in relation to the known risk, between the time when it became known to, or should have been realised by, the defendant, and the time when the damage occurred? Factors such as these, so far as they apply in a particular case, fall to be weighed in deciding whether the defendant's duty of care requires, or required, him to do anything, and if so, what."

15 All of that, it must be remembered, was said in the context of a claim in private nuisance, and in similar vein Megaw L J said at 526 E -

> "The defendant's duty is to do that which is reasonable for him to do. The criteria of reasonableness include, in respect of a duty of this nature, the factor of what the particular man - not the average man, can be expected to do, having regard, amongst other things, where a serious expenditure of money is required to eliminate or reduce the danger, to his means. Just as, where physical effort is required to avert an immediate danger, the defendant's age and physical condition may be relevant in deciding what is reasonable, so also logic and good sense required that, where the expenditure of money is required, the defendant's capacity to find the money is relevant. But this can only be in the way of a broad and not a detailed assessment; and in arriving at a judgment on reasonableness a similar broad assessment may be relevant in some cases as to the neighbour's capacity to protect himself from damage, whether by way of some form of barrier on his own land or by way of providing funds for expenditure on agreed works on the land of the defendant."

16 Cumming-Bruce L J agreed with Megaw L J and so did Shaw L J but, as Mr Dutton QC for Railtrack points out, Shaw L J had misgivings "as to the course which the law of England has taken (note the past tense) in regard to the liability of a land owner for a nuisance arising upon his land independently of the intervention of any human agency". He suggested at 529 E that -

> "The judgment in Goldman v Hargrave may represent the climax to the movement in the law of England expanding that part of the law which relates to liability for nuisance."

Here the barrister for Railtrack does a good job of distinguishing a negative case by pointing out the one line that brings the conclusions in the earlier case into question.

17 The last authority to which I need refer at this stage is Holbeck Hall Hotel Ltd v Scarborough B C [2000] 2 WLR 1396. The hotel was on a cliff and the local authority owned the land forming the under cliff between the hotel grounds and the sea. Landslips were not uncommon, and in 1993 a massive landslip caused loss of support for the hotel

grounds and part of the hotel, so here again there was no allegation of public nuisance. It was argued that the principle in Sedleigh-Denfield, Goldman and Leakey should be confined to cases where there was an escape of some noxious thing from the defendant's land to that of the claimant, but that was rejected, and at 1411 Stuart-Smith L J said -

> "There seems no reason why, where the defendant does not create the nuisance, but the question is whether he had adopted or continued it, different principles should apply to one kind of nuisance rather than another. In each case liability only arises if there is negligence; the duty to abate the nuisance arises from the defendants knowledge of the hazard that will affect his neighbour."

Kennedy, LJ, begins to bring the various cases together here, based on his reading of *Holbeck Hall*.

18 At 1415 it was pointed out that the case was one of non-feasance, so the scope of the duty was more restricted. After referring to the three stage test for the existence of a duty of care set out in Caparo Industries plc v Dickman [1990] 2 AC 605 and adopted in Marc Rich & Co AG v Bishop Rock Marine Company Ltd [1996] AC 211 in relation to all types of damage, Stuart-Smith L J said at 1417 F -

> "the requirement that it must be fair, just and reasonable is a limiting condition where foreseability and proximity are established. In my judgment very similar considerations arise whether the court is determining the scope of the measured duty of care or whether it is fair, just and reasonable to impose a duty or the extent of that duty. And for my part I do not think it is just and reasonable in a case like the present to impose liability for damage which is greater in extent that anything that was foreseen or foreseeable (without further geological investigation), especially where the defect and danger existed as much on the plaintiff's land as Scarborough's."

NOTE: *Caparo* and *Marc Rich* are not nuisance cases. However, Kennedy, LJ, properly refers to them because they set forth the circumstances in which a novel duty of care may be imposed against a defendant. Be sure to use the same kind of lateral thinking in your essays.

The Judge's Conclusions

19 Having set out the authorities I turn now to the findings of the judge, and the submissions made on behalf of the appellants. The judge found, as a matter of fact and degree, that the pigeon infestation and the fouling caused by it amounted to a nuisance, in that they interfered substantially with the comfort and convenience of the public, or a significant class of the public who use the pavements. In this court there has been no direct challenge to that finding.

20 The judge went on to accept that Railtrack had made no unnatural or unreasonable use of its land, and that the local authority had done nothing which caused or contributed to the infestation. The local authority had done all that it reasonably could do to restrict the sources of food available to pigeons in the area. That too is accepted for the purposes of this appeal.

21 The judge then held that although the bridge had become infested with pigeons to such an extent as to cause or amount to a nuisance without any act or default on the part of Railtrack or its predecessors, Railtrack had omitted to remedy the situation within a reasonable time or at all although it could have done so. It was, the judge said, no excuse to say that the pigeons were wild, or that the nuisance did not involve physical injury or damage to property. The judge accepted that Railtrack might be found liable in respect of other bridges, but it was not shown that the financial burden would be enormous, and it was no defence for Railtrack to say that the local authority had its own statutory powers to maintain roads and deal with pigeons, or that keeping the pigeons out of the bridge would only cause them to move elsewhere.

Submissions

The placement of this section is a bit backwards for IRAC purposes, since this section includes both the IRAC 'issue' (i.e., the grounds of appeal) as well as the application, but that is not a huge problem. However, many decisions include the 'C' section prior to the discussion of the law, and you are advised to do the same.

22 I turn now to Railtrack's grounds of appeal. The first ground of appeal is that the judge failed properly to apply the decision of the Court of Appeal in Leakey in that he distinguished between liability in nuisance and negligence when there is no proper distinction between the two torts in these circumstances. Mr Dutton submits that the distinction between the two torts cannot properly be made in cases concerning liability for nuisances which were not created by the tort feasor. In my judgment it has been clear, at least since Tod Heatley was decided in 1897, that where there is a public nuisance on the defendant's land it does not matter whether it was created by the defendant or some third party, or by natural causes (see Slater). If the defendant is aware of it, has had a reasonable opportunity to abate it, has the means to abate it, and has chosen not to do so, then he is liable, and there is no reason to approach the matter as though it were a claim in negligence or private nuisance.

EXAMPLE: See how Kennedy, LJ, refers to the case law described above without repeating it in detail. Kennedy, LJ, also summarizes his legal conclusions in one terse sentence. Try to do the same.

23 In the second ground of appeal it is asserted that the judge was wrong to extend the principle set out in Leakey to a case which did not involve a nuisance causing physical damage to neighbouring land, but only an interference with the enjoyment of that land, and which arose out of the activities of wild birds and not out of the state of Railtrack's land. In my judgment this ground of appeal elides two separate issues, the first issue being whether a nuisance does in fact exist, and the second being concerned once again

with the cause of the problem. I accept that where there is physical damage to land (as in Leakey and Holbeck Hall Hotel) or injury to a claimant (as in Slater) it may be easier for the claimant to prove that the antecedent threat amounted to a nuisance. For example, it is well established that where a complaint relates only to foul smells in an industrial area (see St Helen's Smelting Company v Tipping [1865] 11 HLC 642), that cannot amount to actionable nuisance, but it is clear beyond argument that interference with the right of the public to enjoy the highway in reasonable comfort and convenience can amount to a public nuisance (see the definition of public nuisance referred to earlier in this judgment, and Tod Heatley, albeit the state of the land in that case was said to be injurious to public health). So, in my judgment, the judge was entitled to find as a fact, as he did, that in this case there was a public nuisance, and to some extent the second ground of appeal is an attempt to outflank that finding, which, as I have said, Railtrack have indicated that they accept. The acceptance is not surprising, because the evidence to support the finding was overwhelming.

Notice that you can introduce a new case late in the essay, as long as it relates to a tangential point.

TIP: Notice how the application section does not repeat all of the facts or all of the law – instead, it succinctly combines the two to support the conclusions reached.

24 The second issue raised by the second ground of appeal, namely that the problem arose out of the activities of wild birds is an issue which I have considered when dealing with the first ground of appeal. Whether the cause of the nuisance on a defendant's land was a fall of snow or the arrival of wild birds is immaterial if the defendant had the necessary knowledge, opportunity and means to abate the nuisance. It is submitted by Mr Dutton that the pigeons proliferate because the community provides food, so the local authority, representing the community, should solve the problem by the exercise of statutory powers given to it in section 74 of the Public Health Act 1961 to abate any nuisance, annoyance or damage caused by the congregation of pigeons in any built-up area, and by the exercise of its contractual and statutory street cleaning obligations. But this case is not concerned with the problem of pigeons in general. It is concerned with the nuisance caused by the pigeons which roost under the railway bridge which crosses Balham High Street, and that is a nuisance which, as it seems to me, Railtrack had a clear legal duty to address. If that is right then, as Lindley L J pointed out in Tod Heatley, there would seem to be no reason why the burden should be passed to the council tax payers. Section 13 of the Tyne and Wear Act 1980 permits a local authority to which that Act applies at its own expense to require the owner or occupier of a building or structure fronting upon a highway or footpath to take measures to prevent or minimise the habitual nesting, roosting or alighting of feral pigeons so as to be a source of nuisance or inconvenience to pedestrians using the highway. Mr Dutton submits that the existence of that statutory power carries with it the implication that without it a local authority cannot require a landowner to abate such a nuisance at his own expense. I disagree. For

example, a landowner may not be in a financial position to carry out work which is plainly required, in which case the statutory power could well be useful.

> TIP: Just as a matter of style, note that the preceding paragraph is a bit long. There's no need to emulate that particular aspect of this otherwise exemplary judicial opinion!

25 In the third ground of appeal it is said that the judge failed properly to consider whether Railtrack owed any duty of care to the local authority, and if there was a duty of care the scope of that duty, and in the fourth ground of appeal it is said that the judge failed properly to consider what was required of Railtrack to discharge the duty, the submission being that it was sufficient for Railtrack to invite the local authority to pigeon-proof the bridge at its own expense. In my judgment those two grounds of appeal are misconceived because this was primarily a claim in public nuisance, and the judge rightly so regarded it. As Mr Porten submitted, that meant that in reality there were three questions to be addressed, namely -

> (1) Do the matters complained of constitute a hazard, i.e. being dangerous or materially affecting the comfort and convenience of the public on the highway;
>
> (2) Does Railtrack, as landowner, have knowledge of the hazard;
>
> (3) Has Railtrack taken reasonable steps to prevent the foreseeable effects of the hazard?

26 Mr Dutton contends that such a simple approach, founded on Tod Heatley, cannot be sustained in the light of later authorities, which require a claimant to identify a duty of care, an unreasonable use of the land by a defendant, and a failure by the defendant to take reasonable steps to safeguard the claimant before the claimant can hope to obtain redress. In my judgment where the cause of action is public nuisance Tod Heatley still represents the law, and nothing in the later authorities suggests otherwise.

27 The final two grounds of appeal relate to damages. It is submitted that the judge was wrong to hold that the local authority was entitled to damages in addition to the declaration that he granted. He entered judgment for damages to be assessed. It is further submitted that if Railtrack is to be required to abate the nuisance the local authority should have been required to contribute to the cost. In my judgment there is no reason why the capital cost of pigeon-proofing the bridge should not fall wholly upon Railtrack. As to damages it seems to me that the local authority is entitled to the extra costs of pavement cleaning which it incurred up to 1996 when Railtrack gave the local authority permission to abate the nuisance at its own expense. "Thereafter, as the judge said, damages should be assessed bearing in mind the offer to permit abatement".

Conclusion

This section constitutes the 'C' in IRAC. Notice how short the discussion is: precisely the same length as your 'conclusion' will be, i.e., one

28 For the above reasons I would dismiss this appeal.

LORD JUSTICE CHADWICK:

29 I agree that this appeal should be dismissed.

30 Wandsworth London Borough Council is the highway authority in respect of that part of Balham High Road which adjoins Balham station. The street is crossed by a railway bridge which is now vested in Railtrack plc as part of its undertaking. The construction of the railway bridge is such that it provides a convenient roost to the numerous feral pigeons attracted to the area by the ready availability of food in the vicinity. The obvious consequences of pigeon infestation ensue, to the annoyance and inconvenience of pedestrians using the highway beneath the bridge. The judge found, "as a matter of fact and degree" that the pigeon infestation and the fouling caused by it amounted to a nuisance; that is to say that there was a substantial interference with the comfort and convenience of the public or a significant class of the public who use the footpaths or pavements. There is no challenge to that finding. Nor could there be; the evidence was overwhelming.

31 It is the duty of the Council, as local highway authority, to assert and protect the rights of the public to the use and enjoyment of Balham High Road, including the pavements provided for pedestrian use - see section 130(1) of the Highways Act 1980. In furtherance of that duty the Council has brought these proceedings against Railtrack plc as the owners of the bridge. The issue on this appeal is whether the judge was right to find, as he did, that Railtrack were liable for the public nuisance arising from the pigeon infestation.

32 The liability of a landowner for a public nuisance on or emanating from his land was recognised by this Court over one hundred years ago in *Attorney-General v Tod Heatley* [1897] 1 Ch 560. The decision of this Court in *Tod Heatley* was approved by the House of Lords in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 - see, in particular, the passage at page 899 in the speech of Lord Atkin, to which Lord Justice Kennedy has referred. Liability in public nuisance arises where the landowner has knowledge of the existence of a nuisance on or emanating from his land, where there are means reasonably open to him for preventing or abating it, and where he fails to take those means within a reasonable time. I agree with Lord Justice Kennedy that there is nothing in the subsequent decisions in this Court to which we were referred - *Slater v Worthington's Cash Stores (1930) Ltd* [1941] 1 KB 488, *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 QB 485 and *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] 1396 - nor in the decision of the Privy Council in *Goldman v Hargrave* [1967] 1 AC 645 which throws doubt upon that as the test to be applied in a public nuisance case.

33 The three elements of knowledge, means to abate and failure to take those means are all present in the present case. In my view, the judge was plainly correct to find that

liability in public nuisance had been established. I agree, also, that he was entitled to make an order for the payment of damages in addition to the declaration which he granted.

MR JUSTICE ROUGIER:

34 I also agree.

ORDER: Appeal dismissed with costs to be summarily assessed; interim payment of £15,000 to be paid on account.

(Order does not form part of approved Judgment)