OBJECTIVE STANARDS FOR LIGHT NUISANCE?

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The duty[1] on local authorities to investigate complaints of light nuisance from residents in their area came about through amendments to the Environmental Protection Act 1990 made by the Clean Neighbourhoods and Environment Act 2005.

Section 79 of EPA1990 specifies a number of categories that may manifest themselves as a statutory nuisance if they are considered as either a *nuisance* or *prejudicial to health*. Listed amongst issues such as smoke and noise is 'artificial light emitted from premises'. Although there is potential for injury to health to be caused through sleep deprivation in particularly bad cases of light pollution it is generally accepted that, out of the two limbs of statutory nuisance, the nuisance limb is the most likely to trigger enforcement action. However, there is no precise definition of the term 'nuisance'.

Instead, a number of variable factors (which are mainly derived from common law), are taken into account by the investigating officer, and subsequently the courts, when making a determination as to whether a nuisance exists. These include:

- The sensitivity of the complainant
- Means employed by the perpetrator to avoid or reduce the nuisance
- Social utility of the perpetrators conduct
- Severity (intensity) and duration of the light intrusion
- The motive of the perpetrator
- The nature of the locality (e.g. urban v's rural)
- Duration of the intrusion
- The time of day
- The need for a state of affairs to exist (i.e. a continuing problem)

In essence, through the consideration of the above factors, the law aims to strike a balance between conflicting uses of land and determine whether that use is unreasonable or not.

The suggestion has been made though[2] that the incorporation of an objective numerical threshold for artificial light nuisance be incorporated into the statutory nuisance regime. It being a relatively new addition to the legislation, the level of court activity relating to statutory nuisances caused by artificial light is limited. However, a number of cases involving other categories of nuisance counter that suggestion and, perhaps, offer a little bit of an explanation as to why the two are incompatible.

Evidence obtained from light meter readings, measurements and numerical calculations can be used in light nuisance cases but it has been shown on a number of occasions that there is no necessity to do so in order to establish the existence of a statutory nuisance. In one notable case[3] the necessity for noise meter readings was contended but it was found that there was no precondition for decibel evidence. Justice Royce stated:

> Whether on the facts of a particular case the justices (magistrates) are satisfied so that they are sure that the nuisance has occurred is a matter, of course, for them. There is no prerequisite as to the type of evidence which they must hear.

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[1] Environmental Protection Act 1990, Section 79
[2] Carl Gardener, 'Tackling Light Nuisance' (2009) 5 Lighting Journal 45
[3] Westminster CC v. McDonald [2003] EWHC 2698 (Admin)

This conclusion followed a number of other cases with similar findings including Lewisham LBC v Hall[4] where it was judged that magistrates

> may rely upon the evidence of an environmental enforcement officer or on the evidence of any other lay witnesses but they cannot require the production of acoustic measurement evidence as a precondition for conviction.

The same would apply to artificial light, odour or any other category of nuisance. As statutory nuisance cases in the overwhelming majority of instances are taken by the local authorities the judgement and evidence of the Environmental Health Officer will therefore be crucial.

Although 'light measurements' may not be a prerequisite for conviction it is possible for the EHO to supplement his evidence through the use of, say, an illuminance meter and presentation of Ev [Lux] figures. However, if he does choose to he must be clear and precise in his use of any technical information as his expertise may be tested from the outset. In R v Fenny Stratford[5] an abatement notice stating a maximum acoustic limit of 70dB was served in order to reduce music levels emitted from a public house. A successful challenge was made against the terms of the notice as it did not state where meter should be positioned and failed to consider the likelihood of other noises which may contribute to a measured level. The pitfalls of the use of technical information may not, therefore, always derive solely from a lack of expertise but also in the way in which it is applied in a legal sense.

The legislation provides a duty[6] on the local authority to serve an abatement notice where a statutory nuisance is found to exist on the person responsible for that nuisance. Generally speaking, abatement notices may be categorised into two formats: firstly, those which simply require the abatement of a nuisance, and secondly, those that require it's reduction or abatement by specifying remedial works or technical conditions (that must be carried out to achieve that aim). In many cases there is no legal duty on, or necessity for, the officer to opt for the latter i.e. a works specific notice[7]. Furthermore, as demonstrated in the aforementioned example, choosing to do so can increase the likelihood of a successful appeal by the recipient. As a result, it is not surprising that EHOs may be more comfortable omitting the technical aspects of lighting.

If the EHO *does* choose to introduce numerical data into his evidence at a later stage, it can provide a useful supporting role in criminal proceedings. As long as the evidence is clear and presented in a language that can be easily understood by the court, a comparison may be made against guidelines or standards and an appreciation of the scale or gravity of the situation conveyed. However, ultimately, the usefulness of any numerical evidence in statutory nuisance cases is limited as the law defines no objective standard for which to measure values against. Where non-statutory standards have been presented the courts have not applied them as objective standards; for example, in Murdoch & Murdoch v Glacier Metal Co[8] it was held that noise exceeding the World Health Organisation recommended maximum level for night time noise[9] did not constitute an actionable nuisance per se. Even

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[4] [2002] EWHC 960 (Admin)
[5] JJ ex p Watney Mann (1976)
[6] EPA 1990, s.80
[7] Elvington Park Ltd & Another v City of York Council [2009] EWHC 1805 (Admin) has recently addressed this issue
[8] [1998] Env LR 732
[9] Environmental Health Criteria for Noise

where British Standards have been applied in nuisance cases, for example BS 4142[10], they may only serve a supporting role within a defined set of circumstances.

Where objective standards have been established in law relating to the assessment of noise they have been positioned well clear of statutory nuisance legislation. The Noise Act 1996 was established to complement statutory nuisance powers and sets a maximum permitted decibel level differentiating between the background and noise source. However, the powers are rarely invoked and statutory nuisance powers will continue to be used where permitted levels are not breached. Currently, the number of light nuisance cases received by local authority environmental health departments is small and little evidence exists to show that statutory nuisance powers do not already provide an effective remedy for light nuisance. As a result, it follows that there be little need for further legislation to protect against light that affects the enjoyment of property.

As to the potential for reform or introduction of objective numerical standards into existing legislation is concerned; the courts have made it clear that to assign a precise definition to the expression 'nuisance', be it numerical or otherwise, would serve no useful purpose. The numerous variable factors that must be taken into account in order to permit a fair and flexible approach to enforcement prevent the establishment of a single objective standard. Statutory nuisance powers have been implemented successfully since the mid 19th century in broadly the same format and the inclusion of additional categories of nuisance over the years might be seen as a testament to its success.

That's not to say that objective guidelines for light levels are limited to playing a supporting role for EHOs, on the contrary. The s.80 powers are primarily used as a reactive tool by local authorities and there is one, arguably more important, role where the science of light can (and should) be put to greater use by EHOs; that is through the planning process. As consultees on planning applications, ILE Guidance has the ability to support the EHO in a nuisance prevention role. Standards for lighting limits are extremely useful for EHOs in the consideration of planned proposals, for example, where vertical illuminance at the window can be calculated and potential for deleterious affects on amenity illustrated.

[10] BSI, 'Method for Rating Industrial Noise Affecting Mixed Resdential and Industrial Areas' (BS 4142, 1997)