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BAILII Citation Number: [1977] EWCA Civ 6

Case No.: 1975 M. No. 173

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DURHAM DISTRICT REGISTRY
(MR. JUSTICE REEVE)

Royal Courts of Justice.
6th April 1977.

B e f o r e :

THE MASTER OF THE ROLLS (Lord Denning)
LORD JUSTICE GEOFFREY LANE
and
LORD JUSTICE CUMMING-BRUCE

JOHN EDWARD MILLER	**First Plaintiff (Respondent**
and	
BRENDA THERESA MILLER	**Second Plaintiff (Respondent)**
-v-	
R. JACKSON	**First Defendant (Appellant)**
and	

J. J. CROMERTY **Second Defendant (Appellant)**

(On their own behalf and on behalf of all other members of the Lintz Cricket Club)

(Transcript of the Shorthand Notes of the Association of Official Shorthandwriters Ltd., Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, W.C.2).

MR. J. A. CHADWIN, Q.C . and MR.P.N. SUCH
(instructed by Messrs Hay & Kilner, Solicitors, Newcastle upon Tyne)
appeared on behalf of the Plaintiffs (Respondents).
MR. M. KEMPSTER, Q.C. and MR.J. HARPER
(Instructed by Messrs .Halsey, Lightly and Hemsley, Solicitors,
London agents for Messrs. Nicholson, Martin & Wilkinson, Newcastle upon Tyne)
appeared on behalf of the Defendants (Appellants).

HTML VERSION OF JUDGMENT

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THE MASTER OF THE ROLLS: In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last seventy years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a Judge of the High Court has ordered that they must not play there anymore, lie has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the Judge to stop the cricket being played. And the Judge, I am sorry to say, feels that the cricket must be stopped: with the consequences, I suppose, that the Lintz cricket-club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.

I must say that I am surprised that the developers of the housing estate were allowed to build the houses so close to the cricket ground. No doubt they wanted to make the most of their site and put up as many houses as they could for their own profit. The planning authorities ought not to have allowed it. The houses ought to have been so sited as not to interfere with the cricket. But the houses have been built and we have to reckon with the consequences.

At the time when the houses were built it was obvious to the people of Lintz that these new houses were built too close to the cricket ground. It was a small ground, and there might be trouble when a batsman hit a ball out of the ground. But there was no trouble in finding purchasers. Some of them may have been cricket enthusiasts. But others were not. In the first three years - 1972, 1973 and 1974 - quite a number of balls came over or under the boundary fence and went into the gardens of the houses: and the cricketers went round to get them. A lady in one of the houses, a Mrs. Miller, of house number 20, Brackenridge, was very annoyed about this. To use her own words:

> "...When the balls come over, they the cricketers, either ring or come round in two's and three's and ask if they can have the ball back, and they never ask properly. They just ask if they can have the ball back, and that's it. They have been very rude, very arrogant and very ignorant, and very deceitful ... to get away from any problems we make a point of going out on Wednesdays, Fridays and the week-ends."

Having read the evidence, I am sure that was a most unfair complaint to make of the cricketers. They have done their very best to be polite. It must be admitted, however, that on a few occasions before 1974 a tile was broken or a window smashed.

The householders made the most of this and got their rates reduced. The cricket club then did everything possible to see that no balls went over. In 1975, before the cricket season opened, they put up a very high protective fence. The existing concrete fence was only six feet high. They raised it to nearly 15 feet high by a galvanised chain-link fence. It cost £700. They could not raise it any higher because of the wind. The cricket ground is 570 feet above sea level. During the winter even this high fence was blown down on one occasion and had to be repaired at a cost of £400. Not only did the club put up this high protective fence. They told the batsmen to try to drive the balls low for four and not hit them up for six. This greatly reduced the number of balls that got into the gardens. So much so that the rating authority no longer allowed any reduction in rates.

Despite these measures, a few balls did get over. The club made a tally of all the sixes hit during the seasons of 1975 and 1976. In 1975 there were 2,221 overs, that is, 13,326 balls bowled. Of them there were 120 six hits on all sides of the ground. Of these only six went over the high protective fence and into this housing estate. In 1976 there were 2,616 overs, that is 15,696 balls. Of them there were 160 six hits. Of these only 9 went over the high protective fence and into this housing estate.

No one has been hurt at all by any of these balls, either before or after the high fence was erected. There has, however, been some damage to property, even since the high fence was erected. The cricket club have offered to remedy all the damage and pay all expenses. They have offered to supply and fit unbreakable glass in the windows, and shutters or safeguards for them. They have offered to supply and fit a safety net over the garden whenever cricket is being played. In short, they have done everything possible snort of stopping playing cricket on the ground at all. But Mrs. Miller and her husband have remained unmoved. .Every offer by the club has been rejected. They demand the closing down of the cricket club. Nothing else will satisfy them. They have obtained legal aid to sue the cricket club.

In support of the case, the Plaintiff relies on the dictum of Lord Reid in Bolton v. Stone [1951] AC 850, at page 867:

> "If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all".

I would agree with that saying if the houses or road was there first, and the cricket ground came there second. We would not allow the garden of Lincoln's Inn to be turned into a cricket ground. It would be too dangerous for windows and people. But I do not agree with Lord Reid's dictum when

the cricket ground has been there for 70 years and the houses are newly built at the very edge of it. I recognise that the cricket club are under a duty to use all reasonable care consistently with the playing of the game of cricket, but I do not think the cricket club can be expected to give up the game of cricket altogether. After all they have their rights in their cricket ground. They have spent money, labour and love in the making of it: and they have the right to play upon it as they have done for 70 years. Is this all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it? Can the developer or a purchaser of the house say to the cricket club: "Stop playing. Clear out". I do not think so. And I will give my reasons.

THE LAW IN THE 19th CENTURY

If we were to approach this case with the eyes of the Judges of the 19th Century, they would, I believe, have seen it in this way: .Every time that a batsman hit a ball over the fence so that it landed in the garden, he would be guilty of a trespass. If he hit it so that it went under the fence and down the bank, he would be guilty of a trespass. So would the committee of the cricket club, because they would have impliedly authorised it. They cheered the batsman on. If one or two of the players went round and asked the householder if they could go into the garden to find it, the householder could deny them access:

> "You are not to come in here",

he could say,

> "to get your ball. I am not going to get it for you. For will I let you. It is going to stay there".

If the cricketers said:

> "It's a new ball. It cost us over £6",

the householder could say:

> "That is your look-out. You ought not to have put it there".

Of course, if the householder picked up the ball himself and gave it to his son to play with, he would be liable in conversion. But otherwise he would not be liable at all. He could say:

> "An Englishman's house is his castle. You are not coming in. Nor are you to hit your cricket ball in here. If you go on doing it, I am going to get an injunction to stop you. Once I prove the violation of a legal right, the Court of Chancery will grant me an injunction to prevent the recurrence of that violation" –

see Imperial Gas Light and Coke Co. v. .Broadbent (1859) 7 House of Lords Cases 600. Even if there was any doubt about the plaintiff's right to sue in trespass, he would have a claim in nuisance, once he proved that the balls were repeatedly coming over or under the fence and making things uncomfortable for him. To those claims, in the 19th Century, either in trespass or in nuisance, the committee of the cricket club would have no answer. They could not claim an easement because there is no such easement known to the law as a right to hit cricket balls into your neighbour's land. It would be no good for them to say that the cricket ground was there before the house was built. The householder could rely on the case a hundred years ago of the physician who built his new consulting-room next to the old established kitchen of his neighbour. The physician was held entitled to stop the working of the kitchen on the ground that the noise was a nuisance to him in his consulting-room - see Sturges v. Bridgman (1879) 11 Chancery Division 852.

The only way in which the cricket club could have succeeded in the 19th Century would have been by invoking the doctrine of "derogation from grant". We were told that until recently the cricket ground and the neighbouring fields were all owned by the National Coal Board. The Coal Board let the cricket ground to the cricket club on a long lease for years knowing that the very purpose of the lease was that the club should play cricket on it for the term of the lease. So long as the National Coal Board owned the neighbouring field, they could not complain of the occasional ball being hit out of the ground on to the field: nor could they have got an injunction to restrain the playing of cricket on the ground, seeing that they had leased it to the club for that very purpose. The reason being simply that it would be a derogation from the grant of the lease for them to do so. And if the National Coal Board sold the land to a purchaser (as they did), the purchaser and subsequent successors in title also could not complain of the occasional ball: nor could they have got an injunction: for the obligation imported by the doctrine of "derogation from grant" runs with the land just as do obligations which arise from a restrictive covenant - see Browne v. Flower (1911) 1 Chancery at page 226, by Mr. Justice Parker.

> "They bind not only the grantor but also all who claim through him ..."

It is in this that the importance of the doctrine lies - see Wade and Megarry's law of Real Property, 4th Edition, page 820.

THE LAW IN THE 20th CENTURY

The case here was not pleaded by either side in the formulae of the 19th Century. The plaintiffs did not allege trespass. The defendants did not raise the doctrine of derogation from grant. The case was pleaded in negligence or alternatively nuisance. That was, I think, quite right, having regard to the decision of the House of Lords in Bolton v. Stone [1951] AC 850,. Miss Stone had just stepped out of her garden gate on to the pavement when she was hit by a cricket ball. She did not sue in trespass to the person. That would be quite out of date. As I said in Letang v. Cooper (1965) 1 Queen's Bench at page 239:

> "If the defendant does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care",

Miss Stone did seek to put her case on the doctrine of Rylands v. Fletcher. She suggested that a cricket ball was a dangerous thing which the defendants had brought on to the cricket ground and it had escaped. That suggestion was dismissed by the House of Lords out of hand. Lord Reid said:

> "There is no substance in that argument"

- see [1951] AC at page 867. She also suggested that the club were liable in nuisance: but this was not pressed in the House of Lords, because nuisance was not distinguishable from negligence. Lord Porter remarked that

> "in the circumstances of this case nuisance cannot be established unless negligence is proved", see (1951) Appeal Cases at page 860.

In our present case, too, nuisance was pleaded as an alternative to negligence. The tort of nuisance in many cases overlaps the tort of negligence. The boundary lines were discussed in two adjoining cases in the Privy Council. The Wagon Mound in [1967] 1 AC 617 at page 639; and Goldman v. Hargrave in [1967] 1 AC 645 at page 657. But there is at any rate one important distinction between them. It lies in the nature of the remedy sought. Is it damages? Or an injunction? If the plaintiff seeks a remedy in damages for injury done to him or his property, he can lay his claim either in negligence or nuisance. But, if he seeks an injunction to stop the playing of cricket altogether, I

think he must make his claim in nuisance. The books are full of cases where an injunction has been granted to restrain the continuance of a nuisance. But there is no case, so far as I know, where it has been granted so as to stop a man being negligent. At any rate in a case of this kind where an occupier of a house or land seeks to restrain his neighbour from doing something on his own land, the only appropriate cause of action - on which to base the remedy of an injunction - is nuisance - see the report of the Law Commission on dangerous activities, Law Commission Report No. 32 at page 25. It is the very essence of a private nuisance that it is the unreasonable use by a man of his land to the detriment of his neighbour. He must have been guilty of the fault, not necessarily of negligence, but of the unreasonable use of the land - see The Wagon Mound (1967) 1 Appeal Cases at page 639 by Lord Reid.

It has been often said in nuisance cases that the rule is six utere tuo ut alienuin non laedas. But that is a most misleading maxim. Lord Wright put it in its proper place in Sedleigh-Denfield v. O'Callaghan [1940] AC 880, at page 903:

> "It is not only lacking in definiteness, but is also inaccurate. An occupier may make in many ways a use of his land which causes damage to the neighbouring landowners, and yet be free from liability ... a useful test is perhaps what is reasonable according to the ordinary uses of mankind living in society, or, more correctly, in a particular society."

I would, therefore, adopt this test: Is the use by the cricket club of this ground for playing cricket a reasonable use of it? To my mind it is a most reasonable use. Just consider the circumstances. For over 70 years the game of cricket has been played on this ground to the great benefit of the community as a whole, and to the injury of none. No one could suggest that it was a nuisance to the neighbouring owners simply because an enthusiastic batsman occasionally hit a ball out of the ground for six to the approval of the admiring onlookers. Then I would ask: Does it suddenly become a nuisance because one of the neighbours chooses to build a house on the very edge of the ground - in such a position that it may well be struck by the ball on the rare occasion when there is a hit for six? To my mind the answer is plainly No. The building of the house does not convert the playing of cricket into a nuisance when it was not so before. If and in so far as any damage is caused to the house or anyone in it, it is because of the position in which it was built. Suppose that the house had not been built by a developer, but by a private owner. He would be in much the same position as the farmer who previously put his cows in the field. He could not complain if a batsman hit a six out of the ground - and by a million to one chance - it struck a cow or even the farmer himself. He would be in no better position than a spectator at Lord's or the Oval or at a motor rally. At any rate, even if he could claim damages for the loss of the cow or the injury, he could not get an injunction to stop the cricket. If the private owner could not get an injunction, neither should a developer or a purchaser from him.

It was said, however, that the case of the physician's consulting room was to the contrary. Sturges v. Bridgman (1879) 11 Chancery Division 852. But that turned on the old law about easements and prescriptions, and so forth. It was in the days when rights of property were in the ascendant and not subject to any limitations except those provided by the law of easements. But nowadays it is a matter of balancing the conflicting interests of the two neighbours. That was made clear by Lord Wright in Sedleigh-Denfield v.O'Callaghan [1940] AC 880, at page 903, when he said:

> "A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with".

In this case it is our task to balance the right of the cricket club to continue playing cricket on their cricket ground - as against the right of the householder not to be interfered with. Upon taking the balance, I would give priority to the right of the cricket club to continue playing cricket on the

ground, as they have done for the last seventy years. It takes precedence over the right of the newcomer to sit in his garden undisturbed. After all he bought the house four years ago in mid-summer when the cricket season was at its height. He might have guessed that there was a risk that a hit for six might possibly land on his property. If he finds that he does not like it, he ought, when cricket is played, to sit in the other side of the house or in the front garden, or go out: or take advantage of the offers the club have made to him of fitting unbreakable glass, and so forth. Or, if he does not like that, he ought to sell his house and move elsewhere. I expect there are many who would gladly buy it in order to be near the cricket field and open space. At any rate he ought not to be allowed to stop cricket being played on this ground. This case is new. It should be approached on principles applicable to modern conditions. There is a contest here between the interest of the public at large; and the interest of a private individual. The public interest lies in protecting the environment by preserving our playing fields in the face of mounting development, and by enabling our youth to enjoy all the benefits of outdoor games, such as cricket and football. The private interest lies in securing the privacy of his home and garden without intrusion or interference by anyone. In deciding between these two conflicting interests, it must be remembered that it is not a question of damages. If by a million-to-one chance a cricket ball does go out of the ground and cause damage, the cricket club will pay. There is no difficulty on that score. No it is a question of an injunction. And in our law you will find it repeatedly affirmed that an injunction is a discretionary remedy. In a new situation like this, we have to think afresh as to how discretion should be exercised. On the one hand, Mrs. Miller is a very sensitive lady who has worked herself up into such a state that she exclaimed to the Judge:

> "I just want to be allowed to live in peace. Have we got to wait until someone is killed before anything can be done?"

If she feels like that about it, it is quite plain that, for peace in the future, one or other has to move. Either the cricket club have to move: But goodness knows where. I do not suppose for a moment there is any field in Lintz to which they could move. Or Mrs. Miller must move elsewhere. As between their conflicting interests, I am of opinion that the public interest should prevail over the private interest. The cricket club should not be driven out. In my opinion the right exercise of discretion is to refuse an injunction. I would allow the appeal, accordingly.

LORD JUSTICE GEOFFREY LANE. Since about 1905 cricket has been played on a field at the village of Lintz, County Durham. The village cricket ground is an important centre of village life in the summer months. It provides pleasure and relaxation for many, whether as spectators or players. We are told that the land is owned by the National Coal Board who let it to the club. The National Coal Board had also been the owners of an area of pasture-land to the north of the cricket ground. No difficulties arose from the use of the ground until 1972. The pasture-land had been sold by the National Coal Board to the Stanley Urban District Council in 1965, but in about 1972 it was bought from the J.D.C. by Messrs, Wimpey's Ltd. Wimpey's built a line of semi-detached houses there. One of those was bought by the plaintiffs. That is No. 20, Brackenridge - the name of the road.

The ground is small. In the centre is the "square" on which the wickets are prepared. This area is roughly 95' x 90' wickets are prepared North - South. From the Northern edge of this square to the boundary of the ground and the Plaintiffs' garden is only 102 feet. From the Southern crease to the garden is about 200 feet and to the house is only another 60 feet or so. In terms of cricket pitches, from the Southern crease to the Northern boundary it is only about 3 cricket pitches. From there to the house, less than another cricket pitch. It is therefore not surprising that since the houses were built, there have been a number of occasions on which cricket balls have been hit from the ground into the gardens of the various houses in Brackenridge.

The Judge accepted that the Plaintiffs when they bought the house did not pay any particular attention to the fact that it was a cricket field at the bottom of their garden, rather than any other sort of open space.

At that time there was a 6 foot high concrete fence between the ground and the gardens. But there was a sharp slope down from the fence to the gardens which were well below the level of the pitch. Thus the top of the 6 foot fence is roughly on a level with the eaves of the houses. The Judge accepted the Plaintiffs' evidence that on a number of occasions cricket balls have been struck into their garden or against their house. Some chipped the brick-work - some damaged the roof. In particular in 1972 three caused damage. In 1974 several balls came over - one of which caused damage.

The Plaintiffs complained. At the beginning of the 1975 season, as a result, the club erected a galvanised chain-link fence above the wall. The total height of wall and fence then became 14 feet 9 inches. It was an expensive operation costing some £700. Since then the Defendants have kept a tally of offending six-hits over this boundary. In 1975 9 balls hit the fence and 6 went over it. In the 1976 season 4 hit the fence and 8 or 9 went over it - 3 on one single day - August 21st. According to the Millers, five of the 1975 ones landed in their garden and 2 of those in 1976. On the 26th July, 1975 one just missed breaking the window of a room in which their son was seated. He was then aged about 11 or 12.

The Plaintiffs claimed damages and an injunction on the grounds of negligence and nuisance. The Judge upheld their claim. He granted an injunction, the effect of which in practical terms will be to stop cricket from being played on the ground.

The Defendants now appeal.

The Millers were not the only people in Brackenridge who suffered in this way. The Craigs moved to the next-door house, No. 19, in June 1975. By the time of the hearing in October 1976 they had had quite a number of balls come into their garden; about 6 to 8 in the 1975 season and the same number in 1976. One of them went through a glass pane and into the dining-room. That ball went over Mr. Craig's head as he was picking raspberries in his garden. His wife was in the house. Broken glass landed all around her. Mr. Craig since then does not venture out into the garden while there is a match in progress.

The Milners live at No. 24. They have been there for 4 years. They have only had 2 balls come over into their garden. They have a baby who was about 9 months old at the time of trial. Mrs. Milner would not leave him in the garden whilst a match was in progress.

There is no doubt however that of all the residents in Brackenridge the Millers were the people who seemed to have suffered the most. Judging from the evidence, Mrs. Miller -whether justifiably or not - seems to have become almost neurotic about this trouble. Certainly the Millers now take themselves off elsewhere while cricket is in progress, so that they will not be troubled by the incursions of cricket balls and of those who seek to retrieve them. It is perhaps worth remarking in passing that one of the things Mrs. Miller said she objected to was the attitude of club members who came to No. 20 in search of the balls. Although the Judge made no specific finding on the matter, it seems that she may have been unduly sensitive on this aspect of the affair at least.

In the end there was little if any dispute as to the basic facts. Taking the 1975 season as typical, the following statistics emerge. The season lasted 20 weeks. There were 36 matches. Three were on Sundays lasting 5 hours each. 14 were on weekdays lasting 2½ hours. 19 were on Saturday lasting about 5 hours. That is 145 hours in all, of which 110 were at the weekend. Thus on almost every Saturday during the summer when the weather was fine the houses and gardens in Brackenridge and anyone in them would be at risk.

The club officials who gave evidence were refreshingly candid and forthright. Mr. Jackson, the Chairman of the Club, freely conceded that there was no way in which they could stop balls going into the premises in Brackenridge from time to time; that the Plaintiffs were likely to suffer in the future as they had done in the past from broken tiles and so on; that something like an average of

eight balls a year were going to land in the vicinity of the Millers' house. Mr. Nevins, the captain of the first team, agreed that when these homes were first built it was obvious that there was going to be trouble from balls driven over the bowler's head into the gardens.

I have dealt with the evidence at some length because in the end the outcome of the case may depend upon a decision as to the degree of potential or actual danger to person or property.

No one has yet suffered any personal injury, though Mrs. Craig at least was perhaps lucky to have avoided it. There is no doubt that damage to tiles or windows at the Plaintiffs' house is inevitable if cricket goes on. There is little doubt that if the Millers were to stay in their garden whilst matches are in progress they would be in real danger of being hit.

In these circumstances, have the Plaintiffs established that the Defendants are guilty of nuisance or negligence as alleged? No technical question arises as to the position of the Defendants. It is conceded that if the actions of the players in striking the ball into the Plaintiffs' property is tortious, the Defendants are responsible therefore.

Negligence

The evidence of Mr. Nevins makes it clear that the risk of injury to property at least was both foreseeable and foreseen. It is obvious that such injury is going to take place so long as cricket is being played on this field. It is the duty of the cricketers so to conduct their operations as not to harm people they can or ought reasonably to foresee may be affected. The Defendants' answer to this, as I understand it, is as follows. They have taken every feasible step to prevent injury by erecting as high a fence as is possible having regard to the likely wind-forces. They have offered to fit louvered shutters to the Millers' south-facing windows to prevent the glass being broken. They have as an alternative offered to fit unbreakable glass to these windows. The Plaintiffs have declined the offer. The Defendants have now, since the trial, offered to erect a wire mesh cage or roof over the whole garden whilst matches are in progress, the cage to extend from the top of the concrete wall to the eaves of the house. Thus, say the Defendants, they have taken or offered to take all reasonable steps to protect the Plaintiffs from harm and consequently should not be liable on the basis of lack of reasonable care for the safety of their neighbours. That argument is fallacious. There is no obligation on the Plaintiffs to protect themselves in their own home from the activities of the Defendants. Even if there were such an obligation it would be unreasonable to expect them to live behind shutters during the summer weekends and to stay out of their garden. The latest idea of roofing over the garden with wire mesh is ill-thought out and impracticable. The drawing shows an unsupported 30 ft. span of netting. This is inaccurate. The agreed plan makes it clear that the true span is 60 ft. This obviously could not be kept in place without intermediate supports in the garden. It would be quite unreasonable to expect the Plaintiffs to consent to that sort of construction. There is no way in which damage to the Plaintiffs' property can reasonably be prevented except by ceasing to play cricket on this ground. The learned Judge put the matter in the following terms:

> "I have no hesitation in reaching the conclusion that when cricket is played on this ground any reasonable person must anticipate that injury is likely to be caused to the property at 20 Braekenridge or its occupants."

That is a finding from which it would be improper to depart even if one were minded to, which I am not.

It is true that the risk must he balanced against the measures which are necessary to eliminate it and against what the Defendants can do to prevent accidents from happening - Latimer v. A.E.C. [1953] AC 643. In that case a sudden storm had caused a factory floor to become flooded and slippery. The Defendants did all that could reasonably be expected of them, short of closing the factory, to prevent injury. It was held by the House of Lords that the risk of injury from the slippery floor was not sufficient to require the Defendants to shut the factory. Their decision in the words of Lord

Oaksey (at page 656) was at the highest "an error of judgment in circumstances of difficulty, and such an error of judgment does not amount to negligence". In the present case, so far from being one incident of an unprecedented nature about which complaint is being made, this is a series of incidents, or perhaps a continuing failure to prevent incidents from happening, coupled with the certainty that they are going to happen again. The risk of injury to person and property is so great that on each occasion when a ball comes over the fence and causes damage to the Plaintiffs, the Defendants are guilty of negligence.

Nuisance

In circumstances such as these it is very difficult and probably unnecessary, except as an interesting intellectual exercise, to define the frontiers between negligence and nuisance. See Lord Wilberforce in Goldman v. Hargrave [1967] 1 AC 645, 656.

Was there here a use by the Defendants of their land involving an unreasonable interference with the Plaintiffs' enjoyment of their land? There is here in effect no dispute that there has been and is likely to be in the future an interference with the Plaintiffs' enjoyment of No. 20 Brackenridge. The only question is whether it is unreasonable. It is a truism to say that this is a matter of degree. What that means is this. A balance has to be maintained between on the one hand the rights of the individual to enjoy his house and garden without the threat of damage and on the other hand the rights of the public in general or a neighbour to engage in lawful pastimes. Difficult questions may sometimes arise when the Defendants' activities are offensive to the senses for example by way of noise. Where, as here, the damage or potential damage is physical the answer is more simple. There is, subject to what appears hereafter, no excuse I can see which exonerates the Defendants from liability in nuisance for what they have done or from what they threaten to do. It is true no one has yet been physically injured. That is probably due to a great extent to the fact that the householders in Brackenridge desert their gardens whilst cricket is in progress. The danger of injury is obvious and is not slight enough to be disregarded. There is here a real risk of serious injury.

There is, however, one obviously strong point in the Defendants' favour. They or their predecessors have been playing cricket on this ground (and no doubt hitting sixes out of it) for 70 years or so. Can someone by building a house on the edge of the field in circumstances where it must have been obvious that balls might be hit over the fence, effectively stop cricket being played. Precedent apart, justice would seem to demand that the Plaintiffs should be left to make the most of the site they have elected to occupy with all its obvious advantages and all its equally obvious disadvantages. It is pleasant to have an open space over which to look from your bedroom and sitting room windows, so far as it is possible to see over the concrete wall. Why should you complain of the obvious disadvantages which arise from the particular purpose to which the open space is being put? Put briefly, can the Defendants take advantage of the fact that the Plaintiffs have put themselves in such a position by coming to occupy a house on the edge of a small cricket field, with the result that what was not a nuisance in the past now becomes a nuisance? If the matter were res integra, I confess I should be inclined to find for the Defendants. It does not seem just that a long-established activity - in itself innocuous - should be brought to an end because someone chooses to build a house nearby and so turn an innocent pastime into an actionable nuisance. Unfortunately, however, the question is not open. In Sturges v. Bridgman (1879) Law Report Chancery Division 852 this very problem arose. The Defendant had carried on a confectionary shop with a noisy pestle and mortar for more than twenty years. Although it was noisy, it was far enough away from neighbouring premises not to cause trouble to anyone, until the Plaintiff who was a physician built a consulting room on his own land but immediately adjoining the confectionary shop. The noise and vibrations seriously interfered with the consulting room and became a nuisance to the physician. The Defendant contended that he had acquired the right either at Common Law or under the Prescription Act by uninterrupted use for more than twenty years to impose the inconvenience. It was held by the Court of Appeal affirming the judgment of Lord Jessel, the Master of the Rolls, that use such as this which was, prior to the construction of the consulting room, neither preventable nor actionable, could not

found a prescriptive right. That decision involved the assumption, which so far as one can discover has never been questioned, that it is no answer to a claim in nuisance for the Defendant to show that the Plaintiff brought the trouble on his own head by building or coming to live in a house so close to the .Defendant's premises that he would inevitably be affected by the Defendant's activities, where no one had been affected previously. See also Bliss v. Hall (1838) 4 Bingham New Cases 183. It may be that this rule works injustice, it may be that one would decide the matter differently in the absence of authority. But we are bound by the decision in Sturges v. Bridgman and it is not for this Court as I see it to alter a rule which has stood for so long.

Injunction

Given that the Defendants are guilty of both negligence and nuisance, is it a case where the Court should in its discretion give discretionary relief, or should the Plaintiffs be left to their remedy in damages? There is no doubt that if cricket is played damage will be done to the Plaintiff's tiles or windows or both. There is a not inconsiderable danger that if they or their son or their guests spend any time in the garden during the weekend afternoons in the summer they may be hit by a cricket ball. So long as this situation exists it seems to me that damages cannot be said to provide an adequate form of relief. Indeed, quite apart from the risk of physical injury, I can see no valid reason why the Plaintiffs should have to submit to the inevitable breakage of tiles and/or windows, even though the Defendants have expressed their willingness to carry out any repairs at no cost to the Plaintiffs. I would accordingly uphold the grant of the injunction to restrain the Defendants from committing nuisance. However, I would postpone the operation of the injunction for 12 months to enable the Defendants to look elsewhere for an alternative pitch.

So far as the Plaintiffs are concerned, the effect of such postponement will be that they will have to stay out of their garden until the end of the cricket season but thereafter will be free to use it as they wish.

I have not thought it necessary to embark upon any discussion of the possible rights of the Defendants arising from matters which were neither pleaded nor argued.

LORD JUSTICE CUMMING-BRUCE: I agree with all that Lord Justice Lane has said in his recital of the relevant facts and his reasoning and conclusion upon the liability of the Defendants in negligence and nuisance, including his observation about the decision in Sturges v. Bridgman. The Plaintiffs are successors in title to the National Coal Board, who granted the present lease to the Defendants in 1970, and that lease replaced an earlier lease. Both leases let the land for use as a cricket ground. It might seem strange therefore that the Defendants have not relied upon the defence that by their claim the Plaintiffs seek to achieve a derogation of the grant of their predecessors in title. If available, this would be a defence to the actions in negligence and nuisance. It is a principle now established as a rule of law, and applies equally to assignees and purchasers with and without notice. That approach to the facts was suggested by the Court in this court, but the Plaintiffs did not apply to amend their defence, and made no submission upon it. We have been told today that the National Coal Board sold the Brackenridge land five years before the new lease. It is not open to this court to consider that defence.

The only problem that arises is whether the learned Judge is shown to be wrong in deciding to grant the equitable remedy of an injunction which will necessarily have the effect that the ground which the Defendants have used as a cricket ground for 70 years can no longer be used for that purpose.

Mr. Justice Reeve correctly directed himself that the principles which apply are those described by Lord Evershed, the Master of the Rolls, in the Pride of Derby case, and by Lord Justice A.L. Smith in Shelfer v. City of London Electric Lighting Co. (1895) 1 Chancery 287. Did he correctly apply those principles to the facts of the case? There is authority that in considering whether to exercise a judicial discretion to grant an injunction the court is under a duty to consider the interests of the public. So said Lord Romilly, Master of the Rolls, over 100 years ago, but the conflict of interest

there was between proprietary private rights and the inconvenience to be suffered by users of a railway. Courts of equity will not ordinarily and without special necessity interfere by injunction where the injunction will have the effect of very materially injuring the rights of third persons not before the court. The principle has recently been accurately stated in a text book:

> "Regard must be had not only to the dry strict rights of the plaintiff and the defendant, but also the surrounding circumstances, to the rights or interests of other persons which may be more or less involved. So it is that where the Plaintiff has a prima facie right to specific relief, a court of equity will, if occasion should arise, weigh the disadvantage or hardship which he will suffer if relief were refused against any hardship or disadvantage which would be caused to third persons or to the public generally if relief were granted". See Spry on Equitable Remedies at page 365, and the cases referred to in the footnote.

Putting it in a slightly different way, Lord Wright said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society (Sedleigh-Denfield v. O'Callaghan [1940] AC 880, at page 903).

So on the facts of this case a court of equity must seek to strike a fair balance between the right of the Plaintiffs to have quiet enjoyment of their house and garden without exposure to cricket balls occasionally falling like thunderbolts from the heavens, and the opportunity of the inhabitants of the village in which they live to continue to enjoy the manly sport which constitutes a summer recreation for adults and young persons, including one would hope and expect the plaintiffs' son. It is a relevant circumstance which a court of equity should take into account that the plaintiffs decided to buy a house which in June 1972 when completion took place was obviously on the boundary of a quite small cricket ground where cricket was played at weekends and sometimes on evenings during the working week. They selected a house with the benefit of the open space beside it. In February, when they first saw it, they did not think about the use of this open space. But before completion they must have realised that it was the village cricket ground, and that balls would sometimes be knocked from the wicket into their garden, or even against the fabric of the house. If they did not realise it, they should have done. As it turns out, the female plaintiff has developed a somewhat obsessive attitude to the proximity of the cricket field and the cricketers who visit her to seek to recover their cricket balls. The evidence discloses a hostility which goes beyond what is reasonable, although as the learned judge found she is reasonable in her fear that if the family use the garden while a match is in progress they will run risk of serious injury if a great hit happens to drive a ball up to the skies and down into their garden. It is reasonable to decide that during matches the family must keep out of the garden. The risk of damage to the house can be dealt with in other ways, and is not such as to fortify significantly the case for an injunction stopping play on this ground.

With all respect, in my view the learned judge did not have regard sufficiently to these considerations. He does not appear to have had regard to the interest of the inhabitants of the village as a whole. Had he done so he would in my view have been led to the conclusion that the plaintiffs having accepted the benefit of the open space marching with their land should accept the restrictions upon enjoyment of their garden which they may reasonably think necessary. That is the burden which they have to bear in order that the inhabitants of the village may not be deprived of their facilities for an innocent recreation which they have so long enjoyed on this ground. There are here special circumstances which should inhibit a court of equity from granting the injunction claimed. If I am wrong in that conclusion, I agree with Lord Justice Lane that the injunction should be suspended for one year to enable the defendants to see if they can find another ground.

(Order: Appeal allowed. Past and future damages at £400. No order for costs here or below save legal aid taxation)

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