

CHAPTER SIX LIABILITY NOT BASED ON CONDUCT

6.4. FROM LIABILITY BETWEEN NEIGHBOURS TO ENVIRONMENTAL LIABILITY

6.4.1. LIABILITY REGIMES APPLICABLE BETWEEN NEIGHBOURS

a) As regards German law, § 906 BGB provides the framework for relations between neighbours.¹ That provision is primarily concerned with *actions to obtain the termination of interferences* with the enjoyment of property that come from other properties, including the subjection to gases, vapours, odours, smoke, soot, heat, noise or vibrations. Such actions can be brought by the owner of the affected land pursuant to §§ 903 and 1004 BGB. As a first step, § 906(1) BGB enables the defendant — the owner of the “emitting” property — to avoid a termination order by showing that the interference does not constitute a significant restriction on the use of the property of the claimant.² Otherwise, termination of the interference will be ordered unless, in reliance on § 906(2) BGB, the defendant can show that the interference arises from a use of property that is common at that location (*ortübliche Benutzung des Grundstücks*) and cannot be avoided by measures which can economically be imposed on the user (*wirtschaftlich zumutbar*). If the defendant avoids a termination order by satisfying the burden of proof under § 906(2) BGB, the claimant has the *right to obtain compensation* by establishing that the interference excessively impairs his or her ability to put the property to use and produce benefits such as is common at the location. In its case law, the BGH has transposed the finely balanced substantive criteria and evidentiary burdens of § 906 BGB to *cases brought under § 823 BGB* in respect of emissions from a piece of land; accordingly, § 906 BGB, which makes no reference to fault on the part of the defendant, plays a significant role in the application of § 823 BGB, and that as regards emissions which affect not only other pieces of land, but also those which have an adverse impact on moveable property.³

¹ See *supra*, Chapter II, 2.3.2., Introductory Note under f) as well as **2.G.39**, and notes thereafter.

² In this respect, the second and third sentences of § 906(1) BGB refer to legislative or administrative norms governing pollution and emission. Respect of such norms by the defendant indicates that the restriction imposed upon the plaintiff is not significant. In addition, Münchener-Säcker, § 906 at 607-12, para. 22-38, mentions that the criteria used to determine whether the restriction is significant now tend to incorporate a reference to the surroundings, which puts property owners in busy areas at a disadvantage and tends to render the rest of § 906 BGB irrelevant.

³ See BGH, 18 September 1984, *supra*, **2.G.39**.

LIABILITY NOT BASED ON CONDUCT

b) Under French law, a specific regime of liability without fault has arisen out of the case law concerning inconveniences between neighbours (*troubles de voisinage*).⁴ That regime of liability was originally an application of Art. 1382 C.civ. in the realm of relations between neighbours, but it has outgrown its origin to become an autonomous head of liability that does not involve fault. The key principle is that “one shall not interfere with the enjoyment of neighbouring property in a manner going beyond the normal”.⁵ The focus of the examination therefore lies on the abnormality of the interference, which is assessed according to its intensity, its duration, the use of property at that particular location and, within certain limits, the sensitivity of the plaintiff.⁶ Pursuant to Article L. 112-16 of the *Code de la construction et de l’habitation*, the defendant can also raise a “first occupancy” defence.⁷

c) Finally, the tort of — private — nuisance as well as the rule in *Rylands v. Fletcher* are available to the aggrieved holder of a right in real property under English law.⁸ Nuisance deals primarily with interferences with the enjoyment of land coming from another piece of land, while the rule in *Rylands v. Fletcher* concerns the escape of noxious substances from one piece of land to another. The two torts were drawn closer to one another by the decision of the House of Lords in *Cambridge Water Co. v. Eastern Counties Leather Plc.*⁹ Neither of the torts requires fault or negligence on the part of the defendant: under the tort of nuisance, the liability of the defendant for reasonably foreseeable damage can be engaged if there was an *unreasonable use* of land;¹⁰ similarly, under the rule in *Rylands v. Fletcher*, the defendant will be liable for reasonably foreseeable damage if the presence of the escaping substances on the defendant’s land constituted a *non-natural use* of the defendant’s property for the escaping substances to be there.¹¹ When assessing the reasonableness of use under the tort of nuisance, account will be taken of the character of the neighbourhood, the duration of the interference, the significance of the discomfort for the average person and the defendant’s intent.¹²

⁴ See *supra*, Chapter II, 2.3.3., Introductory Note under c).

⁵ See Viney and Jourdain, *Conditions* at 1063-4, para. 939; Le Tourneau and Cadet at 815-6, para. 3292.

⁶ See Viney and Jourdain, *Conditions* at 1078-83, para. 955-8; Le Tourneau and Cadet at 818-9, para. 3305-9.

⁷ *Ibid.*

⁸ See *supra*, Chapter II, 2.3.1., Introductory Note under a) as well as **2.E.35.** and notes thereafter.

⁹ *Supra*, **2.E.35.**

¹⁰ *Clerk & Lindsell on Torts* at 905, para. 18-29.

¹¹ *Clerk & Lindsell on Torts* at 959-61, para. 19-10 and 19-11; Markesinis and Deakin at 464-6; Rogers at 451-4.

¹² See *Clerk & Lindsell on Torts* at 894-7, para. 18-10 to 18-14; Markesinis and Deakin at 425-30, 433-4; Rogers at 405-14.