IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO HCV 0852/2006

BETWEEN	**ERICA ALLEN NEEDHAM**	**FIRST CLAIMANT**
AND	**FIONA CLARKE**	**SECOND CLAIMANT**
AND	**CHARMAINE SENIOR**	**DEFENDANT**

IN CHAMBERS

Mr. Crafton Miller and Miss Stephanie Orr instructed by Crafton Miller and Company for the claimants

Defendant absent and not represented

March 16, 17 and 24, 2006

EX PARTE APPLICATION FOR INJUNCTION, PRIVATE NUISANCE AND TORT OF HARASSMENT

SYKES J

1. Mrs. Erica Allen-Needham, first claimant, is the registered proprietor of the house where she lives in the parish of St. Andrew. Mrs. Fiona Clarke, the second claimant, lives in a studio at the same premises. Mrs. Clarke does not have known proprietary interest in the property and neither does she have or is entitled to exclusive possession. Mrs. Erica Allen-Needham is the mother of Mrs. Fiona Clarke. They have come to this court seeking an injunction to protect them from telephone calls Ms. Charmaine Senior, the defendant, made to the telephone number assigned to Mrs. Clarke on February 21, 22 and 23, 2006. The telephone is at the house where both claimants live. These telephone calls are the latest episode in a fifteen year saga during which Ms. Senior has been bothering Mrs. Allen-Needham. Mrs. Clarke does not appear to be the target of Ms. Senior's obsession.

2. The claimants seek an interim injunction in the following terms:

The defendant by herself or by her agent or whosoever on her instruction be restrained from

i. harassing, molesting, threatening, pestering, assaulting or otherwise interfering with the Claimants;

ii. communicating with them by telephone or otherwise;

iii. watching, besetting or coming or remaining within 500 feet of Claimant (sic), the first claimant's residence or behaving towards them in any other manner which is of such nature or degree as to cause annoyance or interference to the Claimant and amount to nuisance.

3. I have used the allegations from the amended particulars of claim to state the history of the matter. Since approximately 1991 Ms. Senior has been harassing Mrs. Allen-Needham. Ms. Senior believes that she is the abandoned daughter of Mrs. Allen-Needham and the Right Honourable Michael Manley (the former Prime Minister of Jamaica). Mrs. Allen-Needham emphatically denies that she had any relationship with Mr. Manley and she definitely did not have his daughter.

4. Ms. Senior's harassment of Mrs. Allen-Needham began when the claimant worked at the now defunct Jamaica Broadcasting Corporation. Mrs. Allen-Needham has changed jobs a number of times since 1991 and at each new work place Ms. Senior appears and tries to secure acknowledgment that she is the first claimant's daughter. Ms. Senior has, over the years, sent to the first claimant unwelcomed and unwanted cards and letters.

5. Ms. Senior has contacted Mrs. Allen-Needham by telephone at her places of employment. Mrs. Allen-Needham now works at Power 106 and Nationwide News Network. The defendant is at these premises almost daily. The defendant waits at the gate or across the street. The first claimant has another job at Advertising Consultants Ltd. The defendant contacts her there by telephone. There is no indication that the calls threaten violence but they are clearly annoying and upsetting to the first claimant.

6. Matters escalated since June 2005 when the defendant turned up at St. Jude's Anglican Church, Stony Hill, St. Andrew, where the first claimant worships and made quite a scene which caused Mrs. Allen-Needham grave embarrassment. On two occasions in December 2005, the defendant berated Mrs. Allen-Needham at the church. The constant fear of the defendant's presence at the church led to Mrs. Allen-Needham changing her place of worship where she has worshipped for approximately thirty years.

7. There is evidence to suggest that Ms. Senior is suffering from a psychiatric illness and that she has been treated and is being treated by psychiatrists. It is said that the defendant has admitted to having a fixation on Mrs. Allen-Needham.

8. The claimants allege that unless the defendant is restrained they fear that they will be unable to live free from fear of the defendant's harassment. Warnings from the police and the private security firm employed by Mrs. Allen-Needham have not had the desired effect. The claimants believe that the defendant will at some point arrive at the civic address of the claimants and behave in the same way that the she does at each new place of employment.

9. It was the calls made on February 21, 22 and 23, 2006, to the first claimant's home on a telephone line in the name of the second claimant that have precipitated this application. In one message left on the telephone answering service the defendant admitted that she has been, treated by numerous psychiatrists, has taken prescribed medication for her illness and has been hospitalised on at least fourteen occasions. Understandably, both claimants fear for their safety. The claimants hang their claim for the injunction on the peg of private nuisance.

10. It is observed that the terms of the injunction all speak to acts directed at the claimants in their personal capacity, that is to say, it affects the claimants whether or not they are registered proprietors or entitled to exclusive possession or have exclusive possession of land and does not diminish their enjoyment of the property as property. This observation, without more, is sufficient for me to say that the tort of nuisance cannot be used to ground this injunction. However, I shall not leave the matter there. I shall demonstrate by analysing the law that the injunction sought cannot be granted in this cause of action.

The law

11. It is well established law that an injunction is not a cause of action but a remedy flowing out of a cause of action, that is to say, facts which give rise to a claim recognised by law (see ***Siskina (cargo owners) v Distos Cia Naviera SA The Siskina*** [1979] AC 210). The claimants rely on private nuisance as the cause of action. The first question is whether the conduct alleged amounts to private nuisance.

12. Mrs. Allen-Needham obviously has a proprietary interest in the land where the telephone is located and so has locus standi to bring the action in nuisance. Mr. Miller has cited the case of ***Khorasandjian v Bush*** [1993] 3 All ER 669 in support of the proposition that telephone calls can constitute harassment which itself can amount to private nuisance. For reasons that I shall give later I do not agree with this proposition. What ***Khoransandjian*** and the instant case highlight is the yawning gap in the common law. It does not recognise

any general right to privacy and up until now has not explicitly recognised the tort of harassment.

13. Dillon L.J. in ***Khoransandjian*** took the bold step of declining to follow a previous decision of the English Court of Appeal of ***Malone v Laskey*** [1907] 2 KB 141 in favour of a decision of the Alberta Supreme Court in Canada (***Motherwell v Motherwell*** (1976) 74 D.L.R. (3d) 62) in order to grant the remedy sought. Dillon L.J. took the view that the law did not prevent a person without proprietary interest in land from suing in private nuisance. He went on to suggest that persons with less than proprietary interest or the right to exclusive possession could sue. Thus spouses and children without any of the interests just mentioned could sue. Rose L.J. concurred with this radical judgment. Peter Gibson J. strongly disagreed.

14. This revolt was short lived and by 1997, the House of Lords restored orthodoxy and halted the advance of the heresy in a firm and decisive manner in its decision of ***Hunter v Canary Wharf*** [1997] A.C. 655. The House decided, accepting the submissions of Lord Irvine, that to sue in private nuisance the claimant must have a proprietary or possessory interest in land; mere occupation is insufficient. This is so because the tort of nuisance has as its main object the protection of a person's enjoyment of his land. As will be shown, it is entirely logical that the law requires that the claimant should be the person in actual possession as (a) free holder, (b) a tenant or (c) at least a licensee in exclusive possession. A reversioner can only sue if the nuisance is such that his reversionary interest is being damaged. The House scotched the purported distinction relied on by Dillon L.J. distinction between a mere licensee and a person with occupation of a substantial nature short of the three things just mentioned. Lord Goff stigmatised the approach of Dillon L.J. as an improper method of introducing through the back door a new tort. Lord Goff said at page 691 - 692:

> *If a plaintiff, such as the daughter of the householder in Khorasandjian v. Bush, is harassed by abusive telephone calls, the gravamen of the complaint lies in the harassment which is just as much an abuse, or indeed an invasion of her privacy, whether she is pestered in this way in her mother's or her husband's house, or she is staying with a friend, or is at her place of work, or even in her car with a mobile phone. In truth, what the Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in her home. I myself do not consider that this is a satisfactory manner in which to develop the law, especially when, as in the case in question, the step so taken was inconsistent with another decision of the Court of Appeal, viz. Malone v. Laskey [1907] 2 K.B. 141, by which the court was bound. In any event, a tort of harassment has now*

received statutory recognition: see the Protection from Harassment Act 1997. We are therefore no longer troubled with the question whether the common law should be developed to provide such a remedy. For these reasons, I do not consider that any assistance can be derived from Khorasandjian v. Bush by the plaintiffs in the present appeals.

It follows that, on the authorities as they stand, an action in private nuisance will only lie at the suit of a person who has a right to the land affected. Ordinarily, such a person can only sue if he has the right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession. Exceptionally however, as Foster v. Warblington Urban District Council shows, this category may include a person in actual possession who has no right to be there; and in any event a reversioner can sue in so far his reversionary interest is affected. But a mere licensee on the land has no right to sue.

15. The weakness of the claimants' case based on private nuisance is exposed by the fact that had the same conduct being used to ground the injunction, namely the telephone calls between February 21 and 23, 2006, taken place at places of work or out in the public square via cellular telephones, no lawyer would think of a claim in private nuisance. The opening sentences of the just cited passage makes the point well. The complaint in this case before me is really one of a personal nature rather that one that has anything to do with land per se. Lord Goff also objected to this extension on the ground that the substantial-connection-with-the-property test on which Dillon L.J. relied was too uncertain in determining who should sue.

16. Lord Berwick's classification of the three types of nuisance really puts an end to the claimants' argument based on the tort of private nuisance. He stated at page 695 and 696:

Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land. In cases (1) and (2) it is the owner, or the occupier with the right to exclusive possession, who is entitled to sue. It has never, so far as I know, been suggested that anyone else can sue, for example, a visitor or a lodger; and the reason is not far to seek. For the basis of the cause of action in cases (1) and (2) is damage to the land itself, whether by encroachment or by direct physical injury.

In the case of encroachment the plaintiff may have a remedy by way of abatement. In other cases he may be entitled to an injunction. But where he claims damages, the measure of damages in cases (1) and (2) will be the diminution in the value of the land. This will usually (though not always) be equal to the cost of reinstatement. The loss resulting from diminution in the value of the land is a loss suffered by the owner or occupier with the exclusive right to possession (as the case may be) or both, since it is they alone who have a proprietary interest, or stake, in the land. So it is they alone who can bring an action to recover the loss.

...

Like, I imagine, all your Lordships, I would be in favour of modernising the law wherever this can be done. But it is one thing to modernise the law by ridding it of unnecessary technicalities; it is another thing to bring about a fundamental change in the nature and scope of a cause of action. It has been said that an actionable nuisance is incapable of exact definition. But the essence of private nuisance is easy enough to identify, and it is the same in all three classes of private nuisance, namely, interference with land or the enjoyment of land. In the case of nuisances within class (1) or (2) the measure of damages is, as I have said, the diminution in the value of the land. Exactly the same should be true of nuisances within class (3). There is no difference of principle. The effect of smoke from a neighbouring factory is to reduce the value of the land. There may be no diminution in the market value. But there will certainly be loss of amenity value so long as the nuisance lasts. If that be the right approach, then the reduction in amenity value is the same whether the land is occupied by the family man or the bachelor.

If the occupier of land suffers personal injury as a result of inhaling the smoke, he may have a cause of action in negligence. But he does not have a cause of action in nuisance for his personal injury, nor for interference with his personal enjoyment. It follows that the quantum of damages in private nuisance does not depend on the number of those enjoying the land in question. It also follows that the only persons entitled to sue for loss in amenity value of the land are the owner or the occupier with the right to exclusive possession.

17. The question is, in which of these three categories does the claimants' case fall? There is certainly no encroachment and there is undoubtedly no direct physical injury to the land of the claimants. We are therefore left with the third category. But does the action complained of fit there? Regrettably, the answer is no.

18. This passage establishes that the way in which damages are measured in the tort of private nuisance makes it difficult for the claimants to sustain their case under this tort. Can it be said that there has been a loss of amenity value of the property where the claimants live? If the tort of nuisance is as I understand it, the question then is what diminution in value or enjoyment of the land has occurred because of the telephone calls? How would the damages for Mrs. Clarke be assessed? Would it be any different for her mother's?

19. Lord Hoffman, another of the majority, stated that the third category of private nuisance identified by Lord Berwick has, over time, been seen, quite erroneously, as dealing with personal discomfort to the individual and not to the land. The third category is not about personal discomfort per se though the nuisance may in fact produce personal discomfort. It is about reducing the usefulness of the land. To quote from Lord Hoffman at page 707

Once it is understood that nuisances "productive of sensible personal discomfort" (St. Helen's Smelting Co. v. Tipping, 11 H.L.Cas. 642, 650) do not constitute a separate tort

of causing discomfort to people but are merely part of a single tort of causing injury to land, the rule that the plaintiff must have an interest in the land falls into place as logical and, indeed, inevitable.

20. When understood in this way it is obviously quite a stretch to say that the telephone calls have reduced the usefulness of the land. The light shed by Lord Hoffman has stripped the present claim of any proper legal foundation for an injunction. What the claimants are really concerned about is their personal discomfort and not the reduced utility of the land. Mr. Miller sought to overcome these difficulties by suggesting that the question of whether telephone calls are sufficient to constitute private nuisance was left intact by ***Hunters'*** case. The claimants' written submissions say that that issue was not before the House and therefore it is still the law that telephone calls may constitute private nuisance. I doubt this very much because phone calls per se are extremely unlikely to reduce the utility of the land as land. For this reason, I do not think that the actual decision of ***Khoransandjian*** that telephone calls can constitute the tort of private nuisance can stand with the analysis of the majority of the House of Lords and must necessarily be overruled in so far as it decides that telephone call can amount to the tort of private nuisance.

21. The dissenting judgment of Lord Hope has not satisfactorily answered the issues raised by the majority. His references to international developments relating to the rights of children and other developments do not advance his thesis. I therefore conclude that the first claimant's claim fails on the basis that telephone calls per se do not constitute the tort of private nuisance. The second claimant fails for the same reason and additionally, she fails because there is no evidence of any proprietary interest or right to exclusive possession in her. But is this necessarily the end of the matter? I do not think so.

22. The House, in ***Hunter***, was relieved of the problem of considering whether the common law should now recognise a tort of harassment. I should state explicitly that I agree with the reasoning of the majority of the House of Lords in ***Hunter*** that private nuisance is not the appropriate tort for the kind of conduct for which an injunction is being sought in the case before me. However I do not agree with the House that Clement J.A. who delivered the judgment of the court in the Canadian case of ***Motherwell***, misread the English case of ***Foster v. Warblington Urban District Council*** [1906] 1 K.B. 648. What he was doing was to demonstrate the ability of the common law to adapt to new situations. He made reference to the development in the law of negligence, restitution, unjust enrichment and fiduciary duties to make the point about the adaptability of the common law. To this could

be added freezing injunctions and search orders. Clement J.A. was quite aware that he was being asked to apply the law of nuisance not covered by previous exposition of the law.

23. Should a tort of harassment now be recognised? The issues in the case of ***Minna Wong v. Parkside Health NHS Trust & Anr*** [2001] EWCA Civ 1721 (delivered November 16, 2001) were (1) the limits of the tort of intentional inflicting harm under the ***Wilkinson v Downton*** [1897] 2 Q.B. 57 principle and (2) whether the tort of harassment existed before the Prevention of Harassment Act of 1997. Lady Justice Hale stated that the ***Wilkinson v Downton*** principle had not gone as far as giving a cause of action if the conduct of the defendant was deliberate but there was no physical harm or recognised psychiatric illness. She said that the necessary ingredients of the tort are (1) the defendant acted deliberately and intended to violate the claimant's interest in freedom from such harm and (2) actual damage which is either physical or a recognised psychiatric illness (see para. 11 and 12). She added that the damage must be such that the degree of harm was sufficiently likely to result from the defendant's conduct. Apparently the intention to cause the harm under the tort of intentional harm must be pleaded specifically (see para. 13).

24. Lady Justice Hale (as she then was) embarked upon an analysis to determine whether the tort of harassment existed. Hale L.J. concluded her analysis by saying that "[there was] no warrant for concluding that the common law had by then [the time of Hunter] reached the point of recognising a tort of intentional harassment going beyond the tort of intentional infliction of harm. It is a clear indication that matters should now be left to Parliament" (see paragraph 29). It is significant that she also concluded that "[u]ntil that Act came into force, there was power to restrain by injunction conduct which **might** result in the tort of intentional infliction of harm or otherwise threaten the claimant's right of access to the courts, but there was no right to damages for conduct falling short of an actual tort" (see paragraph 30) (my emphasis).

25. Her Ladyship concluded, upholding the decision to strike out the case against the second defendant, that at the time the alleged incidents took place there was no tort of harassment. It is to be noted that Hale L.J. was speaking in the post Prevention of Harassment Act era and so she was not concerned with whether the tort of harassment ought to be recognised. She simply decided that the tort did not exist at the time the claimant filed her action against the second defendant. The Act, it was said, did not operate retrospectively. It is important to note that the Lady Justice did not identify any conceptual

impediments to recognising such a tort. When she observed that the tort of intentional harassment did not extend to cover situations where there was not physical harm or recognised psychiatric illness, she was simply identifying the boundaries of that tort. Her conclusion, in my view, only served to highlight the gap in the law. It is quite remarkable that the claimant has to suffer either physical harm or a recognised psychiatric illness before he can succeed whenever harassment is being alleged. I would have thought that the law would wish to prevent physical or psychiatric harm once there is clear evidence of harassing conduct aimed at producing the harm but has not yet done so. Even if the claimant launches a claim alleging the tort of intentional harassment, he would only receive, until trial, an interim injunction on a quia timet basis but would fail if, at the subsequent trial, he was unable to prove physical harm or a recognised psychiatric illness.

26. Implicit in Her Ladyship's analysis and conclusion is that prior to the 1997 Act, harassment cases can be dealt with under the rubric of the tort of intention to inflict harm. Her Ladyship was therefore saying if the harassment in question **might** (not did) result in the tort of intentional infliction of harm then an interim injunction may be granted. This is one way in which the current case may be dealt with and I agree with the Lady Justice on this. This solution for the reasons I have stated above is not the best that the law can devise.

27. What is significant about the ***Minna*** case and those cited by Hale L.J. is that there was no doubt that the conduct complained of was harassment. They were targeted at the claimants in all the cases with the clear intention of making the claimants' lives miserable. Harassment may not produce any recognised psychiatric illness and may not produce any physical harm but there can be no doubt that it produces anxiety and distress. When one reads the cases, the language is all there to identify the elements of the tort of harassment. In response to the analysis of Hale L.J. we are left with three options. First, extend the tort of intentional harm to cover situations where there is no physical damage or recognised psychiatric illness, (b) recognise explicitly the tort of harassment or (c) await legislative action. Of these three I opt for the second. I do so for these reasons. The tort of intentional harm has already been established and its ingredients are well known. Awaiting legislative action is not an attractive proposition given that there is no indication that this matter will be considered any time soon and that the common law can be developed in a manner consistent with existing law to deal with harassment. It would seem to be that the common

law can and should evolve to deal with these situations. The recognition of this tort would complete the circle of torts that deal with conduct directed at persons. It would fill the gap between assaults and the tort of intentional harm.

28. The tort of harassment should now be recognised. In taking this step I am doing nothing more than what Wright J. did in ***Wilkinson v Downton***, that is, recognising that certain facts do give rise to a cause of action. The elements as I see it are deliberate conduct directed at the claimant resulting in damage; the damage being anxiety and distress, short of physical harm or a recognised psychiatric illness. Professor Fleming makes the point that frequently the intention of the defendant is to frighten, terrify or alarm the claimant. I agree with this but for the tort of harassment these are not necessary though sufficient to sustain the tort of harassment. The defendant may only intend to produce anxiety or distress. Mere annoyance is not enough. There is nothing in ***Hunter*** or indeed any case that suggests that defining the tort of harassment in this way would do any violence to existing legal concepts. The issue of how the damages should be quantified is not an obstacle. The courts have long experience in assessing damages in difficult areas (see Lord Hoffman in ***Hunter***). In the tort of harassment the most likely remedy is an injunction.

Conclusion

29. The final question is the disposition of the case before me. The law of private nuisance is an improper vehicle to ground the injunctive relief sought. The application for the injunction is dismissed because private nuisance is not an appropriate cause of action out of which the injunction prayed can flow. The claimants' need to amend their claim or file a new claim alleging either (a) the tort of intentional harm where an injunction an quia timet basis may be granted or (b) the tort of harassment.