

SPORT AND NUISANCE LAW*

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I ALLACLAS INVESTMENTS v MILNERTON GOLF CLUB (2008)

(a) Background

When the a quo decision in *Allaclas Investments v Milnerton Golf Club*¹ was reported I initially regarded it as a straightforward and sensible application of ‘normal’, well-established neighbour law principles.

The applicants owned or occupied residential property in a development bordering on the Milnerton Golf Course that was marketed as a golf estate.² They claimed that their houses on several occasions had been hit by stray golf balls. The second applicant had at one point erected a net around part of his property, but this did not solve the problem and obscured his view of Table Mountain.³ The respondent planted trees that would (in time) eventually screen the houses from stray golf balls, but this solution had not yet become effective.⁴ Applicants wanted the respondent to take more immediate measures, including reducing the sixth hole from a par 5 to a par 4, but this would have affected the functioning of the golf course and would have caused similar problems for owners elsewhere along the course.⁵ Respondents temporarily reduced the sixth hole to a par 4 on all days but Wednesdays and Saturdays, but contended that the applicants had not made a

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¹ *Allaclas Investments (Pty) Ltd v Milnerton Golf Club (Steltzner & others intervening)* 2007 (2) SA 40 (C). See C G van der Merwe & J M Pienaar ‘The law of property (including real security)’ 2007 *ASSAL* 961 at 986–8; J Neethling & J Potgieter ‘The law of delict’ 2007 *ASSAL* 767 at 781–2 for a discussion of the a quo decision.

² *Allaclas* (C) para 3.

³ See note 12 below.

⁴ *Allaclas* (C) para 5.

⁵ Some of the other owners therefore intervened to argue against this remedy: *ibid* paras 18, 21.

convincing case to substantiate an order that would compel them to make that arrangement permanent.⁶

The Cape High Court confirmed the general neighbour law principle that the reasonableness of a landowner's actions, in so far as they affect neighbours, has to be assessed with reference to the kind and location of the properties involved, their normal use, and local custom concerning their use.⁷ In this context, the court decided, an owner of property adjoining a golf course had to expect a certain level of intrusion from stray golf balls and also had to be willing to undertake steps to alleviate the problem.⁸ The applicants accepted that their use and enjoyment of property would be restricted by its location on a golf course, but complained that the incidence of stray golf balls hitting their home were unacceptably high and that some of the stray balls had caused damage to their houses.⁹ However, the court held that it had not been established that the incidence of stray golf balls actually hitting the property was extraordinarily high, or that the damage caused was unreasonably serious for the context or the kind of property involved.¹⁰ From the court's perspective, it seemed as if the applicants were not displaying the necessary neighbourly tolerance.¹¹ After all, reasonableness means not only that landowners should not be subjected to unlawful annoyances caused by the use of neighbouring land, but also that they have to put up with a reasonable level of disturbances caused by normal and otherwise lawful use of neighbouring land. In the court's view, it seemed as if the applicants simply wanted to sit back, expecting the respondents to solve the problem.¹² The application for injunctive relief was accordingly dismissed because it had not been shown that the respondents had unreasonably interfered with the rights of the applicants.¹³

⁶ Ibid para 14.

⁷ Ibid paras 17, 20–2.

⁸ Ibid para 22. This principle was established in *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A), where the court said that landowners had to undertake the small effort or expense required to clear their own gutters of fallen and wind-blown leaves, even if those leaves should come from other properties. See further *Vogel v Crewe* 2003 (4) SA 509 (T).

⁹ *Allaclas* (C) supra note 1 para 13.

¹⁰ Ibid para 20. In this passage the court argued that the mere fact that stray golf balls entered the applicant's property did not constitute nuisance; it was necessary to prove that the stray balls caused or threatened to cause damage to property or physical injury.

¹¹ Ibid in para 21 the court considered the attitude of the applicant as one of the factors that should be taken into account when deciding whether the action was reasonable.

¹² Ibid paras 21, 22. The court thought that the applicants were loath to protect their property by erecting a suitable net because it obstructed their view. However, in the decision on appeal it was pointed out that the net in fact did not reduce the number of balls that entered the property: *Allaclas Investments (Pty) Ltd v Milnerton Golf Club* 2008 (3) SA 134 (SCA) para 8.

¹³ *Allaclas* (C) paras 25, 27.

When the Supreme Court of Appeal overturned this decision and granted the applicants injunctive relief I was therefore initially quite surprised.¹⁴ However, I soon realised that I had underestimated the complexities of the case because I had failed to make a vital distinction between two different kinds of nuisance, namely nuisance that causes discomfort or annoyance and nuisance that causes damage to property or injury to persons. South African textbooks on property law mention the distinction between nuisance in the narrow (annoyance) and in the wide (damage or injury) sense, but the courts (including the two *Allaclas* decisions) have so far not drawn this distinction very clearly or consistently. My purpose in this article is to argue that this distinction should be made explicitly and clearly and that it should determine the adjudication of a number of crucial issues in nuisance cases.

The Supreme Court of Appeal decided that the applicants were entitled to an interdict that would force the respondents to suspend use of the sixth hole until the necessary measures had been taken to prevent a repetition of the disturbance complained of. In one sense, the decision on appeal can be explained purely on the facts, since the Supreme Court of Appeal decided, contrary to the court a quo, that the applicants were indeed subjected to unreasonably high levels of dangerous intrusions by stray golf balls.¹⁵ In the court's view, the evidence indicated that golf balls hit the appellants' property with such regularity and in such a dangerous way that their ability to use and enjoy their property normally was significantly affected.¹⁶ The number of golf balls entering their property was therefore 'clearly excessive and unreasonable in the circumstances'.¹⁷ Accordingly, they were entitled to an interdict that would force the respondents to suspend use of the sixth hole until the necessary preventative measures had been taken.¹⁸ In this perspective, the difference between the decision a quo and the decision on appeal is explained by different interpretations of the facts, with the one court thinking that the infringement was not serious enough and the other thinking that it was. On the face of it, both decisions rest on the same principle: nuisance is a question of reasonableness and therefore the intensity

¹⁴ *Allaclas* (SCA) supra note 12.

¹⁵ The High Court decision merely refers to golf balls having entered the applicants' property 'on several occasions' (para 4), without going into the actual number of hits and instead concentrating on the question whether the stray balls actually caused damage or injury or merely entered the property or were found there (para 20), while the Supreme Court of Appeal referred explicitly to the actual number of stray hits that were counted (875 between December 2003 and March 2006: para 7), the number of hits in areas where they endangered the physical integrity of the applicant's family (21 out of 57 entering the swimming pool between November 2004 and January 2005: para 19) and the force with which they hit (according to a photograph: para 19). It is unclear whether all the physical evidence was available to the trial court, but the more explicit analysis of the facts in the decision on appeal certainly paints a different picture of the danger posed by the stray golf balls.

¹⁶ *Allaclas* (SCA) supra note 12 paras 7, 18.

¹⁷ *Ibid* para 20.

¹⁸ *Ibid* para 25.

of the immission plays a large role in determining whether it is actionable. Should the facts establish that the intrusion by stray golf balls was indeed so excessively high as to have a significant impact on the appellants' use of their own property, the decision would be justified to stop the nuisance until remedial measures have been put in place. On this reading, the Supreme Court of Appeal seemed to have followed the same logic as the trial court: it would be reasonable for the appellants to tolerate a small number of stray golf balls entering their property, but 'what they have had to endure clearly goes substantially further than what a neighbour is obliged to put up with on application of the principle of "give and take, live and let live", which forms the basis of our law on this point'.¹⁹ On this interpretation, the reversal of the initial order is explained by the Supreme Court of Appeal's different assessment of the facts, without referring to the distinction between nuisance in the narrow and in the wide sense. However, I will argue that this distinction provides a better explanation for the reversal of the decision *quo*.

(b) An alternative explanation

Apart from the facts, there is another interpretation that could explain the reversal on appeal of the original decision even more convincingly. The basis on which the reversal was discussed above is the 'normal' principle of reasonableness, according to which landowners have to tolerate a reasonable level of noise, dust and similar effects of the normal and reasonable use of neighbouring land. This principle of tolerance is suspended when the intrusion exceeds the level of reasonableness; at that point the neighbours are no longer required to accept the interference with their use and enjoyment of their own land. In this context, the distinction between reasonable effects of the use of neighbouring land and unlawful nuisance is a question of degree; of staying within or exceeding the limit of tolerance.

The alternative interpretation I want to raise involves a different kind of assessment. As soon as normal and lawful use of one property causes (or threatens to cause)²⁰ actual material damage or personal injury to occupiers of neighbouring land (as opposed to mere annoyance or discomfort), the ordinary physical comfort test is not applied at all and an interdict should be available to prevent or stop the nuisance, without the complainant having to show that the damage or injury exceeds the ordinary physical comfort level of a reasonable person.²¹ In effect, this means that, in contrast with the

¹⁹ *Ibid* para 21.

²⁰ I add this qualification because the disputes often reach the courts at a stage where the damage has not yet occurred or where it is ongoing and where the point is to avoid or terminate the threat. Without repeating the point I assume that the threat is real and imminent; otherwise the courts will not take notice, in accordance with the normal principles for awarding either an interdict or damages. I shall return to this point below.

²¹ This interpretation finds support in J R L Milton 'The law of neighbours in South Africa' 1969 *Acta Juridica* 123 at 151–2.

normal nuisance principles, there is no reasonable level of actual damage or physical injury that neighbours are supposed to tolerate. Nuisance that causes (or threatens to cause) actual damage to property or physical injury is judged differently from nuisance that merely annoys or inconveniences neighbours, in the sense that the reasonableness test is determinative in the latter but not applied in the former case. As soon as the Supreme Court in *Allaclas* decided that the facts established a high incidence of stray golf balls that struck the appellants' property in a dangerous way, the threat of damage or injury shifted the focus and the issue was no longer whether the appellants were supposed to bear with a certain level of discomfort caused by normal use of the neighbouring golf course, but rather whether they should be protected against the real and imminent threat of damage to their property or physical injury.

The courts are not always equally clear about this principle and about the difference between the two categories. In *Allaclas* the Supreme Court of Appeal's reversal of the initial order could be read as a confirmation of either the 'normal' approach or as an application of the alternative approach. In *Dorland v Smits*²² it was held that the mere threat of danger (without any proof of actual damage or injury) does not constitute a nuisance per se; the question was whether the limitations that the threat imposed on the applicant's use of her property exceeded the boundaries of what could be expected of her. This could of course be seen as confirmation of the normal principle, where it is required that the intrusion on normal use should exceed the level of reasonableness, just like the appeal decision in *Allaclas* seems to focus on the degree to which the appellants' ability to use their property was significantly affected by the intrusion. However, both decisions could also be read as focusing on the probability that the threat of injury posed by the intrusion might realise, rather than on the degree or level of the intrusion.

According to the normal line of thinking, the appellants would be entitled to an interdict because their normal use of their own property was significantly infringed by the unacceptably high number of stray golf balls flying onto their property. According to the alternative approach, they would be entitled to an interdict simply because the stray golf balls posed a serious and real threat to their property or physical integrity. In the first case, the number of stray balls at a certain point exceeds a limit where the annoyance that they cause is of a level or magnitude that the neighbour can tolerate. In the second case, the number of stray balls is important only in so far as a higher number and greater force of the hits establish the probability that the danger or threat posed by any single ball would in fact realise. In this case, it is not the level of annoyance or reasonableness of the intrusion that had to be established by proving a high incidence of stray balls striking the applicant's property, but the probability that the threat would materialise.

The remedy that the Supreme Court of Appeal granted to the applicants in

²² 2002 (5) SA 374 (C) at 384A–B.

Allaclas demonstrates the difference between the two approaches outlined above when compared with the order given in *Laskey v Showzone CC*.²³ In *Laskey*, a case concerning noise in the inner city, the court also granted injunctive relief because it considered the noise caused by the respondents excessive, even in the location, but it suspended the interdict to give the respondent a reasonable time to install the necessary insulation, without thereby affecting his business. The stricter order in *Allaclas*, where the owners of the golf course had to suspend play until the necessary steps could be taken, might be justified because of the threat of actual damage to property or personal injury. Although there is no clear explanation or justification in the case law, this reading of the cases suggests that the choice of remedy is affected by the distinction between ‘normal’ or narrow nuisance cases and cases where the nuisance causes or threatens to cause damage to property or personal injury. In the latter category, it seems, injunctive relief should be the rule rather than the exception, the injunction would not be suspended simply to give the offender time to continue doing business while complying with the order, and an award of damages should only be employed as a remedy in exceptional cases.

Of course it is possible simply to take the Supreme Court of Appeal on its word and accept that the normal principles of nuisance have been applied in *Allaclas* — that the high incidence of stray balls exceeded the level of tolerance that is expected of any neighbour, and that the appellants were therefore entitled to an interdict to have the use of the golf course suspended until suitable preventive measures have been taken. However, the alternative explanation creates an opportunity to reconsider aspects of neighbour law relating to nuisance caused by sport from a different angle.

(c) ‘Coming to the nuisance’

The issue of coming to the nuisance was raised in the trial court, the respondents arguing that the applicants (appellants) could not complain about stray golf balls when they chose to build a house right next to a golf course. The applicants accepted that ‘by virtue of the fact that they own/occupy a property which borders on a fairway of a golf course, their right to free and undisturbed use of their property will be interfered with to some extent’; their complaint was that the number of golf balls actually entering their property exceeded the limits of what was reasonably to be expected, even when living on a golf estate.²⁴ The trial court agreed with the applicants’ argument that coming to the nuisance was no defence, deciding that none of the sources cited by the respondents could ‘elevate “coming to the nuisance” to a legal principle which is at variance with the basic principles of the law of delict’.²⁵ The applicants’ decision to buy property next to a golf course was

²³ 2007 (2) SA 48 (C) paras 40–7.

²⁴ *Allaclas* (C) supra note 1 para 13.

²⁵ *Ibid* para 15. Counsel for the applicants relied on foreign case law, including the unreported decision in *Campbelltown Golf Club Ltd v Winton* [1998] NSWSC 257

relevant to the question whether the respondent's actions were reasonable, but it was not decisive.²⁶

It is safe to say that 'coming to the nuisance' does not in itself offer a complete defence against a nuisance action in South African law, although the prior existence of the source of the alleged nuisance and the complainant's choice to occupy land in its vicinity could indicate that any relatively minor annoyance caused by it would not be unreasonable and thus not actionable. On the one hand, the fact that the plaintiff voluntarily occupied premises in the vicinity of a known and already existing nuisance is not a complete defence against an action based on nuisance.²⁷ The principle is that priority of occupation does not automatically entitle one landowner to use her property in such a way as to deprive neighbours of the reasonable physical comfort and enjoyment of their property.²⁸ On the other hand, though, the fact that the nuisance existed at the time when the plaintiff moved to its location might be a defence under certain circumstances, or it might influence the decision whether the nuisance is unreasonable.²⁹ Whether causing the nuisance is unreasonable must be established in every individual case with reference to all the circumstances, including the question whether the use of the respondent's property that causes the annoyance is lawful, normal in the location and context, and reasonable as far as its intensity, time of occurrence and duration and its effect on others are concerned. One might also expect changing circumstances to play a role in rendering previous seemingly reasonable or lawful use of property unreasonable and unlawful.

This conclusion is in line with the position in foreign law, where the notion of coming to the nuisance is not viewed as an absolute defence that would exclude any nuisance claim purely because the source of the nuisance existed before the complainant occupied the neighbouring land.³⁰ In a well-known English case³¹ the court refused to stop the long-standing practice of playing cricket on the village green, although the majority did hold that the club was liable in negligence and nuisance because of the real threat of damage or injury caused by stray cricket balls. I return to this

(40056/1995, 23 June 1998), in which the facts were very similar to those in *Allaclas*. In the Supreme Court of Appeal decision in *Allaclas* supra note 12 para 17 it was said that the Australian decision 'reflects precisely what a South African court would have held in the closely analogous factual circumstances of this case'. I return to *Campbelltown* in section II below.

²⁶ *Allaclas* (C) supra note 1 para 16.

²⁷ J Church & J Church 'Nuisance' in W A Joubert, J A Faris & L T C Harms (eds) *The Law of South Africa* vol 19 2 ed (2006) para 210, citing *Howard Farrar, Robinson & Co Ltd v East London Municipality* 1908 EDC 149; *Miller v Jackson* [1977] 1 QB 966 (CA).

²⁸ This is essentially also what the New South Wales Supreme Court decided in *Campbelltown Golf Club Ltd v Winton* supra note 25.

²⁹ Church & Church op cit note 27 para 210, citing *Miller v Jackson* supra note 27.

³⁰ Coming to the nuisance is not recognised as a defence in either English law, Australian law or Canadian law; see the references in section II of the article below.

³¹ *Miller v Jackson* supra note 27.

decision below. The prior existence of the source of the nuisance is generally acknowledged as a factor in deciding whether the defendant's use of her property is reasonable and lawful, but in itself this factor does not trump the use right of neighbours. Traverso DJP thus reflected a generally accepted principle when she stated in *Allaclas* that the fact that the complainant 'came to the nuisance' was a relevant, but not in itself decisive, factor.³²

Although the defence of coming to the nuisance is generally not accepted, the sympathy that courts may have with defendants who have used their land in the same way for a long time may also find expression in the principle that a plaintiff in nuisance cannot expect a higher level of comfort than is customary in the particular context — the locality principle. Outside of sport cases it has been established that the courts would expect applicants to show a relatively high tolerance level against nuisance that was known to exist or that could be expected in their vicinity. In these cases the idea of coming to the nuisance was not accepted as an absolute defence, but the courts have been adamant that landowners should be reasonably tolerant of disturbances that could be described as normal and reasonable or that should be expected in the area. Residents in an inner-city area thus have to tolerate the kind and level of noise that could be expected there,³³ just as they have to tolerate the electrified security fencing³⁴ or the leaves falling from trees that one should expect in urban residential areas.³⁵ These cases confirm the general principle that the reasonableness of disturbances emanating from the normal and otherwise lawful use of land should be determined with reference to the context within which they occur. It has been pointed out in the literature that the locality principle was emphasised so strongly in *Miller v Jackson*³⁶ that the general rejection of the coming to the nuisance defence was effectively circumvented.³⁷

However, the cases that illustrate the locality principle are qualified by a widely accepted proviso: it does not apply if the nuisance causes damage to property or personal injury. This proviso helps to explain the *Allaclas* decision on appeal: the nuisance caused by city noise or falling leaves is in the nature of an annoyance or a discomfort, a disturbance of the senses rather than a threat of actual damage to property or personal injury.³⁸ One could therefore say that the *Allaclas* decision indicates that, even though the locality principle plays an important role in the application of the reasonableness test in South African nuisance law, it has less or no purchase in cases where the nuisance causes a real and significant threat of damage to property or personal injury, as

³² *Allaclas* (C) supra note 1 para 16.

³³ *Laskey v Showzone CC* supra note 23 paras 19–32, 47.

³⁴ *Dorland v Smits* supra note 22.

³⁵ *Malherbe v Ceres Municipality* supra note 8; *Vögel v Crewe* supra note 8.

³⁶ Supra note 27. See further R A Buckley 'Cricket and the law of nuisance' (1978) 41 *Modern LR* 334.

³⁷ See section II(c) below.

³⁸ Buckley op cit note 36 argues that the same applies to the comparable English cases; see section II(d) below.

opposed to cases where the nuisance involves a mere disturbance or annoyance. The locality principle indicates that a higher level of tolerance or forbearance might be expected of the complainant in a nuisance case, but this aspect of the reasonableness test does not carry the same weight in cases where the nuisance causes or threatens damage to property or personal injury, and therefore the *Allaclas* decision in the SCA could be explained with reference to the nature of the nuisance and not just the level or intensity of the disturbance.

(d) *Abuse of rights*

The doctrine of abuse of rights also featured in the *Allaclas* case. In the trial court Traverso DJP argued that '[a] dispute between neighbours invariably involves, among other things, the question whether there has been an abuse of a right' and that the question should be 'whether the neighbour whose conduct is being complained of exceeded his powers of ownership' in view of considerations of reasonableness and fairness.³⁹ This is a somewhat unusual approach to both the concept of nuisance and the doctrine of abuse of rights. Of course it is true that nuisance law is founded on the principle that every landowner should use her land in such a way that it does not cause harm for neighbours,⁴⁰ but that does not mean that causing actionable nuisance amounts to abuse of rights — on the contrary, the more conventional view is that nuisance starts off with normal and lawful use of one's own land and becomes unlawful and actionable when the effects that it has on neighbouring land become unreasonable. Contrary to what the decision seems to suggest, malice might be a factor in establishing actionable nuisance, but it is not required. The doctrine of abuse of rights, on the other hand, is usually associated with the malicious exercise of rights, which could occur either if the offending landowner uses her land purely to cause harm or annoyance for neighbours,⁴¹ or if the complaining neighbour maliciously insists on vindicating her right, with grave negative effects for the other party, but without acquiring any significant benefit from it herself.⁴² In foreign law the doctrine plays an important role in preventing either purely malicious exercises of one's rights or use of property that could in principle be lawful, but which are

³⁹ *Allaclas* (C) supra note 1 para 9.

⁴⁰ Usually expressed with reference to the maxim *sic utere tuo ut alienum non laedas*. D van der Merwe *Oorlas in die Suid-Afrikaanse Reg* (1982) 430 summarises variations of this maxim found in the neighbour law cases, all of which reflect the underlying principle stated by Gaius *Institutes* 1.53: 'mala enim nostro iure uti non debemus' (for we ought not to abuse our lawful right; translation of F de Zulueta *The Institutes of Gaius* part I *Text with Critical Notes and Translation* (1946) 17).

⁴¹ The clearest South African case is *Kirsch v Pincus* 1927 TPD 199; see note 45 below.

⁴² The clearest South African example is *Lombard v Fischer* [2003] 1 All SA 698 (O), an encroachment case, in which the applicant attempted to enforce her right of exclusion purely to spite the neighbour.

rendered unreasonable and unlawful by the spite or malice with which the rights are exercised under the specific circumstances of the case.⁴³

There is authority in South African law for the view that use of one's own property that is aimed exclusively at causing harm for a neighbour would be unlawful because it amounts to abuse of rights, although it is sometimes said that the doctrine harbours a contradiction in terms because one cannot abuse a right.⁴⁴ On the basis of the explanations developed in foreign law one could say, however, that it is indeed possible to abuse a right in the sense that having a right (such as ownership of land) does not allow uses of that right that would generally be lawful but that are, in the circumstances, designed purely to

⁴³ The doctrine is embodied in two separate sections of the Dutch civil code. The general provision regarding abuse of right in BW 3:13.1 states that a person cannot rely on a right in cases when she is abusing it. Three examples are enumerated in BW 3:13.2, namely where the right is exercised with no other purpose than to cause harm to someone else; use of a right for a purpose for which it was not intended; and use of a right that should not have occurred, had one considered the imbalance between the interest of the person exercising the right and the interests of the person harmed by it. See C C van Dam, F H J Mijnsen & A A van Velten *Mr C Asser's Handleiding tot de Beoefening van het Burgerlijk Recht 3.II Goederenrecht: Zakelijke Rechten* (2002) para 46; H J Snijders & E B Rank-Berenschot *Goederenrecht* 4 ed (2007) para 93; W H M Reehuis & A H T Heisterkamp with G E van Maanen & G T de Jong *Pitlo Het Nederlands Burgerlijk Recht 3 Goederenrecht* 12 ed (2006) para 37. In the narrower context of abuse of the right of ownership, regulated in BW 5:54, abuse of right refers to cases where an owner causes harm to another by exercising his right of ownership in a way that could be lawful in principle but is unlawful under specific circumstances, particularly if it is exercised purely to cause harm. See Van Dam, Mijnsen & Van Velten op cit para 37; Snijders & Rank-Berenschot op cit para 183; Reehuis & Heisterkamp with Van Maanen & De Jong op cit para 488. The classic example is building a structure on one's own land purely to block the neighbour's view: Court of Colmar 2 May 1855; a decision also referred to by C G van der Merwe *Sakerog* 2 ed (1989) 189n163. Other examples are HR 13 March 1936, *NJ* 1936, 415; HR 2 April 1937, *NJ* 1937, 639; see Reehuis & Heisterkamp with Van Maanen & De Jong op cit para 489. It is now widely accepted that the doctrine simply proscribes actions undertaken purely with the malicious intent to harm someone else. The doctrine of abuse of right forms an important part of modern German law. The word *Rechtsmissbrauch* does not appear in the civil code, but § 226 BGB (*Schikanenverbot*) prohibits the exercise of a right when it can only have the purpose of causing harm for another person. In addition, § 242 BGB (the general good faith clause) is interpreted widely to prevent abuse of right in various areas of the law. In the classic English case of *Mayor of Bradford v Pickles* [1895] AC 587 (HL) the House of Lords decided that a lawful act of a landowner would not be rendered unlawful merely because he exercised his rights maliciously. However, academic commentators have pointed out that conduct which would otherwise be unexceptionable might be a nuisance if it is intended purely to harm, annoy or provoke another person. Malice might in itself not be sufficient to establish nuisance, but it is helpful in striking the reasonableness balance between the neighbours. See S Hedley & N Padfield *Tort* 4 ed (2004) 206–7; M Lunney & K Oliphant *Tort Law: Text and Materials* 3 ed (2008) 644–5.

⁴⁴ Van der Merwe op cit note 43 at 189. See also Milton op cit note 21 at 162–5; Van der Merwe op cit note 40 at 326–31; P J Badenhorst, J M Pienaar & H Mostert *Silberberg & Schoeman's The Law of Property* 5 ed (2006) 117–9. For an extensive historical account see J E Scholtens 'Abuse of rights' (1958) 75 *SALJ* 39.

harm another person. It is not entirely clear whether an otherwise lawful use of property is always and necessarily rendered unlawful purely because of the spiteful or otherwise malicious intent of the user, but there are indications in case law that purely malicious use of land, without any reasonable benefit for the user, would be considered unlawful.⁴⁵ Other decisions are more flexible, suggesting that malice or spite is just one factor that could render an otherwise lawful use of land unreasonable and thus unlawful.⁴⁶ Whether or not one chooses to describe this principle in terms of the doctrine of abuse of rights does not seem to affect the application of the principle much. It is more important to note that the notion of abuse of rights could apply in two different forms in the cases exemplified by *Allaclas*, namely either if the nuisance was caused by malicious use of the neighbouring property (which was clearly not the case, since the use of the golf course was normal) or if the affected neighbour maliciously insisted on vindication of her right purely to cause harm or inconvenience for the neighbour from whose property the nuisance arises (which was not the case either, as it was held that the level of intrusion was unacceptably high). The doctrine of abuse of rights therefore found no application in the *Allaclas* case, but it could become relevant in other conflicts caused by nuisance.

II FLYING BALLS AND NUISANCE IN FOREIGN LAW

(a) Introduction

In this section I discuss a number of foreign cases on nuisance caused by stray cricket and golf balls, focusing on the topics identified in the introductory section. The first question raised by these decisions is which remedy should be made available: injunctive relief (terminating the nuisance) or damages? The second and third questions deal with two defences often raised against nuisance claims of this nature: coming to the nuisance (the plaintiff was the

⁴⁵ *Kirsch v Pincus* supra note 41. The landowner planted trees, in an unusual manner, along the boundary with a neighbour with the obvious intent that the trees should shed leaves onto the malt floors of the neighbour and damage his business, without there being any proven benefit for himself or his property in doing so. The court decided that this amounted to malicious use of property and ordered removal of the trees. Milton op cit note 21 at 164 describes the decision as 'irreproachable'; see further at 267. In *Union Government v Marais* 1920 AD 240 the Appellate Division argued that the English case of *Mayor of Bradford v Pickles* supra note 43 might have been decided differently in South African law because of the *animo vicini nocendi* principle, which underlies the doctrine of abuse of rights in Roman-Dutch law. In *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 107G Steyn CJ explicitly recognised the principle that an owner may not do anything on his land purely with the spiteful intent to harm a neighbour, but in the context of the case this remark was obiter.

⁴⁶ In *Gien v Gien* 1979 (2) SA 1113 (T) at 1121D–1122E the court confirmed that the disposition (or subjective intention) of the respondent was relevant when deciding whether her use of land was reasonable and lawful for purposes of nuisance law, but reiterated that the test for reasonableness is objective.

architect of her own misery because she moved in next to a cricket field) and the locality principle (the complaining neighbour cannot expect a higher level of protection than is customary in the locality where the properties are situated). The fourth issue was mentioned above as an alternative explanation of the Supreme Court of Appeal decision in the South African *Alladas* case, namely the importance and effect of the fact that the nuisance is not a mere annoyance but causes or poses a real and imminent threat of damage to property or personal injury. Finally, I discuss the approach followed in German law to cases concerning nuisance caused by objects similar to cricket or golf balls, arguing that the German approach would reinforce the decisions in other jurisdictions where it was held that injunctive relief is most suitable and that it could be awarded, without relying on the reasonableness balancing test, in cases where the nuisance causes or threatens to cause damage to property or personal injury.

(b) *Remedy: injunction or damages?*

*Miller v Jackson*⁴⁷ is the most famous English case about nuisance caused by stray balls. The plaintiffs had bought a house that was built right next to a quite small cricket field on the village green. They complained that cricket balls were regularly hit over the fence during games,⁴⁸ causing damage to their house and posing a danger of physical injury, although nobody had been injured to date. The fact that nobody had been injured was explained by the fact that the plaintiffs and other neighbours similarly affected chose either to stay indoors or leave their properties during matches. The fact that these homeowners were forced to stay indoors or leave their properties, particularly on weekends during the summer, was said to prove that the danger caused by flying cricket balls made normal use and enjoyment of their homes and gardens impossible. The cricket club had offered to pay for any damage caused by the flying cricket balls and also to install protective measures such as a high fence, shutters and security glass for the windows, and a net that would prevent stray balls from entering the gardens. However, the evidence showed that the protective fence did not keep the stray balls out; the shutters and windows would only work in so far as the plaintiffs were willing and could be

⁴⁷ *Supra* note 27. See Buckley *op cit* note 36 at 334–7; S Greenfield & G Osborn ‘The sanctity of the village green: Preserving Lord Denning’s pastoral vision’ (1994) 9 *Denning Law Journal* 53 for discussions of the case.

⁴⁸ Two judges referred to the evidence on the incidence of cricket balls entering the plaintiffs’ gardens during matches (Lord Denning MR at 341, Geoffrey Lane LJ at 346). In 1972 three and in 1974 one ball went over the fence and caused damage to the plaintiffs’ house. A high protective fence was then erected. In 1975 six balls went over the high protective fence; in 1976 the number was nine, three of which went over on one day. Of these, five of the 1975 balls and two of the 1976 balls fell into the plaintiffs’ garden, one just missing a window. Other neighbours complained of about eight balls entering their garden in 1975 and another eight in 1976, one of which broke a window and entered a room where a woman was sitting. Yet another couple had about two balls entering their garden, but they have a small baby and would not go into the garden during a match for fear that the baby might be hurt.

expected to stay indoors over the summer weekends; and the proposed net was found to be impracticable.

The trial court granted an injunction to stop cricket being played on the ground and the cricket club appealed. Of the three judges who heard the appeal, a majority (Geoffrey Lane and Cumming-Bruce LJJ, Lord Denning MR dissenting) decided that the stray cricket balls caused an actionable nuisance and that the club was liable for damages in negligence and nuisance⁴⁹ because there was a foreseeable risk of injury to the plaintiffs and their property from the stray cricket balls. The club could not prevent the damage or injury as it could not reasonably expect the plaintiffs to live behind shutters or stay out of their gardens on summer weekends.⁵⁰

However, the decision that the cricket games constituted a nuisance did not have the result for which the plaintiffs had hoped. A different majority (Lord Denning MR and Cumming-Bruce LJ, Geoffrey Lane LJ dissenting) overturned the trial court's decision to grant injunctive relief, holding that this was not an appropriate case for the granting of an injunction since the court had to weigh the interests of both the defendant cricket club and the public at large against those of the individual plaintiffs. This majority on the remedy issue decided that, since an injunction is a discretionary remedy which can only follow upon a proper weighing of the interests of all the parties involved, it should only be granted if the public interest, including the interests of the village, had also been considered. On balance, the majority on the relief issue thought that the interests of the inhabitants of the village as a whole in preserving the cricket ground for their recreation and enjoyment should prevail over the private interest of the plaintiffs, who must have realised when they bought their house that balls would sometimes be hit on to their property from the adjoining cricket ground. The appeal was therefore allowed and the injunction was set aside.⁵¹ At most, the plaintiffs could be awarded a sum of money in damages.

This decision, and particularly the court's refusal to grant injunctive relief, was not generally accepted as the correct approach. In *Kennaway v Thompson*⁵² the judgment in *Miller v Jackson* was said to be inconsistent with the principles on the choice of remedy laid down in *Shelfer*,⁵³ and consequently the Court of Appeal refused to follow it. In cases where there is a continuing

⁴⁹ The decision confirmed that, while balls hit or thrown deliberately into a neighbour's garden could establish trespass, balls hit into the garden by accident from a cricket match on neighbouring land would at most establish nuisance, if anything; see Hedley & Padfield op cit note 43 at 203. Lord Denning MR at 343 cited *Letang v Cooper* [1964] 2 All ER 929 at 932 to underline the point that if the defendant does not inflict injury intentionally, but causes damage or injury by accident, the plaintiff has no cause of action in trespass; his only cause of action is in negligence, for which it has to be proven that he did not exercise reasonable care.

⁵⁰ *Miller v Jackson* supra note 27 at 347, 348, 349.

⁵¹ Ibid at 345, 350, 351.

⁵² [1980] 3 All ER 329.

⁵³ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

actionable nuisance the court's jurisdiction to award damages instead of an injunction is to be exercised very sparingly and then the public interest cannot prevail over the private interest.⁵⁴ In *Watson v Croft Promo-Sport Ltd*⁵⁵ the Court of Appeal again confirmed, in a nuisance case involving noise caused by a car race track, that 'damages in lieu of an injunction should only be awarded under very exceptional circumstances'. The court repeated what was said in *Jaggard v Sawyer*,⁵⁶ namely 'that the test is one of oppression, and the court should not slide into application of a general balance of convenience test'. Accordingly, the Court of Appeal decided,⁵⁷ the effect on the public of the grant of an injunction can be taken into account in a marginal case where the damage caused to the claimant is minimal, but the public benefit cannot on its own 'negate the requirement of exceptional circumstances or oppression of the defendant which both *Shelfer* and *Jaggard* clearly require'. Unless the effect of the nuisance on the plaintiff is so small as to render it marginal, the court should not 'let in consideration of the public interest.' Given the court's decision in *Miller v Jackson* that the threat of damage and injury was in fact serious, it could therefore be argued that an injunction was the most suitable remedy in that case after all. The reading of the *Shelfer* and *Jaggard* decisions that was preferred in *Kennaway* and in *Watson* suggests that injunctive relief is the correct remedy in any case where the nuisance causes or threatens to cause serious damage, which strengthens the argument that it should be the only possible remedy in cases where the nuisance causes or threatens to cause personal injury.

In the Australian case of *Campbelltown Golf Club Limited v Winton*⁵⁸ the Supreme Court of Appeal of New South Wales confirmed that injunctive relief is indeed the most suitable remedy in cases where nuisance caused by stray balls threatens to cause damage to property or personal injury. The facts were very similar to those in the South African *Allaclas* case. The plaintiffs, who had built a house right next to a golf course, complained about the stray golf balls that ended up in their property, damaging the house and once striking an infant child.⁵⁹ The trial court had awarded damages in nuisance and the defendants appealed in an attempt to have the amount of damages reduced. The Supreme Court of New South Wales dismissed the appeal and

⁵⁴ E McKendrick 'Trespass to airspace and property development' (1988) 138 *New LJ* 23; E Grayson 'Sporting legal lotteries' (1994) 144 *New LJ* 788.

⁵⁵ [2009] EWCA Civ 15 (CA) para 27, referring to *Shelfer v City of London Electric Lighting Co* supra note 53; *Jaggard v Sawyer* [1995] 1 WLR 262, 278, 286, 288; *Regan v Paul Properties* [2007] Ch 135 paras 35–7.

⁵⁶ [1995] 1 WLR 262 at 283.

⁵⁷ *Watson v Croft Promo-Sport Ltd* supra note 55 para 51.

⁵⁸ Supra note 25. This decision was referred to with approval in *Allaclas* (SCA) supra note 12 paras 16–17.

⁵⁹ The evidence indicated that between 1 January 1995 and 17 May 1995 at least 421 balls landed in the plaintiff's property; on 16 May 1995 at least 1262 balls had been collected in total.

set out its view of the relationship between owners of a golf course and neighbouring residents:

‘What was required was that the golf course should so adjust its activities as not to interfere unreasonably with the peaceful enjoyment by residents of their land. At the same time, the residents, bordering as they did a golf course, had to accept the fact that the game of golf was going to be played on land adjoining their properties and that it could be expected that from time to time some golf balls might come on to their land. But what they were not bound to accept was a situation such as was suffered by the respondents in which their property was peppered with golf balls on a daily basis, thus posing a threat, not only to the respondents’ property but also to their physical safety. The golf course was obliged so to construct the hole as to divert balls hit normally away from their property. This could be done by resiting the direction of the hole or by appropriate screens, whether natural or artificial, or a combination of both as indeed has apparently happened.’⁶⁰

The court confirmed that the owners and operators of the golf course had to ensure that its use would not cause unreasonable interference with the neighbouring landowners’ use and enjoyment of their land.⁶¹ If the owners of the golf course failed to honour this obligation and the playing of golf caused a nuisance, the affected neighbours might be entitled to injunctive relief.

In the Canadian case of *Lakeview Gardens Ltd v City of Regina*⁶² the Queen’s Bench, Judicial Centre of Regina, granted both an injunction and damages to the plaintiff on the basis of a private nuisance caused by golf balls that are hit onto the plaintiff’s land on a regular basis. Complaints had been lodged with the golf course over a number of years.⁶³ The court held that, as long as the golf course was operated next to the plaintiff’s property, it would be a nuisance which interfered with the plaintiff’s use and enjoyment of its

⁶⁰ *Campbelltown Golf Club Limited v Winton* CA supra note 25. The electronic report is neither paginated nor paragraphed.

⁶¹ Virtually the same approach was followed by the Supreme Court of Victoria in *Champagne View Pty Ltd v Shearwater Resort Management Pty Ltd* [2000] VSC 214 (25 May 2000), although the owners of the golf course in this case had taken the necessary steps to prevent further infringements before the trial commenced and the only remaining issue was costs. The court held that the plaintiffs had a good chance to succeed on the merits and were therefore entitled to their costs. In *Challen v McLeod Country Golf Club* [2004] QDC 24 (27 February 2004) the District Court of Queensland dismissed a very similar claim because it was decided that the golf course had responded reasonably to earlier complaints by moving the tee, but that later complaints were not brought to its attention clearly enough to establish fault through inaction. See on this decision J Woodgate ‘Golf balls — a nuisance?’ *Mullins Sport: Newsletter of Mullins Lawyers* Issue Number 18, May 2004 at 2.

⁶² 2003 SKQB 234 para 9.

⁶³ In the decision on appeal the Court of Appeal for Saskatchewan provided more facts than the trial court did: *City of Regina v Lakeview Gardens* 2004 SKCA 110 para 4. Between ten and twenty golf balls are found on the plaintiff’s land every year. The claim for damages was for glass broken once or twice. Nobody had been hit by a stray golf ball, but there was at least one close miss.

property.⁶⁴ The plaintiff was not asking that the golf course should be shut down, but rather that reasonable steps should be taken to restrain golfers from hitting golf balls onto the plaintiff's land. The court granted a permanent injunction that a course monitor should be appointed to prevent the nuisance, and granted a small amount of compensation for damage previously caused by stray golf balls.⁶⁵ The Court of Appeal for Saskatchewan confirmed that the basis for liability in this particular case was nuisance, not trespass, because the intrusions were indirect and caused by accident rather than design.⁶⁶ The issue in nuisance was

'whether the errant balls, some 10 to 20 per year, which have caused four or five glass breakages, over ten years, but have not struck anyone or otherwise caused any personal injury are a substantial and unreasonable interference with the respondent's use of its property or whether they are merely inconvenient or a minor discomfort'.⁶⁷

In the majority of earlier cases, the court noted, there was evidence of significant damage or of a threat of damage to property or personal injury.⁶⁸ However, the plaintiff in this case was not affected nearly as badly as any of the plaintiffs in the earlier cases. Citing the English decision in *Bolton v Stone*,⁶⁹ the Court of Appeal decided that the trial court had erred and that there was not nearly enough evidence in this case to substantiate a nuisance claim for injunctive relief:

'[I]t cannot be said that persons on the respondent's property face anything other than a very remote risk of injury. As for property damage, four or five instances of broken windows over a ten year period is hardly unusual for a business of which a major component is greenhouses. The balls emanating from the golf course could not be characterized as anything more than an inconven-

⁶⁴ Para 10.

⁶⁵ The evidence suggested that golf balls could only land on the plaintiff's land if they were hit there deliberately: *City of Regina v Lakeview Gardens* supra note 63 para 6. The course monitor was therefore considered a suitable remedy. The defendant had planted trees at considerable expense to screen the plaintiff's property from errant balls.

⁶⁶ Ibid para 13. The court explained that the difference between trespass and nuisance was based on the distinction between intrusions directly and deliberately infringing upon neighbouring land (trespass, for which there is liability without proof of harm) and indirect or consequential intrusions (nuisance, for which liability depends on proof of harm unreasonably caused).

⁶⁷ Ibid para 15.

⁶⁸ Ibid para 16, citing *Carley v Willow Park Golf Course Ltd* [2003] 2 WWR 659 (Alta QB) (unable to use their yard, 30 balls in one ten-day period, 174 balls, 88 balls and 176 balls in one-year periods); *Douglas Lake Cattle Co v Mount Paul Golf Course (SPM) Inc* 2001 BCSC 566, [2001] BCJ No 894 (QL) (2577 balls in a period of one year and five days, frequent damage to equipment and narrowly missing employees and customers); *Segal v Derrick Golf & Winter Club* (1977) 76 DLR (3d) 746 (Alta SC (TD)) (over 200 balls in one year, yard unusable for family and children); *Transcona Country Club v Transcona Golf Club* 2002 MBQB 113 [2002] MJ No 163 (QL) (building hit on a daily basis).

⁶⁹ [1951] 1 All ER 1078 (HL). See note 114 below and accompanying text.

nience or a minor discomfort. The risk of either property damage, or personal injury was neither substantial nor unreasonable.⁷⁰

The injunction granted by the trial court was therefore overturned, but the defendant was liable in negligence in so far as it had failed to prevent further damage or injury after the plaintiff had complained about stray golf balls breaking glass and the order for damages was confirmed.⁷¹ In *Tanglewood (Sierra Homes) Inc v Munro Golf Ltd*⁷² the plaintiff, who was developing a housing estate next to the golf course operated by the defendant, became concerned about the stray golf balls landing on his property and, when an initial agreement to solve the problem inter partes failed, applied for an injunction to restrain further playing of golf on the golf course, pending trial to resolve all issues between the parties. The Ontario Superior Court of Justice confirmed that stray golf balls from a golf course cause a nuisance that can be enjoined by an injunction⁷³ but dismissed the application for an interlocutory injunction because, although the plaintiff had shown that there was a serious case to decide on trial, the plaintiff had failed to show irreparable harm, while the closing of even just one hole of the golf course would have a serious detrimental effect on the defendant. Failure to obtain injunctive relief in this case should not be seen as an indication that the court applied the reasonableness test; the decision should be understood in view of the specific requirements for interlocutory relief. The significant point in these two cases is that injunctive relief was denied because of inadequate proof of a significant and real threat and not because the intrusion was regarded as reasonable.

In *Sammut v Islington Golf Club Ltd*⁷⁴ the damage caused and the danger posed by flying golf balls was much more serious. The plaintiffs claimed injunctive relief to restrain the golf club from permitting its members to play golf on the third hole until a redesign and landscaping of that hole have been completed to abate the nuisance of golf balls landing on, hitting or traversing the plaintiffs' property. They also asked for a mandatory order requiring the golf course to redesign and landscape its third hole and claimed damages for nuisance, negligence and trespass.⁷⁵ Apart from damage to their property, the plaintiffs were unable to use their garden for fear of flying golf balls. Remedial steps taken by the golf course, including the planting of trees and fencing, did not solve the problem. The court decided that the golf club, having become aware of the problem, owed a duty of care to the plaintiffs to take the necessary steps to eliminate the problem effectively and that it had

⁷⁰ *City of Regina v Lakeview Gardens (A)* supra note 63 para 21.

⁷¹ *Ibid* para 22, again with reference to *Bolton v Stone* supra note 69.

⁷² [2009] OJ No 1750.

⁷³ Citing *Sammut v Islington Golf Club Ltd* [2005] OJ No 2674; *Segal v Derrick Golf & Winter Club* supra note 68; *Douglas Lake Cattle Co v Mount Paul Golf Course* supra note 68.

⁷⁴ *Supra* note 73.

⁷⁵ The court dismissed the claim based on trespass for lack of evidence: *Sammut v Islington Golf Club Ltd* *ibid* paras 16–17.

failed to do so. This failure has caused damage to the plaintiffs' property, created a continuing potential hazard for their safety and made it impossible for them to enjoy their property.⁷⁶ The stray golf balls constituted a private nuisance and the defendants were ordered to pay damages and to take the necessary steps to prevent its members from hitting golf balls onto or over the plaintiffs' property in future.⁷⁷

By way of contrast, the decision in *Cattel v Great Plains Leaseholds Ltd*⁷⁸ resembles the English decision in *Miller v Jackson*⁷⁹ rather than the other Canadian cases discussed above. The trial court had found that golf balls flying onto property owned by the plaintiffs from the golf course operated by the defendants created a nuisance, granted damages and enjoined the defendants from allowing its members and guests to hit golf balls on the ninth hole of the course so that they would land in the plaintiffs' property. On appeal the Saskatchewan Court of Appeal decided that the trial court's finding of negligence was unreasonable and not supported by the facts⁸⁰ and that, although the defendants were liable in nuisance, the scope of the injunction was overbroad. The steps the golf club would have had to take to abide by the injunction would have had the effect that 'recreational play is inconvenienced, and tournament play is all but precluded, at least at the championship level'.⁸¹ The question was whether the injunction, 'with its absolute and inviolable mandate', its 'very breadth and excessive reach', worked an unfair result that is objectionable in law. In the court's view, the injunction 'is uncomfortably at odds with the notions of "give and take" that temper the law of nuisance'.⁸² In the spirit of the English decision in *Miller v Jackson*,⁸³ the court decided that the injunction granted by the trial judge was overbroad in light of the plaintiffs' acknowledged expectation that stray golf balls would occasionally inconvenience them. The order of the trial court was overturned because the court had failed to balance interests, to weigh the social benefits of the golf club against the private interests of the plaintiffs in the quiet enjoyment of their property. The goal in cases like this, the Court of Appeal held, was 'to moderate the conflicting claims of landowners, each

⁷⁶ *Ibid* para 19.

⁷⁷ The method for attaining this goal was left open and the defendants were given two weeks to comply. They chose to erect a high chain link fence across the plaintiffs' land in a way the court described as a great inconvenience to the plaintiffs and a serious eyesore for them and anyone else. In addition, it restricted the plaintiffs' access to a public highway, created another private and public nuisance and invited further litigation. The defendants were expected to select a reasonable solution that would make matters better for the plaintiffs, not worse, and therefore they were ordered to remove the fence and implement a more reasonable solution. See *Sammut v Islington Golf Club Ltd* *supra* note 73 para 5.

⁷⁸ [2008] SJ No 347.

⁷⁹ *Supra* note 27.

⁸⁰ *Cattel v Great Plains Leaseholds Ltd* *supra* note 78 paras 26–30.

⁸¹ *Ibid* para 15.

⁸² *Ibid* para 19.

⁸³ *Supra* note 27.

desiring the maximum enjoyment of their property, and to accomplish this without unduly subordinating the interests of one owner to the comfort of the other'.⁸⁴ Legal intervention is warranted only 'when an excessive use of property causes inconvenience *beyond what other occupiers in the vicinity can be expected to bear*, having regard to the prevailing standard of comfort of the time and place'.⁸⁵ The terms of the injunction were therefore amended to make it possible for the golf course to operate, albeit under non-ideal circumstances, while respecting the rights of the plaintiffs. Like the English case of *Miller v Jackson*, this decision focused on balancing the interests of the parties, in other words the 'normal' nuisance principle of reasonableness, instead of granting injunctive relief purely because of the threat of damage or injury. The two decisions therefore go against the trend established in the rest of the case law on this issue.

(c) *Coming to the nuisance*

The second issue is whether coming to the nuisance is a complete defence in nuisance cases. In *Miller v Jackson*⁸⁶ the only strong argument that the defendant raised against injunctive relief was that the plaintiffs had 'come to the nuisance'. A majority (Geoffrey Lane and Cumming-Bruce LJ, Lord Denning MR dissenting) held that the club's use of the cricket ground amounted to an actionable nuisance and that it was no defence that the plaintiffs had been the authors of their own misfortune by buying a house so close to the ground that they would inevitably be affected by the cricket.⁸⁷ A majority of the court thus confirmed the principle, albeit reluctantly, that coming to the nuisance was not a complete defence against a claim in nuisance or negligence.⁸⁸ Lord Denning MR disagreed with the majority on

⁸⁴ *Cattel v Great Plains Leaseholds Ltd* supra note 78 para 20.

⁸⁵ *Ibid* para 22 (emphasis in the original).

⁸⁶ *Supra* note 27.

⁸⁷ *Ibid* at 348, 349; applying *Stuges v Bridgman* (1879) 11 Ch D 852.

⁸⁸ The principle was established in *Stuges v Bridgman* supra note 87; see further *Kennaway v Thompson* supra note 52. See further Lunney & Oliphant op cit note 43 at 668; R Kidner *Casebook on Torts* 5 ed (1990) 383. J Pugh-Smith, G Sinclair & W Upton *Neighbours and the Law* 4 ed (2006) note that a duty to fence may arise in negligence to prevent foreseeable escapes, eg in sporting activities, depending on the frequency of the occurrence and the cost of preventing it. In Dutch law there are some indications that priority in time will establish a stronger right to use property in a certain way, but it is not clear that coming to the nuisance will be an absolute defence in a nuisance claim; see Van Dam, Mijnsen & Van Velten op cit note 43 para 41; Snijders & Rank-Berenschot op cit note 43 para 183; Reehuis & Heisterkamp with Van Maanen & De Jong op cit note 43 para 487, citing HR 3 May 1991, NJ 1991, 476; HR 18 September 1998, NJ 1998, 69. In German law the priority principle also applies, but only in considering reasonableness and not as an absolute defence: H Prütting *Sachenrecht* 33 ed (2008) 125; H Westermann, HP Westermann, K H Gursky & D Eickmann *Westermann Sachenrecht: Ein Lehrbuch* 7 ed (1998) 502. M Wolff & M Wellenhofer *Sachenrecht* 24 ed (2008) 378; BGH NJW 2001, 3119. As is pointed out in the penultimate section below, the matter is steered in a different direction by other considerations that apply in German law.

this point, arguing that coming to the nuisance was indeed relevant and that it should affect the outcome of the case: the first user in time should enjoy priority over the interests of those who came to the area later and whose use and enjoyment of their property conflict with the prior use.⁸⁹ Buckley⁹⁰ has pointed out that, even though the majority accepted the authority of the decision in *Sturges v Bridgman*⁹¹ and held that coming to the nuisance was not a complete defence, the notion of coming to the nuisance nevertheless had an impact on the decision in that it resulted in the plaintiffs being deprived of the injunctive relief that they should have been entitled to in terms of the established authority of the decision in *Shelfer*.⁹²

In the Australian case of *Campbelltown Golf Club Limited v Winton*⁹³ the Supreme Court of New South Wales confirmed that coming to the nuisance was not a complete defence in nuisance cases,⁹⁴ adding that it was not a defence that could be used to reduce the amount of damages either. 'The problem with the appellant's submission', the court stated,

'is that it endeavours to relegate houses built on land in the subdivision to an inferior position to that occupied by the golf course. In the appellant's submission, the golf course was the focal point. If it created a problem for

⁸⁹ *Miller v Jackson* supra note 27 at 342, 344. Lord Denning at 344–5 would have adopted the principle that coming to the nuisance was a complete defence in this case because the use of the village commons for cricket matches was a reasonable use and because it could not be rendered unreasonable or a nuisance simply because the plaintiffs built a house right next to it. If anybody had to move to solve the problem, he thought it should be the plaintiffs. At 345 Lord Denning MR went as far as to argue that the plaintiff should leave if he could not accept the situation: '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.' Geoffrey Lane LJ at 348–9 would, if the matter was open for decision, have preferred not to stop 'a long-established activity, in itself innocuous, . . . because someone chooses to build a house nearby and so turn an innocent pastime into an actionable nuisance'. However, he was bound by the authority of the decision in *Sturges v Bridgman*. Cumming-Bruce LJ at 349 agreed with that conclusion, although at 351 it looks as if he came perilously close to in fact accepting a defence on the basis of coming to the nuisance, at least as far as the decision on the correct remedy is concerned: '[T]he plaintiffs having accepted the benefit of the open space marching with their land should accept the restrictions on enjoyment of their garden which they may reasonably think necessary.'

⁹⁰ Buckley op cit note 36 at 336.

⁹¹ Supra note 87.

⁹² *Shelfer v City of London Electric Lighting Co* supra note 53; see the discussion above.

⁹³ Supra note 25. This decision was referred to with approval in *Allaclas* (SCA) supra note 12 paras 16–17.

⁹⁴ Citing *Attorney-General v Corporation of Manchester* [1893] 2 Ch D 87 at 95; *Sturges v Bridgman* supra note 87.

residents, that was something which the residents had to tolerate. That is not the law'.⁹⁵

In *Sammut v Islington Golf Club Ltd*⁹⁶ the Canadian court also rejected the notion of coming to the nuisance as a complete defence in nuisance cases. The plaintiffs built their house and moved there long after the golf course had been built and started functioning as such. The golf club had always opposed the building of the houses and was not surprised when the plaintiffs' house was hit by hundreds of golf balls per week during the golf season. The court rejected the argument that the plaintiffs could not complain because they had come to the nuisance — even in so far as they had consented to some discomfort by building and living in a house in that location, there is no reason to conclude 'that they have ever consented to endure a problem of this nature or magnitude'.⁹⁷

In *Nussbaum v Lacopo*⁹⁸ the New York state court said that 'one who chooses to reside on property abutting a golf course is not entitled to the same protection as the traveler on the public highway', which could create the impression that coming to the nuisance is accepted as a defence in nuisance cases. Generally speaking, however, the doctrine of coming to the nuisance does not provide a complete defence against a nuisance claim in US law.⁹⁹ In *Rinaldo v McGovern*¹⁰⁰ the New York Court of Appeals explained that the statement in *Nussbaum v Lacopo* does not imply that individuals outside of the golf course who are struck by stray balls as they travel on the highway are entitled to special protection either. In US law liability for damage or injury caused by stray balls depends on the general principles of liability in tort.

In foreign law the principle is therefore established that coming to the nuisance does not provide a complete defence in any nuisance case. In cases where the nuisance causes or threatens to cause damage to property or personal injury this principle should be even stronger.

(d) *The locality principle*

In *Miller v Jackson*¹⁰¹ the majority decided not to grant an injunction because of the public interest in continuing the use of the green as a cricket field. The court therefore paid special attention to the public interest in applying the balancing test that is supposed to indicate whether the defendant's use of its property was reasonable. As was indicated above, the decision not to grant injunctive relief was influenced by the view that the interests of the public in

⁹⁵ *Campbelltown Golf Club Limited v Winton* CA supra note 25. The electronic report is neither paginated nor paraphrased.

⁹⁶ Supra note 73.

⁹⁷ Ibid para 23.

⁹⁸ 27 NY 2d 311 at 316 (1970).

⁹⁹ RA Epstein *Torts* (1999) 365–6; A Best & D W Barnes *Basic Tort law: Cases, Statutes, and Problems* (2003) 769, citing *Restatement (Second) of Torts* § 840D; *Lawrence v Eastern Airlines Inc* 81 So 2d 632 at 634 (Fla 1955).

¹⁰⁰ 78 NY 2d 729 (1991).

¹⁰¹ Supra note 27.

preserving the long-established use of the green as a cricket ground had to prevail over the individual interests of the plaintiffs. As far as the majority on this issue was concerned this was an application of the locality principle, although Lord Denning MR in his individual judgment declared explicitly that he saw the fact that the plaintiffs had come to the nuisance as a valid defence against the nuisance claim.

The locality principle means that a land user cannot expect a higher level of comfort than is usual or customary in the locality where the property is situated. In the decision of the majority in *Miller v Jackson* this meant that the owners who built or moved into houses that are close to a cricket ground cannot expect to enjoy the use of their properties completely free of occasional intrusions by stray cricket balls. Obviously this principle bears some relation to the notion of coming to the nuisance, but in the form of the locality principle it is nothing more than a factor that will play a role in weighing up the conflicting interests in the context, whereas it is seen as a complete defence according to the notion of coming to the nuisance. Buckley¹⁰² points out that the refusal of injunctive relief in *Miller v Jackson* was justified with reference to the principle that a plaintiff in a nuisance case is not entitled to a higher standard than is customary in the particular locality — in this case, the dominating use of the locality was the playing of cricket and thus the plaintiffs could not obtain a higher standard of protection than is allowed by that custom. The same argument has been used elsewhere as a weaker version of the defence of coming to the nuisance.

However, the matter is more complicated than it may seem from the decision in *Miller v Jackson*. In the Australian case of *Campbelltown Golf Club Limited v Winton*¹⁰³ the court applied the locality principle differently by pointing out that the occupiers of land bordering a golf course had to expect that some golf balls might come on to their land from time to time, but that they did not have to accept that their property would be ‘peppered with golf balls on a daily basis’ in a way that posed a threat to their property and their physical safety. The golf course was obliged to accommodate their interests and safety by adapting its operations in a suitable way. The locality principle therefore does not mean that the affected neighbours simply had to put up with whatever level of nuisance is usual or customary in their area; they had to tolerate the effects of normal or customary use in their area only in so far as it is reasonable.

In the Canadian case of *Cattel v Great Plains Leaseholds Ltd*¹⁰⁴ the plaintiffs had built houses or moved into existing houses next to the golf course; both acknowledged that they fully expected that some stray golf balls would land on their property. ‘It is trite logic’, the court pointed out, ‘that inconvenience

¹⁰² Buckley op cit note 36 at 336.

¹⁰³ Supra note 25. This decision was referred to with approval in *Allaclas* (SCA) supra note 12 paras 16–17.

¹⁰⁴ Supra note 78.

of that nature is part and parcel of the “golf community lifestyle”.¹⁰⁵ The problem is, as the court wittily noted, that in this area of the law ‘there is no bright line signifying the point where sport becomes tort’.¹⁰⁶ The Saskatchewan Court of Appeal held that the injunction granted by the trial court was overbroad because the court failed to weigh the social benefits of the golf club against the private interests of the plaintiffs in the quiet enjoyment of their property.¹⁰⁷ The goal in cases like this, the court held, was to balance the conflicting claims of landowners without subordinating the interests of one owner to the comfort of the other, taking into account the level of inconvenience that occupiers in the vicinity can be expected to bear.¹⁰⁸ The terms of the injunction were therefore amended to make it possible for the golf course to operate while respecting the rights of the plaintiffs. This decision seems to go in the same general direction as the English decision in *Miller v Jackson* in the sense that the court did not simply award injunctive relief because of the danger that the nuisance might cause damage or injury, but instead employed the reasonableness test (including the locality principle) to balance the conflicting interests of the parties. It thus went against the trend of the other decisions in which the locality principle was not applied because of the danger of damage or injury. At the same time this decision did not go quite as far as *Miller v Jackson* in that it still awarded injunctive relief, but structured the order to allow the defendant to continue to operate.

The decisions in *Miller v Jackson* and *Cattell* are problematic in the sense that they arguably gave too much prominence to the locality principle in cases where the nuisance went beyond merely causing a discomfort or disturbance. In the latter cases the locality principle is subject to a significant proviso, as the next section will show.

(e) *Danger of damage or injury*

In *Miller v Jackson*¹⁰⁹ Geoffrey Lane LJ thought that the rule in *Sturges v Bridgman* against the notion of coming to the nuisance worked an injustice in this case, but he was nevertheless the only judge who was willing to grant injunctive relief to suspend the playing of cricket on the village green because of the danger that it posed for the plaintiffs. There was no question, he decided, that property would be damaged and that someone might suffer injury at some point if the cricket games continued. The defendants would be liable in negligence and in nuisance if that should happen.¹¹⁰ Geoffrey Lane LJ distinguished between nuisance to the senses (such as noise) and nuisance that poses a real and serious threat of physical damage or personal

¹⁰⁵ Ibid para 11.

¹⁰⁶ Ibid para 12.

¹⁰⁷ Ibid para 20.

¹⁰⁸ Ibid para 22. See the discussion of this case above.

¹⁰⁹ Supra note 27.

¹¹⁰ *Miller v Jackson* ibid at 348.

injury. In the latter case, he argued, ‘the answer is more simple’ — the balancing of the interests of the plaintiffs on the one hand and of the defendants and the public at large on the other becomes more straightforward because there is a real and obvious risk that property may be physically damaged and that people might suffer serious injury. In such cases, the judge declared, there is ‘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’.¹¹¹ Given the unavailability of a defence based on coming to the nuisance, the threat of damage or injury had to be avoided, and the only way of doing so was to grant an injunction to stop the club from playing cricket on the green.¹¹² This judgment demonstrates the alternative interpretation referred to in the introduction: when the nuisance causes or threatens to cause damage to property or personal injury the normal neighbour law procedure of weighing and balancing the interests of neighbours is suspended and injunctive relief is granted. In other words, the actual threat of damage or injury indicates that balancing is unnecessary because there is no level at which neighbours are expected to tolerate damage or injury.

Buckley shows that the defence based on the locality principle has always been subject to the same qualification: the locality principle applies to nuisance causing interference with comfort and enjoyment of property, but it has never been allowed when there was damage to property.¹¹³ Neither the defence of coming to the nuisance nor the defence of locality should therefore be available or considered in cases where the nuisance threatens or causes damage or injury. According to this qualification, *Miller v Jackson* was wrongly decided and the injunction should have been upheld. The decision in *Cattel* might still be justifiable despite this qualification, in so far as the court in *Cattel* did not deny injunctive relief altogether but structured the order so to allow the defendant to do business while protecting the plaintiff against damage or injury.

The high incidence of stray balls flying into the property of the plaintiffs and the likelihood that physical damage and serious injury would be caused by them distinguish *Miller v Jackson* from *Bolton v Stone*,¹¹⁴ where the House of Lords allowed the appeal and restored the trial court judgment that nuisance was not proved because negligence could not be established. In *Bolton v Stone*, the court decided on the facts that the low frequency of cricket balls being hit out of the ground, combined with the fact that the street on

¹¹¹ *Ibid.*

¹¹² Because of his sympathy for the cricketers, he was willing to suspend the injunction for twelve months to allow the club time to look for an alternative pitch.

¹¹³ Buckley op cit note 36 at 336.

¹¹⁴ *Supra* note 69. See Greenfield & Osborn op cit note 47 at 53 for a discussion. Another case where a stray ball caused personal injury is *Castle v Augustine's Links Ltd* (1922) 38 TLR 615; a taxi-cab driver lost an eye when a badly hit golf ball hit him in the eye while driving on the road adjoining a golf course. The court held that public nuisance was established and Castle was awarded damages. See R A Buckley *The Law of Nuisance* (1981) 59–60 on both *Bolton v Stone* and *Castle v Augustine's Links*.

which the plaintiff was hit by a stray cricket ball was not frequented by pedestrians, indicated that injury caused by stray balls was improbable. The principle is that one must take reasonable care to avoid an occurrence that is not just remotely possible but reasonably likely in the sense that the reasonable person would contemplate it as a probability. In *Bolton v Stone* the House of Lords said that if cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all,¹¹⁵ but on the facts the risk of injury to a person was remote and therefore the defendants were not guilty of creating a nuisance.¹¹⁶ In cases where the nuisance threatens or causes damage or injury the courts should therefore focus on evidence concerning the incidence and the manner of immission, not in order to determine the level where neighbourly tolerance is exceeded but to assess the risk of actual damage or injury. The appeal decision in *Lakeview Gardens Ltd v City of Regina*¹¹⁷ can be explained on the same basis, namely that the incidence of dangerous stray golf balls was too low to create a real threat.

It is also clear from the Australian decision in *Campbelltown Golf Club Limited v Winton*¹¹⁸ that the threat of damage to property and physical injury places a stricter duty of care upon the owners and operators of the golf course to ensure that their activities would not establish a nuisance for adjoining landowners. The threat of damage or injury cancels out the neighbour's obligation within reason to tolerate intrusions caused by stray golf balls.

In US law the question of liability is decided on the basis of the normal principles of tort law, particularly the duty of care. It has been decided by the New York Court of Appeals that a golfer preparing to drive a ball has no duty to warn persons 'not in the intended line of flight on another tee or fairway'.¹¹⁹ Apart from the duty to other players on the golf course, a golfer is ordinarily not held liable for damage or injury to persons located outside of the boundaries of the golf course who happen to be hit by a stray ball.¹²⁰ In *Rinaldo v McGovern*¹²¹ the New York Court of Appeals decided that the statement in *Nussbaum v Lacopo*¹²² that 'one who chooses to reside on property abutting a golf course is not entitled to the same protection as the traveler on the public highway' does not imply that individuals outside of the

¹¹⁵ *Bolton v Stone* supra note 69. In *Miller v Jackson* supra note 27 at 342 Lord Denning MR referred to this statement, but accepted it only in so far as the plaintiff was not coming to the nuisance.

¹¹⁶ The only facts to be proven in the case established that about six balls had been hit into the street over a period of thirty years. This makes the incidence of stray balls a very infrequent occurrence, to which must be added the small likelihood that a stray ball would actually hit a pedestrian on a not very busy street.

¹¹⁷ Supra note 63 para 9.

¹¹⁸ Supra note 25. This decision was referred to with approval in *Allaclas* (SCA) supra note 12 paras 16–17.

¹¹⁹ *Jenks v McGranahan* 30 NY 2d 475 at 479 (1972).

¹²⁰ *Nussbaum v Lacopo* supra note 98.

¹²¹ 78 NY 2d 729 (1991).

¹²² Supra note 98.

golf course who are struck by stray balls as they travel on the highway are entitled to special protection.¹²³ The issue in *Rinaldo v McGovern* was whether the golfer had a duty to warn persons outside of the golf course, and the court held that she did not, as such a warning would be either futile or impossible. The court confirmed the decision in *Jenks v McGranaghan*¹²⁴ that the risk of a mis-hit golf ball is not a preventable occurrence and that there was no liability in tort unless 'the harm flowing from the consummation of that risk was reasonably preventable'. To establish liability the plaintiff would have to prove that the golfer failed to exercise due care, for instance by showing that the golfer 'aimed so inaccurately as to unreasonably increase the risk of harm'.¹²⁵

By contrast, the decision of the Saskatchewan Court of Appeal in *Cattel v Great Plains Leaseholds Ltd*¹²⁶ seems to go in the opposite direction, more closely resembling the decision of the English Court of Appeal in *Miller v Jackson*¹²⁷ in its effort to establish a fair balance of the interests of the conflicting owners and of the public. Both *Miller* and *Cattel* raise the question how far a court could go in accommodating the interests of the owners of sporting facilities (or the public interest) as against the interest of those threatened with damage to their property or personal injury. In the *Allaclas* case the question also arose whether the court should suspend the injunction to give the owners of the golf club time to find an alternative solution, but the Supreme Court of Appeal refused to do so. In that regard the contrast between the *Allaclas* decision and the other recent South African nuisance case, *Laskey v Showzone CC*,¹²⁸ is instructive. In *Laskey*, a noise case, the court went out of its way to suspend the injunction to give the owner of the offending property an opportunity to rectify the situation without damaging its business. Apparently, this was not possible in *Allaclas* because of the threat that continuation of normal golf activities could cause damage to property or personal injury. The difference between the two cases seems to be the difference between nuisance in the form of annoyance or discomfort and nuisance that causes or threatens to cause damage to property or personal injury. In the former case the courts can be lenient to protect the interests of the defendant; in the latter there is apparently less room for lenience.

¹²³ In US law the doctrine of coming to the nuisance does not provide a general defence against a nuisance claim: Epstein op cit note 99 at 365–6; Best & Barnes op cit note 99 at 769, citing *Restatement (Second) of Torts* § 840D; *Lawrence v Eastern Airlines Inc* 81 So 2d 632 at 634 (Fla 1955).

¹²⁴ Supra note 119.

¹²⁵ Citing *Nussbaum v Lacopo* supra note 98.

¹²⁶ Supra note 78.

¹²⁷ [1977] 3 All ER 338. See Buckley op cit note 36 at 334; Greenfield & Osborn op cit note 47 at 53 for discussions of the case.

¹²⁸ Supra note 33.

(f) *German law: an alternative approach*¹²⁹

Apart from a famous case on noise caused by the unfortunate placing of a tennis court,¹³⁰ I could not find any German case law on flying balls causing nuisance. Of course the Germans do not play cricket much, but even golf balls seem to cause less of a problem in case law. There is a special reason for this seemingly strange absence of case law on nuisance caused by stray balls.

The German civil code (Bürgerliches Gesetzbuch) does not define nuisance. The general background provision in § 1004 BGB allows land-owners a remedy to demand that impositions upon or interferences with their property should be removed or terminated (similar remedies are provided for other land users in other paragraphs of the code). Nuisance is regulated by a qualification of this general principle in § 906 BGB, which provides that the owner of land cannot prevent the spreading of gasses, steam, smells, smoke, soot, heat, noise, vibrations and similar immissions from neighbouring land in so far as they do not (at all or significantly) affect the use of his land negatively. Negative effects are considered insignificant when they do not exceed limits or guidelines laid down in legislation or administrative rules or when the effect of the immission is insignificant or, in cases where its effect is significant, when the immission is caused by use of the neighbouring land that is normal in the area and prevention of the immission would be economically unreasonable.

Most importantly for present purposes, § 906 BGB, which qualifies the right in § 1004 BGB to have interferences with ownership terminated, explicitly excludes materials that can be weighed (*wägbare Stoffe*)¹³¹ — if larger, weighable bodies entered upon neighbouring land § 906 BGB would

¹²⁹ Information for this section was mostly adapted from sections from ch 6 (Nuisance) of AJ van der Walt *The Law of Neighbours* (forthcoming, 2010).

¹³⁰ In the *Tennisplatz* case (NJW 1983, 751) the German Federal Court in Civil Matters (Bundesgerichtshof: BGH) granted a complete prohibition order against playing of tennis on courts in close proximity to the residential property of the plaintiff. The matter was subsequently regulated by a specially promulgated regulation under the federal nuisance protection law (Bundes-Immissionsschutzgesetz 14.5.1990, BGBl I 881), that regulates protection against noise from sport facilities. See Westermann, Westermann, Gursky & Eickmann *supra* note 88 at 504–5.

¹³¹ The category of large or weighable materials excluded from the duty of tolerance imposed by § 609 BGB would include flying stone or brick chips and large animals like pigeons, chickens, cats and rabbits, but bees have been included as light (unweighable) objects: Westermann, Westermann, Gursky & Eickmann *op cit* note 88 at 498. Dutch law functions slightly differently, but it would include bees and large numbers of birds as objects that could cause actionable nuisance, while in some cases excluding pigeons: Snijders & Rank-Berenschot *op cit* note 43 para 183; Van Dam, Mijnsen & Van Velten *op cit* note 43 para 37; Reehuis & Heisterkamp with Van Maanen & De Jong *op cit* note 43 para 486. It is important to distinguish nuisance caused by invasion of the animals themselves from nuisance caused by noise made by them — in German law the noise made by chickens would fall directly under § 609 BGB, while an invasion of the chickens themselves would be excluded from the duty to tolerate. In that sense there might be a stricter duty to tolerate the noise but a less strict duty to tolerate the invasion of the animals themselves.

not apply and the neighbour could simply invoke § 1004 BGB to terminate the intrusion. Immissions by heavy or weighable bodies such as rock or stone chips — or golf and cricket balls — are simply excluded from the duty to tolerate insignificant immissions in § 906(1) BGB. In effect, the qualification in § 906 BGB means that there is no level at which any land owner or user has to tolerate, in a spirit of neighbourly ‘give and take’, immissions from larger objects such as balls that invade her property as a result of the use of neighbouring land. On the basis of § 1004 BGB such an invasion by larger objects is immediately unlawful and the affected neighbour can bring action to have it terminated without having to prove that it was unreasonable or beyond what is normal or acceptable in the location.

One could speculate about the reasons for this exclusion from the nuisance principle in § 906 BGB, but the obvious reason seems to be that larger objects — objects of a size and consistency that render them weighable — that fly over the fence and into your property more or less automatically and self-evidently pose a danger of causing physical damage to property or personal injury. Consequently, there could be no expectation that neighbours should reasonably put up with that danger. The notion of coming to the nuisance is not recognised in German law as a complete defence in nuisance cases.¹³²

III CONCLUSIONS

A number of general conclusions appear possible from these cases. First, nuisance in the sense of discomfort and annoyance should be distinguished from nuisance that causes or threatens to cause damage to property or physical injury; in the latter case the plaintiff can obtain relief by merely

¹³² The German Federal Administrative Court has decided that a general change in land use could render a pre-existing use of land on one property unreasonable and unlawful, even though the use itself never changed materially: BVerwGE 38, 209 (1971) (noise created at a facility where fish products were loaded onto trucks, often at night); BVerwGE 49, 365 (1975) (exploitation of stone in a nature conservation area). According to German constitutional law a user of land cannot insist on unchanged enjoyment of its favourable characteristics; changing circumstances could render the use that creates the disturbances unlawful: A J van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 153, 154–5. This principle also applies in private law and accordingly the notion of coming to the nuisance has no place in German law. Prütting op cit note 88 at 125; Westermann, Westermann, Gursky & Eickmann op cit note 88 at 502. Wolff & Wellenhofer op cit note 88 at 378 seem to contradict this position, citing *BGH NJW* 2001, 3119, but the principle they state is in fact the same: priority in time could prevent an owner who moves into the area where the nuisance existed from relying on her right to have the nuisance abated, but will not necessarily do so — it depends on the context of each case. In Dutch law the fact that the source of the nuisance was in place before the plaintiff arrived or started using her land in a certain way could indicate that she might have to tolerate the nuisance: Van Dam, Mijnsen & Van Velten op cit note 43 para 41; Snijders & Rank-Berenschot op cit note 43 para 183; Reehuis & Heisterkamp with Van Maanen & De Jong op cit note 43 para 487, citing HR 3 May 1991, *NJ* 1991, 476; HR 18 September 1998, *NJ* 1998, 69.

showing that damage or injury is probable and not that it exceeds the level of reasonable tolerance between neighbours. At least in principle it seems as if there is no level of reasonable tolerance as far as physical damage to property or personal injury are concerned; neighbours do not have to put up with a real and significant threat that property would be damaged or persons might be injured at all. The fact that the nuisance complained of poses a threat of damage to property or physical injury steers the application of the normal nuisance principles in a different direction, reducing the obligation of the affected neighbour to display tolerance and forbearance and increasing the likelihood of obtaining injunctive relief to prevent or terminate the nuisance. In this regard the German principle that larger, weighable objects are explicitly excluded from the tolerance principle seems to be both laudably clear and eminently sensible.

However, the decision in *Dorland v Smits* shows that the threat that property would be damaged or that physical injury would occur unless the nuisance is abated or prevented has to be real and significant. The courts will not grant an injunction to terminate or prevent use of property if the danger that they pose for neighbours is very remote or unlikely. The fact that one or two stray golf or cricket balls have been known to fly out of the grounds and onto a not very busy public street now and then is not enough to justify injunctive relief that would terminate or restrict the use of the sport grounds. At the same time it is important to distinguish clearly between an analysis of the facts to ensure that the threat is real and significant, and the normal reasonableness test, which is aimed at establishing whether the nuisance exceeds the level of tolerance that could be expected of a neighbour. Neighbours are not expected to bear a real and significant threat of damage or injury at all, and therefore the test in these cases is aimed at establishing probability and not balancing of interests.

Secondly, coming to the nuisance is generally not recognised as a complete defence, even though some courts have expressed dismay at the injustice caused by this rule. Furthermore, even if the courts should accept a defence based on the notion of coming to the nuisance, this defence should not apply or be considered at all in the case of a real and imminent threat of damage or injury. In this perspective the South African *Allaclas* decision looks justified, whereas the English decision in *Miller v Jackson* looks questionable.

Thirdly, the locality principle applies less strictly in cases where the nuisance poses a real and imminent threat of damage or injury. It is true that the locality principle will take up some of the slack left by non-recognition of coming to the nuisance as a defence, but even then the locality principle (like the reasonable tolerance principle) seems to be excluded from cases where the nuisance causes or threatens to cause physical damage to property or personal injury. Case law in which the locality principle or the tolerance principle was applied in these cases is questionable.

Finally, as far as remedies are concerned, recent English case law seems to establish that deviations from the *Shelfer* principle should not be undertaken

lightly.¹³³ The idea that injunctive relief is discretionary and that the public interest should be taken into account when exercising the discretion to award pecuniary damages in lieu of injunctive relief finds its limits as soon as the applicant or plaintiff has established a significant (non-marginal) intrusion on her rights, and again the presence or threat of physical damage to property or personal injury seems to take the matter over that particular boundary conclusively. In short, if the nuisance threatens damage or injury, the plaintiff or applicant is entitled to injunctive relief. In the same spirit, the tendency to allow certain offenders to continue with their use of the property while attending to measures to prevent or reduce the nuisance should not find application in the damage and injury cases. The South African decisions in *Allaclas* and *Laskey* illustrate the point well: if the nuisance causes discomfort or annoyance the courts should exercise their discretion to decide whether injunctive relief should be implemented immediately or suspended to protect the legitimate interests of the defendants, but if the nuisance causes or threatens to cause damage or injury suspension of the injunctive relief should only be allowed in very exceptional circumstances.

As far as the granting of injunctive relief is concerned, Murphy¹³⁴ argues that injunctions appear to be most easily obtained in respect of property and property-like interests, but that this prioritisation of property is questionable in so far as it 'appears to downgrade the status of the right to bodily integrity'. He therefore proposes that injunctions should be made more easily available in negligence in cases involving a dangerous state of affairs, particularly one that threatens bodily integrity. If stronger and stricter protection against nuisance is justified when the nuisance threatens to cause damage to property or personal injury, the protection of personal and physical integrity and safety should be even stronger than for property interests.

In light of these considerations the Supreme Court of Appeal's decision in *Allaclas* seems to reflect a fairly general, well-motivated and sensible trend in current law worldwide. It is a pity, however, that the courts have so far failed to explain the distinction between normal annoyance cases and dangerous nuisance cases more explicitly and clearly.

¹³³ South African nuisance law was influenced by English examples on this point. See *Rand Waterraad v Bothma* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

¹³⁴ J Murphy 'Rethinking injunctions in tort law' (2007) 27 *Oxford Journal of Legal Studies* 509.