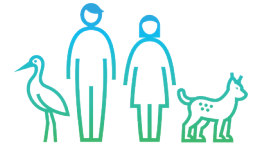


LIABILITY TO NEIGHBOURING LANDHOLDERS



CORE TOPICS:

- Potential liability to neighbouring landholders where rewilding activities damage or otherwise disturb their enjoyment of their land.

KEY TAKEAWAYS

- A landholder can be held liable for doing something on their land that interferes with a neighbour's land or their enjoyment of it.
- Neighbours adversely impacted may be able to claim damages and/or seek an injunction to stop the relevant activity.
- Landholders may be required to take action to stop or prevent things from occurring on their land if they are impacting their neighbours, including in relation to animals.
- Rewilders should check with their insurance broker the extent to which the risk of liability to neighbouring landholders is or can be covered by their insurance.

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INTRODUCTION

In the vast majority of cases, tensions that arise between neighbouring landholders¹ can be resolved amicably through agreement. However, should that not be possible, it is important to be aware of the potential for legal claims to arise in nuisance, as described in this note.²

This briefing note will: (i) cover the key aspects of nuisance; (ii) consider in more detail the circumstances in which landholders can be held responsible for damage caused by (natural and man-made) hazards occurring on their land; and (iii) apply the aforementioned to potential sources of nuisance in a rewilding context, including flooding, subsidence, and fire.

1. WHAT CONSTITUTES NUISANCE?

The law in this area can appear contradictory and is too complex to cover in full here. In brief, however:

- Nuisance is typically committed by the occupier of land (which could be the landowner, but also the tenant or other occupier(s) of the land). It occurs when an occupier carries out an act on their land which interferes with their neighbour's enjoyment of their own land.
- Interference could take the form of physical damage, but such damage is not a prerequisite to a claim of nuisance, and most actions for nuisance do not involve physical damage at all. The claimant also does not need to demonstrate that the value of their land has been impacted.
- The interference must be “substantial” or “unreasonable”, meaning something an ordinary person could not be expected to put up with in the circumstances.³ Location and context are important. Something that would amount to an unreasonable

nuisance in an urban area may not do so in a rural area, for example. Physical damage will generally always amount to substantial interference, however.

- Whilst nuisance usually involves a continuous or recurrent interference, a one-off event can give rise to nuisance. An example of this is flooding.
- The affected party doesn't need to be the owner of the neighbouring land but must have a proprietary interest in it.⁴ This includes tenants and other occupiers of the land.
- The occupier can be liable for nuisance caused by others on their land (including trespassers) if they “adopt” the nuisance by failing to take reasonable care to stop it once they are aware of it (or should reasonably be aware of it).

2. CAN A LANDHOLDER BE LIABLE FOR HAZARDS OCCURRING NATURALLY ON THEIR LAND?

As noted above, the landholder will be liable for a nuisance if they “adopt” it by failing to take reasonable steps to prevent it. As well as actions by others (such as visitors to or tenants on the land), this principle extends to hazards occurring on the landholder's land, both man-made and natural.⁵

Where such a hazard is present, the landholder will owe a “measured duty” to take “reasonable steps” to prevent or minimise the risk of it causing damage or harm to neighbouring land.⁶ What constitutes reasonable steps here will depend on:

- what is fair, just and reasonable as between neighbouring landholders;
- both the claimant's and defendant's resources and abilities, including the availability and cost of preventive measures; and

- how reasonably foreseeable it was that the hazard would cause the damage if not dealt with.

3. ARE THERE CIRCUMSTANCES IN WHICH A LANDHOLDER CAN BE HELD STRICTLY LIABLE FOR DAMAGE CAUSED BY A HAZARD ON THEIR LAND?

By way of contrast to the situations of naturally occurring hazards above (where the landholder may be liable if she fails to take reasonable steps to prevent the damage occurring), there are other situations in which strict liability (i.e., liability irrespective of whether or not reasonable steps have been taken) will arise for the landholder. This arises where:⁷

- landholders accumulate something (such as water or a toxic substance) on their land which is likely to cause harm if it escapes (things which accumulate naturally without human intervention are not caught for these purposes);
- the above constitutes a “non-natural” use of the land (though not clearly defined, generally this means the use of the land must be extraordinary or unusual, rather than involving something man-made or artificial); and
- the thing escapes and the damage in question is a natural consequence of that escape.

This rule usually applies where there is an escape of something, such as water (where it accumulated unnaturally, e.g., through the construction of a dam) or a toxic substance, which spreads onto neighbouring land and causes substantial damage.

4. WHAT ARE THE POTENTIAL NUISANCES THAT COULD ARISE FROM REWILDING ACTIVITIES?

The application of the above principles can potentially expose those managing rural land (including rewilders) to liability to neighbouring landholders in a number of ways.

4.1 Flooding and waterways

EXAMPLE 1

A rewilding project decides to permit a small artificial lake to overtop its barrage at times of heavy rain (rather than using a sluice gate to manage the water level in the lake). The water mistakenly drains onto neighbouring farmland, spoiling the neighbouring landholder's crops.

Though the flooding was not deliberate, this may constitute an unreasonable interference by the rewilding project with the neighbour's enjoyment of their land, and the neighbour could be successful should they seek damages by way of compensation.

The rewilding project could also be held strictly liable for the damage (i.e., without any need to establish unreasonableness) if the creation of the lake constituted an extraordinary or unusual use of their land and, in the circumstances, it was likely that the escape of the water would cause harm.

Many rewilders will have bodies of water or watercourses on the land they are rewilding. For some, returning them to a more natural state will be a key component of the rewilding project.⁸ Rewilding should, in theory, improve a landscape's natural defences against flooding by reducing peak water volumes and slowing run-off. Nevertheless, the possibility of alterations leading to flooding of neighbouring

land (or, least, accusations of that being the case) cannot be ruled out. This could potentially see the rewilding project facing a complaint of nuisance or even a claim for an injunction or damages from their neighbours, or receiving an order to remedy the cause of the flooding (e.g., by removing debris blocking the watercourse).⁹

The validity of the neighbouring landholder's claim in these circumstances will turn on the facts, but generally speaking:

- A landholder will be liable to their neighbour for physical damage and loss of enjoyment if they deliberately release a body of water onto their neighbour's land.¹⁰
- Where it is alleged that the flood damage was caused by the landholders's failure to prevent natural flooding (i.e., from extreme rain, or increased water flow from upstream) from occurring, it will be necessary to consider whether they did what was reasonably necessary in the circumstances.¹¹ This assessment will take into account:
 - (i) whether it was reasonably foreseeable that the flooding would occur;
 - (ii) the extent to which flood damage was foreseeable;
 - (iii) whether it was practicable to prevent or minimise the flood damage and, if so, the extent of work required; and
 - (iv) the financial resources of the rewilding project (and of the neighbour).

Applying the above, if changes to rewilding land create an apparent risk of flooding to neighbouring land (e.g., because drainage features have been removed or allowed to be filled over time) and the landholder could reasonably be expected to maintain or retain those features, then there is a risk of the rewilding project being liable to neighbouring landholders for any flood damage their property may suffer as a result.

EXAMPLE 2

A rewilding project introduces beavers to their land in large enclosures. The beavers create a dam in a stream near the boundary of the property, which causes water to accumulate. Eventually, following heavy rainfall the dam causes water to run onto neighbouring land, in turn flooding the neighbour's barn and damaging goods they have stored there.¹²

In these circumstances, it might be open to the neighbouring landholder to argue that they are entitled to damages by way of compensation for the loss of enjoyment of and physical damage to their barn, as well as an injunction compelling the rewilding project to clear the dam which caused it. The neighbour cannot, however, seek damages in nuisance for the damage to the goods in the barn.

Should any such claim make its way to court, the court would need to consider whether the rewilding project had failed to comply with their measured duty to prevent the flood damage. This will turn on a factual assessment of how foreseeable it was that the beaver dam would lead to flooding impacting the neighbouring land. Consideration will also need to be given to how readily the rewilding project could have removed the dam.

4.2 Fire

EXAMPLE 3

A wooded area is to be rewilded and as part of this the landholder ceases maintaining it and clearing it of debris. Dry brush begins to accumulate. During a particularly dry summer a large wildfire starts and spreads to neighbouring land, damaging crops and causing injury. The neighbour alleges that wild campers – who are invited to enter the land – have regularly been lighting campfires, and this is tolerated by the landholder.¹³

The rewilder could find themselves open to a claim that they failed to mitigate the risk of fire occurring or spreading to neighbouring land. The neighbour could also argue that the rewilder, by inviting wild campers and tolerating campfires on the land, has “adopted” a nuisance precipitated by the campers and failed to take reasonable steps to stop it.

A detailed factual assessment would be required to determine what amounts to “reasonable steps” in these circumstances. However, it would assist the rewilder to be able to point to having taken reasonable precautions such as erecting signs prohibiting fires or, alternatively, maintaining dedicated fire pit areas that are periodically cleared of flammable debris. The rewilder could also argue that the wildfire and/or its spread were not reasonably foreseeable, and that it would not be reasonable to expect them to clear all dry brush from the land to address the outside chance of such an occurrence during an unusually dry period.

If successful in any claim, the neighbour could obtain an injunction and recover compensation for damage to their crops, but not for the personal injury caused by the fire (they could also recover for personal injury if they can demonstrate that the rewilder’s conduct was negligent).

Whilst some rewilding activities can reduce wildfire risk, where land is no longer being actively managed in the way it had been previously and fire starts which spreads to and damages neighbouring property (despite the rewilder responding in the usual way, such as calling the fire brigade and alerting her neighbour), the possibility of neighbouring landholders seeking an injunction and/or damages cannot be ruled out.

Should this transpire, the rewilder may be liable for nuisance if they failed to take reasonable steps to control the spread of the fire or prevent it from occurring in the first place.¹⁴ This will ultimately turn on the facts at hand, focusing on how foreseeable it was that fire could start and spread to other land without precautions being taken, how readily the rewilder, given their resources, could have contained or mitigated that risk, and the reasonableness of requiring them to do so.

The rewilder could also potentially be *strictly* liable for fire damage to a neighbouring property (i.e., without any breach of duty of care/assessment of the reasonableness of their conduct on their part), following the principles in section 3 above. However, this could only arise where the landholder themselves brought the fire onto their property (i.e., by starting it. Where a fire starts accidentally, and then spreads to neighbouring land, the rewilder will likely only be liable if their conduct can be said to be unreasonable (even if the material which caught fire was particularly flammable and was accumulated on the land by the rewilder).

4.3 Subsidence and landslides

Every landholder has a right to have their land supported in its natural state by the land of their neighbours.¹⁵ Higher level land is known as the “dominant land” that benefits from a right of support from the lower “servient land”. If support is removed from the “dominant land”, and subsidence results, then the owner of the “dominant land” may be able to bring an action against the neighbouring “servient” landholder.¹⁶ Such a claim can be for harm caused to buildings on the land (as well as the land itself) if the land would have subsided without the extra weight of the buildings on it, or otherwise if the building itself can be said to have a right of

support from the neighbouring property.¹⁷ The right of support may extend to requiring positive action on the part of a neighbouring rewilder,¹⁸ subject to the application of the reasonableness test which requires that where such a hazard (such as a risk of subsidence) is present, the landholder will only owe a “measured duty” to take “reasonable steps” to prevent or minimise the risk of damage to neighbouring land. What constitutes reasonable steps will depend on what is fair, just and reasonable, taking into account the resources and abilities available, and how reasonably foreseeable it was that the hazard would cause the damage if not dealt with.

In this particular context, the following three elements will be taken into account when determining whether liability for nuisance arises: (i) whether the landholder knew or could be presumed to have known of the risk of subsidence; (ii) whether the landholder foresaw that this would cause damage to the neighbour’s land if not remedied; and (iii) the landholder’s ability to address it.

In cases where the “servient” landholder has done nothing to create the danger which has arisen through nature, the “measured duty” of care owed is a more restricted one and is dependent on the facts of each case. The “servient” landholder’s duty is limited to taking reasonable steps to avoid damage caused by apparent (rather than concealed) risks which they ought to have foreseen without geological investigation. In the leading case,¹⁹ it was determined that “reasonable steps” amounted to the “servient” landholder simply warning the “dominant” landholder about the foreseen risk and on the facts, there was no duty to carry out expensive preventative works. A landholder will not be liable merely because they could have discovered the defect on further investigation.

The “servient” landholder’s duty is further limited by the fact that it would *not* be considered fair, just or reasonable to find liability in circumstances where the damage was greater in extent than anything foreseeable without further geological investigation and where the danger had been equally apparent to the “dominant” landholder.

Similarly, an owner of land situated uphill from their neighbour can be held liable for failing to take reasonable steps to address the risk of erosion causing landslides which result in damage to or unreasonable interference with the downhill property, where they are or should be aware of that risk.²⁰ Again, the above-mentioned reasonableness test will apply when determining liability. Whilst in such circumstances it may be impossible, disproportionate or outside the rewilder's resources to fully cure the source of the nuisance, to minimise the potential for liability the rewilder should ensure they still take some practical action. This may simply include discussing the issue with the neighbouring landholder and seeing if any steps can readily be taken to reduce the risk of a landslide occurring.²¹

If successful in a nuisance claim of this sort, the main remedies available to the claimant are seeking an injunction, damages in lieu of an injunction, or abatement of the nuisance.²² To the extent a rewilding project involves allowing natural processes to shape and sculpt the landscape (e.g., by allowing a river to return to its more natural course, or removing coastal defences), the rewilder should therefore consider whether this could potentially result in an increased risk of neighbouring land being adversely impacted by subsidence, undermining or landslips.

Whilst the rewilder will not be under an obligation to do everything in their power to prevent such risks from materialising, liability is more likely to arise where they have been made aware of a risk and it is readily in the rewilder's means to address it.

EXAMPLE 4

As part of a large rewilding project, a river is to be allowed to regain its natural floodplain. To that end, the rewilder refrains from maintaining banks and river defences. Over time the river begins to meander and widen. Eventually this leads to the erosion of neighbouring land overlooking the river, parts of which begin to break off and are no longer safe for grazing.

The neighbour's land overlooking the river is likely to benefit from a right of support from the rewilder's land below, and it appears that support is being removed by the widening of the river and the subsequent erosion to the land on the far bank.

In the event that the rewilder is aware of the erosion and can foresee the risk it presents to the neighbour's land and fails to take any action, it may be possible for the neighbour to bring an action against the rewilder in nuisance to compensate for the loss of enjoyment of the land and/or the cost of establishing new river defences to prevent further erosion and undermining of the land.

However, it would also need to be fair, just and reasonable to establish a duty of care in the first place. The damages which the neighbour could seek will also be limited to the extent of damage which the rewilder foresaw or should have foreseen and the neighbour would need to establish that erosion was a foreseeable consequence of the river widening and that the rewilder failed to take reasonable steps to prevent it.

N.B. Failing to maintain the beds and banks of the watercourse could separately also amount to a breach of riparian obligations, affecting up or down-stream riparian owners. As noted at endnote 8 above, such activities might also necessitate consultation with the relevant risk management authorities.

4.4 Animals

As with the other forms of "natural nuisance" discussed above, a landholder can be held liable in nuisance for damage caused to neighbouring land by animals, including, in some situations, wild animals, on their land. Liability for nuisance caused by wild animals may arise where a landholder is aware or ought to have been aware of the nuisance being caused by the wild animals, has the means to put a stop to the nuisance and fails to take reasonable steps to prevent that damage from occurring.²³

In addition to liability in nuisance, the Animals Act 1971 sets out a statutory regime governing when individuals can be held liable for damage caused by animals (both "dangerous" and non-dangerous), including livestock. In many circumstances this regime sets a lower threshold for liability and is more likely to be relevant to the rewilder than liability in nuisance. Please see the *Rewilding in England & Wales: Liability for Damage Caused by Animals* briefing for more details on the statutory regime governing when individuals can be held liable for damage caused by animals.

It should be noted, however, that the Animals Act 1971 does not impose liability in respect of animals that are living wild (i.e. that no one possesses or is in control of), whereas a landholder may potentially be liable in nuisance for things done by wild animals on their land in the circumstances described above (i.e. they are aware of the nuisance, they have the means to stop it and they fail to take such action)²⁴. There may therefore be circumstances in which a neighbouring landholder can claim damages in nuisance but not under the Animals Act 1971.

4.5 Encroachment by trees and shrubs

Encouraging the (re)growth of trees is a hugely important element of many rewilding projects. Whilst supporting natural regeneration of forests might be a common approach for many rewilders, it may also be necessary to support the natural process through reducing grazing, direct seeding and planting saplings.

With this in mind, rewilders should be aware that encroachment by trees onto neighbouring property can give rise to liability in nuisance where damage results, for example in the (perhaps unlikely) event of encroaching roots extracting moisture and causing subsidence to neighbouring land and buildings, or overhanging branches negatively impacting the neighbour's land (e.g., by stifling growth of crops, or poisoning livestock)²⁵. This applies both to trees planted by the landholder and self-sown trees. In these circumstances, whether liability arises will again depend on whether the landholder failed to take reasonable steps to prevent or minimise the danger presented by the

encroaching trees. Such potential liability will generally only ever apply to trees on or near the boundary of the property.

The rewilder should therefore consider whether trees bordering neighbouring properties could cause damage to or interfere with neighbouring land, and how readily the risk of damage can be contained. However, the mere presence of trees, which over time spread onto or overhang neighbouring land, will not in itself constitute a nuisance; there must be some physical damage or other form of harm to the neighbour's enjoyment of their land.

The above principles also apply to plants other than trees, including shrubs and – notably – weeds. For example, the close presence of Japanese knotweed on neighbouring property has been held to constitute an unreasonable interference with the enjoyment of a landholder's property (even in the absence of physical damage), giving rise to liability in nuisance.²⁶ Weeds are also subject to their own statutory regime, which is likely to be of greater relevance to the rewilder than the ordinary principles of nuisance. This regime is covered in detail in the *Rewilding in England and Wales: Invasive and protected plants* briefing.

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of 31 October 2022.

ENDNOTES

1. A landholder can either own land outright or hold it (e.g. on trust for a beneficiary, or under a lease), so this is a broader concept than that of “*landowner*”.
2. This note addresses private nuisance only. It does not cover “*public nuisance*”, which applies to conduct that impacts the general public rather than just the occupier of neighbouring land; nor “*statutory nuisance*”, pursuant to which local authorities (or, upon application by adversely impacted persons, magistrates' courts) can serve abatement notices for certain specified categories of nuisance.
3. *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312.
4. *Hunter v Canary Wharf Ltd* [1997] AC 655.
5. *Leakey v The National Trust* [1981] QB 485.
6. *Ibid.*
7. *Rylands v Fletcher* [1868] UKHL 1.
8. Those who own land through or along which watercourses run – “*riparian*” owners – are subject to special legal rights and responsibilities, which are outside the scope of this note. Interference with these rights by landholders up- or down-stream is actionable in damages or can be remedied by way of injunction. Riparian owners are also subject to a statutory obligation under the [Land Drainage Act 1991](#) not to erect any obstruction in the watercourse, erect culverts, or alter culverts in a way that would affect the flow of the watercourse without obtaining prior consent. Any changes to a watercourse's path or its ability to manage floodwaters must first be discussed with the relevant risk management authority. Depending on the watercourse, this will either be the local flood authority or the Environment Agency.
9. For the latter remedy, a neighbour is in practice more likely to complain to the relevant flood management authority to take action under the Land Drainage Act 1991, which in all likelihood will be both quicker and less costly.
10. *Whalley v Lancashire and Yorkshire Railway Co* [1884].
11. *John Green v Lord Somerleyton* [2003].
12. N.B. this case study raises many questions that are beyond the scope of this briefing note. For example, as noted in endnote 8 above, such riparian owners owe special responsibilities, which include the obligations to avoid causing obstruction to the watercourse, to maintain the beds and banks of the watercourse by clearing waste and debris (even where not generated by them) and to maintain trees and vegetation growing on the banks. Failure to comply with these obligations could expose the landholder to liability to neighbouring riparian landholders, if their riparian rights (such as to use water from and navigate the watercourse) are impinged upon.

We have restricted our comments to those that illustrate the law relating to nuisance.
13. Again, our comments are limited to illustrating nuisance.
14. *Spicer v Smea* [1946] 1 All ER 489. It should also be noted that in these circumstances the neighbouring landholder would also likely be able to seek damages by alleging the landholder was *negligent* in allowing the fire to begin or spread. The legal test for liability under negligence would be substantially the same, but there would be an advantage for the claimant in also being able to recover damages for personal injury or damage to possessions on their land.
15. *Hunt v Peake* [1860] 70 ER 603.

16. *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] 2 All ER 705. In this case the claimants were the owners of a hotel which was destroyed when the cliff on which it rested slipped into the sea. It was held that the defendant owners of the adjoining land had a duty to take reasonable steps to address any threat to the claimants' property from failure of the support provided by their land.
17. When such a right of support arises is outside the scope of this note, but many properties will benefit from one, whether through an express grant or by being acquired over time.
18. *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] 2 All ER.
19. *Ibid.*
20. *Leakey v National Trust* [1980] QB 485 (CA). In this case erosion caused a landslide onto the claimant's house. However, damage to buildings is not necessary for liability in nuisance to arise, provided there has been some degree of physical damage to property or unreasonable interference with the neighbour's enjoyment of their land.
21. *Ibid.*
22. Abatement of nuisance may involve the "dominant" landholder being ordered to carry out specific actions to bring the nuisance to an end.
23. *Wandsworth London Borough Council v Railtrack plc* [2001] EWCA Civ 1236. This case involved a finding of public nuisance rather than private nuisance, as the claimant's enjoyment of their land was not interfered with and there was no physical damage to it. However, it illustrates that failure to prevent unreasonable interference emanating from wild animals can amount to a nuisance. Further, in *Sedleigh-Denfield v O'Callaghan* [1940] AC 899 it was acknowledged that, in both public and private nuisance claims, liability can arise when a defendant knew of the danger posed and was able to prevent it yet did not prevent it. It is therefore prudent to assume that interference emanating from wild animals can amount to private, as well as public, nuisance.
24. *Ibid.* In this case the nuisance was caused by pigeons roosting under a railway bridge on the defendant's land and messing on passing pedestrians and the pavement.
25. *Davey v Harrow Corpn* [1957] 2 All ER 305.
26. *Network Rail Infrastructure v Williams & Waistell* [2018] EWCA Civ 1514.

WHO'S BEHIND THIS GUIDANCE?



This note is part of a range of information produced by Rewilding Britain and The Lifescape Project to provide practical guidance to rewilders. Each is designed to help rewilding practitioners across Britain overcome common barriers in their rewilding journey, as identified through conversations with members of our Rewilding Network.

Rewilding Britain's Rewilding Network provides a central meeting point for landowners, land and project managers and local groups in Britain, offering opportunities for collaboration and allowing smaller landowners to take on larger-scale rewilding together. If you find this useful, please consider joining the Network, where those in Britain can explore these issues further with others in the same boat.



The Lifescape Project is a rewilding charity using a multi-disciplinary approach to achieve its mission of catalysing the creation, restoration and protection of wild landscapes. Lifescape's legal team is working to support rewilders in understanding how the law applies to their activities and pursuing systemic legal change where needed to support the full potential of rewilding. These notes form part of Lifescape's Rewilding Law Hub which aims to provide a legal resource centre for those wanting to manage land in accordance with rewilding principles.



JOIN THE CONVERSATION

We'd love to hear what you've found useful in these notes and where we can help fill gaps in the guidance so that we can make sure they remain an up-to-date practical tool for rewilders.

Get in touch with us at:
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