

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

**Regina v. Rimmington (Appellant) (On Appeal from the Court of
Appeal (Criminal Division))**

**Regina v. Goldstein (Appellant) (On Appeal from the Court of
Appeal (Criminal Division))**

Appellate Committee

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

Regina v. Rimmington

Appellants:

James Guthrie QC

Bernard Eaton

(instructed by Coninghams)

Respondents:

David Perry

Mark Rainsford

(instructed by Crown Prosecution Service)

Regina v. Goldstein

Appellants:

Jonathan Goldberg QC

Gary Grant

(instructed by Barker Gillette)

Respondents:

David Perry

Tracy Ayling

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THURSDAY 27 OCTOBER 2005

HOUSE OF LORDS

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[2005] UKHL 63

LORD BINGHAM OF CORNHILL

My Lords,

1. These appeals, heard together, raise important and difficult questions concerning the definition and ingredients, today, of the common law crime of causing a public nuisance. The appellants contend that, as applied in their cases, the offence is too imprecisely defined, and the courts' interpretation of it too uncertain and unpredictable, to satisfy the requirements either of the common law or of the European Convention on Human Rights. A question also arises on the mens rea which must be proved to establish the offence.

2. The facts of the two cases are quite different. Mr Rimmington was charged in an indictment containing a single count of public nuisance, contrary to common law. The particulars were that he

“between the 25th day of May 1992 and the 13th day of June 2001, caused a nuisance to the public, namely by sending 538 separate postal packages, as detailed in the schedule ..., containing racially offensive material to members of the public selected by reason of their perceived ethnicity or for their support for such a group or randomly selected in an attempt to gain support for his views, the effect of which was to cause annoyance, harassment, alarm and/or distress.”

No evidence has yet been called or facts formally admitted, but it is not effectively in dispute that Mr Rimmington sent the packages listed in the schedule to the identified recipients, some of them prominent public figures, between the dates specified. The communications were strongly racist in content, crude, coarse, insulting and in some instances threatening and arguably obscene. When arrested in June 2001 Mr Rimmington suggested that his campaign had been prompted by a racially-motivated assault upon him by a black male in 1992: he had decided to retaliate by causing “them” mental anguish. The indictment preferred against him was challenged at the Central Criminal Court before Leveson J, who held a preparatory hearing under section 29 of the Criminal Procedure and Investigations Act 1996 to resolve the issues of law raised by the defence. He ruled that the indictment charged Mr Rimmington with an offence known to the law and that the prosecution was not an abuse of process because brought inconsistently with articles 7, 8 or 10 of the European Convention. Mr Rimmington’s appeal to the Court of Appeal (Criminal Division) against that decision was heard by Latham LJ, Moses J and Sir Edwin Jowitt with that of Mr Goldstein, and was dismissed: [2003] EWCA Crim 3450, [2004] 1 WLR 2878, [2004] 1 Cr App R 388.

3. In the proceedings against Mr Rimmington so far, he has been anonymised as “R” in the title of the case. Where a preparatory hearing is likely to be followed by a substantive trial and there is a risk that the trial may be prejudiced by reporting of the preparatory hearing, there may be very good reason to defer full reporting of the preparatory hearing, as is recognised by section 37 of the 1996 Act. But there is no statutory warrant for withholding the name of a defendant (see section 37(9)), and in the present case there is no reason why reporting should be restricted. I would accordingly order under section 37(5) of the Act that subsection (1) shall not apply to this appeal. There should be no resort to anonymity in criminal cases without good reason and statutory authority.

4. Mr Goldstein was charged in an indictment containing one count of public nuisance contrary to common law. The particulars were that he

“between the 16th day of October 2001 and the 20th day of October 2001 caused a nuisance to the public by posting or causing to be posted, an envelope containing salt to Unit 36, Northend Road, Wembley.”

Mr Goldstein, an ultra-orthodox Jew, is a supplier of kosher foods in Manchester. He bought supplies from the company of an old friend in London, Mr Abraham Ehrlich, with whom he had a bantering relationship. Mr Goldstein owed Mr Ehrlich a significant sum of money, which the latter had pressed him to pay. Mr Goldstein accordingly put the cheque in an envelope (addressed to Ibrahim Ehrlich) and included in the envelope a small quantity of salt. This was done in recognition of the age of the debt, salt being commonly used to preserve kosher food, and by way of reference to the very serious anthrax scare in New York following the events of 11 September 2001, which both men had discussed on the telephone shortly before. The inclusion of the salt was intended to be humorous, and Mr Ehrlich gave unchallenged evidence at trial that had he received the envelope he would have recognised it as a joke. But the envelope did not reach him. In the course of sorting at the Wembley Sorting Office some of the salt leaked onto the hands of a postal worker who understandably feared it might be anthrax and raised the alarm. The building, in which some 110 people worked, was evacuated for about an hour, the second delivery for that day was cancelled and the police were called. On inspecting the envelope the police were satisfied that the substance was salt. Mr Goldstein pleaded not guilty before a judge (His Honour Judge Fingret) and jury in the Crown Court at Southwark but on 3 October 2002 he was convicted. He was sentenced to a Community Punishment Order of 140 hours, and ordered to pay £500 compensation and £1850 towards the costs of the prosecution. His appeal against conviction was heard and dismissed with that of Mr Rimmington.

Nuisance

5. The origins and nature of nuisance have been the subject of detailed scholarly research which need not for present purposes be rehearsed: see Winfield, "Nuisance as a Tort", (1932) 4 C LJ 189; F H Newark, "The Boundaries of Nuisance", (1949) 65 LQR 480; J Loengard, "The Assize of Nuisance: Origins of an Action at Common Law" [1978] CLJ 144. It seems clear that what we would now call the tort of private nuisance, recognised in the Assize of Nuisance, provided a remedy complementary to that provided by the Assize of Novel Disseisin. As Holdsworth succinctly puts it (*A History of English Law*, 5th ed (1942), vol III, p 11),

"The novel disseisin was directed to secure an undisturbed possession: the assize of nuisance to secure its free enjoyment."

By the 15th century an action on the case for private nuisance was recognised. Thus the action for private nuisance was developed to protect the right of an occupier of land to enjoy it without substantial and unreasonable interference. This has remained the cardinal feature of the tort, as recently affirmed by the House in *Hunter v Canary Wharf Ltd* [1997] AC 655. The interference complained of may take any one of many different forms. What gives the tort its unifying feature (see *Fleming, The Law of Torts*, 9th ed, (1998), p 457) is the general type of harm caused, interference with the beneficial occupation and enjoyment of land, not the particular conduct causing it.

6. It became clear over time that there were some acts and omissions which were socially objectionable but could not found an action in private nuisance because the injury was suffered by the local community as a whole rather than by individual victims and because members of the public suffered injury to their rights as such rather than as private owners or occupiers of land. Interference with the use of a public highway or a public navigable river provides the best and most typical example. Conduct of this kind came to be treated as criminal and punishable as such. In an unpoliced and unregulated society, in which local government was rudimentary or non-existent, common nuisance, as the offence was known, came to be (in the words of J R Spencer, “Public Nuisance – A Critical Examination”, [1989] CLJ 55, 59) “a rag-bag of odds and ends which we should nowadays call ‘public welfare offences’”. But central to the content of the crime was the suffering of common injury by members of the public by interference with rights enjoyed by them as such. I shall, to avoid wearisome repetition, refer to this feature in this opinion as “the requirement of common injury”.

7. Unusually, perhaps, conduct which could found a criminal prosecution for causing a common nuisance could also found a civil action in tort. Since, in the ordinary way, no individual member of the public had any better ground for action than any other member of the public, the Attorney General assumed the role of plaintiff, acting on the relation of the community which had suffered. This was attractive, since he could seek an injunction and the abatement of the nuisance was usually the object most desired: see Spencer, *op. cit.*, pp 66-73. It was, however, held by Fitzherbert J, as early as 1536 (YB 27 Hy VIII. Mich. pl.10) that a member of the public could sue for a common or public nuisance if he could show that he had suffered particular damage over and above the ordinary damage suffered by the public at large. To the present day, causing a public nuisance has been treated as both a crime and a tort, the ingredients of each being the same.

The crime of public nuisance

8. The House was very helpfully referred to a number of authoritative statements on and definitions of the crime of public nuisance. The earliest of these was Hawkins, *A Treatise of the Pleas of the Crown* (1716), Book 1, Chap. LXXV, where he raised as a first question “What shall be said to be a Common Nuisance”, and began his answer

“Sect. 1. As to the first point it seems, That a Common Nuisance may be defined to be an Offence against the Publick, either by doing a Thing which tends to the Annoyance of all the King’s Subjects, or by neglecting to do a Thing which the common Good requires.

Sect. 2. But Annoyances to the Interests of particular Persons are not punishable by a public Prosecution as Common Nuisances, but are left to be redressed by the private Actions of the Parties aggrieved by them.”

He gave examples. In his *Commentaries on the Laws of England* (Book III, 1768, Chapter 13, p 216) Blackstone distinguished between public or common nuisances, “which affect the public, and are an annoyance to *all* the king’s subjects” and private nuisances, which he defined as “any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another”. In Book IV (1769, Chapter 13, p 167) he explained further:

“... common nuisances are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow subjects.”

9. In 1822, in the first edition of his long-lived work then called *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases*, JF Archbold published a precedent of an indictment for carrying on an offensive trade. The requirement of common injury (as I have called it) was recognised in the particulars:

“ ... to the great damage and common nuisance of all the liege subjects of our said lord the King there inhabiting, being, and residing, and going, returning, and passing through the said streets and highways ... ”

He referred to such other common nuisances as using a shop in a public market as a slaughter house, erecting a manufactory for hartshorn, erecting a privy near the highway, placing putrid carrion near the highway, keeping hogs near a public street and feeding them with offal, keeping a fierce and unruly bull in a field through which there was a footway, keeping a ferocious dog unmuzzled and baiting a bull in the King’s highway. He went on to deal with such common nuisances as keeping a disorderly house and a common gaming house, although these became statutory offences the same year (3 Geo IV, Cap CXIV).

10. It seems likely that the draftsman of section 268 in chapter XIV of the Indian Penal Code (Act XLV of 1860) intended to summarise the English common law on public nuisance as then understood.

“A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.”

In the draft Code annexed to their Report by the Criminal Code Bill Commissioners in 1879, the following proposals were made:

“
Section 150
Common nuisance defined

A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives safety health property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty’s subjects.

Section 151

What common nuisances are offences

Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment, who commits any common nuisance which endangers the lives safety or health of the public, or which injures the person of any individual.

Section 152

*When a common nuisance
is not to be deemed criminal*

Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right."

In *A Digest of the Criminal Law* (1877, Chapter XIX, p 108) Sir James Stephen defined a common nuisance as

"... an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects."

In the eighth and ninth editions of the work, published in 1947 and 1950 respectively, this definition remained unchanged. The definition to be found in para 31-40 of the 2005 edition of *Archbold (Criminal Pleading, Evidence and Practice*, save in its reference to morals, reflects the effect of these definitions:

"A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects."

11. In a number of countries where the law has derived from English sources, an offence of common or public nuisance, having characteristics similar to those defined above, is to be found. Thus in Canada, where common law offences have been abolished, section 180 of the Criminal Code now provides:

“180. (1) Every one who commits a common nuisance and thereby

(a) endangers the lives, safety or health of the public, or

(b) causes physical injury to any person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby

(a) endangers the lives, safety, health, property or comfort of the public; or

(b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.”

Section 230 of the Queensland Criminal Code provides:

“230 *Common nuisances*

Any person who –

(a) without lawful justification or excuse, the proof of which lies on the person, does any act, or omits to do any act with respect to any property under the person’s control, by which act or omission danger is caused to the lives, safety, or health, of the public; or

(b) without lawful justification or excuse, the proof of which lies on the person, does any act, or omits to do any act with respect to any property under the person’s control, by which act or omission danger is caused to the property or comfort of the public, or the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty’s subjects,

and by which injury is caused to the person of some person;
is guilty of a misdemeanour, and is liable to imprisonment for 2 years.”

To similar effect is the Tasmanian Criminal Code Act 1924, section 140:

“140 *Common nuisance defined*

- (1) A common nuisance is an unlawful act or an omission to discharge a legal duty, such act or omission being one which endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty’s subjects.
- (2) For the purposes of this section the comfort of the public shall be deemed to be affected by any pollution of the environment within the meaning of the *Environmental Management and Pollution Control Act 1994*.”

12. All of the foregoing definitions, as I read them, treat the requirement of common injury as a, perhaps *the*, distinguishing feature of this offence.

The authorities: (1)

13. There are many authorities on this subject, and it is necessary to be selective. In *R v White and Ward* (1757) 1 Burr 333 the nuisance to “all the King’s liege subjects” living in Twickenham and travelling and passing the King’s highway was impregnating the air with “noisome and offensive stinks and smells”. Each defendant, on undertaking to avoid repetition, was fined 6s 8d. A mother of a young child who took him through a public street well knowing that the child suffered from the contagious, infectious and dangerous disease of smallpox, was convicted and sentenced to three months’ imprisonment in the custody of the marshal: *R v Vantandillo* (1815) 4 M&S 73. The defendant in *R v Moore* (1832) 3 B&Ad 184 ran a rifle range in Bayswater where customers shot at pigeons, causing a crowd to assemble outside and in neighbouring fields to shoot at the pigeons which escaped, causing noise, damage, disturbance and mischief. On conviction the defendant

undertook to discontinue the shooting and no penalty was imposed. *R v Medley* (1834) 6 C&P 292 arose from pollution of the River Thames. Denman CJ directed the jury that the ignorance of the directors was no defence if they had authorised a manager to conduct the works, and they were each fined £25. In *Soltau v De Held* (1851) 2 Sim NS 133, 142-143, 61 ER 291, 295, Kindersley V-C said:

“I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance – an injury or a damage, to all persons who come within the sphere of its operations, though it may be so in a greater degree to some than it is to others.”

R v Henson (1852) Dears 24, 169 ER 621 involved a mare which, like the child in *R v Vantandillo* 4 M&S 73, was infected with a “contagious, infectious and dangerous disease”. The defendant, having brought the mare on to the highway with knowledge of its condition, was convicted of causing a common nuisance.

14. The House was referred to *R v Stevenson* (1862) 3 F&F 106, 176 ER 48, which concerned the exposing for sale of unfit meat. Similar authorities concern the bringing to market of unfit meat (*R v Jarvis* (1862) 3 F&F 108, 176 ER 49) and the sending to a meat salesman of meat unfit for human consumption (*R v Crawley* (1862) 3 F&F 109, 176 ER 49). It is not entirely clear that these offences were charged as common nuisances at common law. But it is clear that knowledge of the unfitness of the meat, or its intended sale for human consumption, was treated as an ingredient of the offences.

15. The issue in *R v Stephens* (1866) LR 1 QB 702 was whether the owner of a slate quarry was answerable for a public nuisance caused by his workmen without his knowledge and contrary to his general orders. The jury had convicted. The case is important for the observations of Mellor J at pp 708-709:

“It is quite true that this in point of form is a proceeding of a criminal nature, but in substance I think it is in the nature of a civil proceeding, and I can see no reason why a different rule should prevail with regard to such an act as is charged in this indictment between proceedings which are civil and proceedings which are criminal. I think there

may be nuisances of such a character that the rule I am applying here, would not be applicable to them, but here it is perfectly clear that the only reason for proceeding criminally is that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action. Then if the contention of those who say the direction is wrong is to prevail, the public would have great difficulty in getting redress. The object of this indictment is to prevent the recurrence of the nuisance. The prosecutor cannot proceed by action, but must proceed by indictment, and if this were strictly a criminal proceeding the prosecution would be met with the objection that there was no mens rea: that the indictment charged the defendant with a criminal offence, when in reality there was no proof that the defendant knew of the act, or that he himself gave orders to his servants to do the particular act he is charged with; still at the same time it is perfectly clear that the defendant finds the capital, and carries on the business which causes the nuisance, and it is carried on for his benefit; although from age or infirmity the defendant is unable to go to the premises, the business is carried on for him by his sons, or at all events by his agents. Under these circumstances the defendant must necessarily give to his servants or agents all the authority that is incident to the carrying on of the business. It is not because he had at some time or other given directions that it should be carried on so as not to allow the refuse from the works to fall into the river, and desired his servants to provide some other place for depositing it, that when it has fallen into the river, and has become prejudicial to the public, he can say he is not liable on an indictment for a nuisance caused by the acts of his servants. It appears to me that all it was necessary to prove is, that the nuisance was caused in the carrying on of the works of the quarry.”

Blackburn J, who had presided at the trial, agreed. He said at p 710:

“All that it is necessary to say is this, that where a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would lie, if the same nuisance inflicts an injury upon a public right the remedy

for which would be by indictment, the evidence which would maintain the action would also support the indictment. That is all that it was necessary to decide and all that is decided.”

Thus the overlap between the criminal offence and the civil tort was affirmed, and this fact was relied on to justify a strict approach to the ordinary requirement of mens rea.

16. This strict approach was acknowledged by Wright J in *Sherras v De Rutzen* [1895] 1 QB 918, 922. Usually cited for its reference to the presumption that mens rea is an essential ingredient in every offence, this passage continues with a discussion of various exceptions where the presumption does not apply (footnotes omitted):

“Another class comprehends some, and perhaps all, public nuisances: *R v Stephens* where the employer was held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders; and so in *R v Medley* and *Barnes v Akroyd*. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right: see per Williams and Willes JJ in *Morden v Porter*, as to unintentional trespass in pursuit of game; *Lee v Simpson*, as to unconscious dramatic piracy; and *Hargreaves v Diddams*, as to a bona fide belief in a legally impossible right to fish.”

17. The next case which must be mentioned, *Sedleigh-Denfield v O’Callaghan* [1940] AC 880, was a case of private nuisance, concerned with the liability of an owner for continuing a nuisance originally caused, without his knowledge, by a trespasser. Viscount Maugham opined (at p 887):

“All that is necessary in such a case is to show that the owner or occupier of the land with such a possible cause of nuisance upon it knows or must be taken to know of it. An absentee owner or an occupier oblivious of what is happening under his eyes is in no better position than the man who looks after his property

Lord Wright at p 904 formulated what has come to be accepted as the test:

“Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability.”

18. The leading modern authority on public nuisance is *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169. This was a civil action brought by the Attorney General on the relation of the Glamorgan County Council and the Pontardawe Rural District Council to restrain a nuisance by quarrying activities which were said to project stones and splinters into the neighbourhood, and cause dust and vibrations. It was argued for the company on appeal that there might have been a private nuisance affecting some of the residents, but not a public nuisance affecting all Her Majesty’s liege subjects living in the area. In his judgment Romer LJ reviewed the authorities in detail and concluded, at p 184:

“I do not propose to attempt a more precise definition of a public nuisance than those which emerge from the textbooks and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is ‘public’ which materially affects the reasonable comfort and convenience of life of a class of Her Majesty’s subjects. The sphere of the nuisance may be described generally as ‘the neighbourhood’; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue.”

Denning LJ agreed. He differentiated between public and private nuisance at p 190 on conventional grounds:

“The classic statement of the difference is that a public nuisance affects Her Majesty’s subjects generally, whereas a private nuisance only affects particular individuals.”

He went on, at p 191, to say

“that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.”

19. In *R v Madden* [1975] 1 WLR 1379 the defendant made a hoax bomb call by telephone to a steel works. The message was received by a telephonist, who informed the engineer and also the police. The police informed the chief security officer of the works, who caused eight security men to carry out a search. This lasted for just over an hour before the telephone call was found to be a hoax. The defendant was convicted at trial but succeeded on appeal, because the recorder had directed the jury to consider potential and not actual danger and discomfort, and because the requirement of common injury was not met. Giving the judgment of the court, James LJ said at p 1383:

“It is, in our view, still an offence known to the law of this country to commit a public nuisance. A person who makes a bogus telephone call falsely giving information as to the presence of explosives may, in our view, if there is evidence, be shown to have committed an offence of public nuisance.

In this particular case the conviction must be quashed on two grounds. First, the directions which the recorder was persuaded by the Crown to give to the jury were not right in that those directions invited the jury to consider the potential danger to the public rather than the actual danger; or the potential risk to the comfort of the public as distinct from the actual comfort of the public. Secondly, on the

evidence which I have recited, it was not possible for a jury, properly directed, to have arrived at the conclusion that a considerable number of persons were affected by the action of the appellant. It is quite clear that, for a public nuisance to be proved, it must be proved by the Crown that the public, which means a considerable number of persons or a section of the public, was affected, as distinct from individual persons.”

(The first of these grounds would seem hard to reconcile with the decisions in *R v Vantandillo* 4 M&S 73 and *R v Henson* 169 ER 621.)

20. The decision of the Court of Appeal (Criminal Division) in *R v Soul* (1980) 70 Cr App R 295 is not easy to explain. The appellant, who had agreed with others to secure the unlawful release of a restricted Broadmoor patient, was charged and convicted of conspiring to effect a public nuisance. Her appeal failed. The court rejected an argument, based on *R v Madden* [1975] 1 WLR 1379, that the Crown had failed to prove any actual danger. No more than, at most, passing reference was made to the requirement of common injury. A critical commentary in [1980] Crim LR 234 suggested that public mischief, held by the House of Lords in *R v Withers* [1975] AC 842 not to be an offence, could in effect be restored by judicial legislation.

21. *R v Ruffell* (1991) 13 Cr App R (S) 204 was an appeal against sentence. The appellant had pleaded guilty to causing a public nuisance, and had been sentenced to a suspended term of 12 months' imprisonment and a fine of £7000. The nuisance had consisted of an “acid house” party, which had attracted some thousands of people. A side road to the site had been blocked by traffic. There had been very loud music, overnight and lasting for about 12 hours. The surrounding woodlands had been littered with human excrement. The appeal against the sentence of imprisonment failed, but the fine was quashed on the ground that the appellant had no means to pay it. The facts of *R v Shorrocks* [1994] QB 279, which also involved an “acid house” party, were a little similar. The appellant accepted that a public nuisance had been caused, but denied that he had had the requisite knowledge to be criminally liable. Thus the issue concerned the mens rea which the Crown had to prove to establish guilt. Giving the judgment of a Court of Appeal which also included Simon Brown LJ and Popplewell J, Rattee J reviewed the authorities and concluded that the answer was that given by the House in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880: the appellant was guilty of the offence charged (p 289)

“if either he knew or he ought to have known, in the sense that the means of knowledge were available to him, that there was a real risk that the consequences of the licence granted by him in respect of his field would be to create the sort of nuisance that in fact occurred”

22. *R v Ong* [2001] 1 Cr App R(S) 404 was an application for leave to appeal against a sentence of four years’ imprisonment imposed on a plea of guilty to a court of conspiring to cause a public nuisance. The public nuisance which was planned was the extinguishment of the floodlights at a Premier Division football match between Charlton Athletic and Liverpool in order to make a fraudulent gain for a group of Far Eastern bookmakers. The plan, if implemented, would have plunged those attending the match, presumably a crowd of thousands, into darkness, and prevented them seeing the match they had paid to see. Leave was refused.

The authorities: (2)

23. I have reserved for separate consideration a line of recent authority much relied on by the Crown in the case of Mr Rimmington, but the correctness of which is challenged by him.

24. The line appears to begin with *R v Norbury* [1978] Crim LR 435, a case heard by His Honour Judge Beezley in the Crown Court at Norwich in March 1977. The defendant had over a period of some four years made 605 obscene telephone calls to 494 different women. The making of such calls was a summary offence punishable with a maximum fine of £50 under section 78 of the Post Office Act 1969, but the defendant was indicted for causing a public nuisance, an indictable offence for which there was no maximum penalty. His counsel moved to quash the indictment, I infer on the ground that the requirement of common injury was not met, but this argument was rejected. The judge ruled:

“It seems to me, dealing with the present indictment, that a repetition over a long period and on a number of occasions of telephone calls of an obscene nature, intending to cause offence and alarm and resulting in such offence and alarm to a large number of Her Majesty’s subjects, selected from a telephone directory or merely by chance dialling is the

very kind of act and, indeed, the very kind of series of acts which the public has an interest in condemning and has a right to vindicate.”

In the light of this ruling the defendant pleaded guilty. The judge’s observations, as quoted, are unexceptionable and must command unqualified assent. But they do not address the question whether separate calls to individual victims can satisfy the requirement of common injury as I have defined it in para 6 above. The commentator at [1978] Crim LR 435, 436 sounded a note of warning:

“The facts of the present case are strikingly different from the typical case of public nuisance which is obstruction of the highway. There might be some danger of public nuisance assuming the mantle of public mischief. The House of Lords has held that public mischief? even conspiracy to effect a public mischief? is not an offence known to the law: *DPP v Withers* [1975] AC 842; but there is no doubt that public nuisance is an offence. The question is as to how far it extends. The present case shows that it may have some potentiality for growth. Offences covering such a wide range of different matters with no obvious boundaries are only doubtfully compatible with the principle of legality? i.e. that no one should be punished for an act which was not declared by law to be an offence before the act was done.”

25. The warning was not heeded. In *R v Millward* (1986) 8 Cr App R(S) 209 the defendant had made hundreds of telephone calls (636 in a single day) to a young woman police officer with whom he had become infatuated, at the police station where she worked. He had pleaded guilty to two counts of causing a public nuisance and the appeal, which did not succeed, was against a sentence of 30 months’ imprisonment. The ingredients of the offence were not in issue, and the only reference to the requirement of common injury was in the judgment of the court delivered by Glidewell LJ:

“Quite apart from anything else, this disrupts the whole operation of the police station to which these calls are directed, because a member of the public may wish to report an urgent matter such as a criminal offence, and

cannot do so or is delayed in doing so because of this kind of behaviour on the part of the appellant.”

26. In *R v Johnson (Anthony)* [1997] 1 WLR 367, an appeal against conviction, the requirement of common injury was the central issue. The appellant had over a period of years made hundreds of obscene telephone calls to at least 13 women, and had been convicted of causing a public nuisance. It was argued on his behalf that (a) each telephone call was a single isolated act to an individual, and although that might have amounted to a private nuisance it was wrong to group all the calls together and to regard the cumulative effect as a public nuisance, and (b) that in any event the scale and width of the conduct complained of was insufficient to constitute a public nuisance. Tucker J, giving the reserved judgment of the court, rejected the argument. He ruled, at pp 370-371:

“In our judgment it is permissible and necessary to look at the cumulative effect of these calls, made to numerous ladies on numerous occasions in the case of each lady, and to have regard to the cumulative effect of the calls in determining whether the appellant’s conduct constituted a public nuisance. In our opinion it was conduct which materially affected the reasonable comfort and convenience of a class of Her Majesty’s subjects: see *per Romer LJ in Attorney-General v PYA Quarries Ltd* ... It was a nuisance which was so widespread in its range, or so indiscriminate in its effect, that it would not be reasonable to expect one person to take proceedings on her own responsibility, but that they should be taken on the responsibility of the community at large: see *Denning LJ* ... It was proved by the Crown that the public, meaning a considerable number of persons or a section of the public, was affected, as distinct from individual persons.”

27. There was a plea of guilty in *R v Eskdale* [2001] EWCA Crim 1159, [2002] 1 Cr App R(S) 118. The appellant had made about 1000 obscene telephone calls, some of them very highly objectionable, to 15 women over a period of two weeks. An appeal against a sentence of nine years’ imprisonment was dismissed. There was also a plea of guilty in *R v Harley* [2002] EWCA Crim 2650, [2003] 2 Cr App R(S) 16. Over 3 months in the summer of 2001 the appellant had made nearly 5000 calls to more than 1000 people. A sentence of 21 months’

imprisonment was for special reasons reduced to nine months'. Sentences of 18 months' and five years' imprisonment were reduced to nine months' and 30 months' in *R v Holliday and Leboutillier* [2004] EWCA Crim 1847, [2005] 1 Cr App R(S) 349. The appellants were animal liberation activists who had pleaded guilty to causing a public nuisance by making a large number of telephone calls to employees and shareholders of certain companies whose activities the appellants opposed. The calls were designed to jam the company telephone switchboards, and some of them were threatening and intimidating. In *R v Lowrie* [2004] EWCA Crim 2325, [2005] 1 Cr App R(S) 530 the appellant appealed unsuccessfully against a sentence of eight years' imprisonment imposed on his pleas of guilty to 12 counts of causing a public nuisance. In each case the count was based on a hoax call to one of the emergency services.

The current standing of public nuisance

28. The appellants contended (1) that conduct formerly chargeable as the crime of public nuisance had now become the subject of express statutory provision, (2) that where conduct was the subject of express statutory provision it should be charged under the appropriate statutory provision and not as public nuisance, and (3) that accordingly the crime of public nuisance had ceased to have any practical application or legal existence.

29. There is a large measure of truth in the first of these contentions. Section 79(1) of the Environmental Protection Act 1990, as amended, establishes nine categories of statutory nuisance (the state of premises, smoke emissions, fumes or gases from dwellings, effluvia from industrial trade or business premises, accumulations or deposits, animals, noise from premises, noise from vehicles or equipment in a street and other matters declared by other Acts to be statutory nuisances). Section 33 controls the dumping of waste. The Act lays down a detailed procedure for securing abatement, provides for criminal proceedings and prescribes maximum penalties for failure to comply with an abatement notice: see, generally, *McCracken, Jones, Pereira and Payne, Statutory Nuisance* (2001), chapters 2, 3, 5, 8, 9 and 10. Section 85 of the Water Resources Act 1991 makes it an offence to pollute controlled waters. It prescribes a maximum penalty of three months' imprisonment and a fine of £20,000 on summary conviction, and two years' imprisonment and a fine on conviction on indictment. By section 137 of the Highways Act 1980 it is a summary offence punishable by a fine not exceeding level 3 on the standard scale wilfully

to obstruct free passage along a highway. Section 1 of the Protection from Harassment Act 1997 creates a crime of harassment, punishable summarily by imprisonment for a maximum of six months and a fine on scale 5. If the harassment involves repeated threats of violence the defendant is liable under section 4, on conviction on indictment, to five years' imprisonment and a fine. Section 32 of the Crime and Disorder Act 1998 creates an offence of racially or religiously motivated harassment and prescribes maximum penalties. Section 63 of the Criminal Justice and Public Order Act 1994 confers powers on the police to remove persons attending or preparing for a rave "at which amplified music is played during the night (with or without intermissions) and is such as, by reason of its loudness and duration and the time at which it is played, is likely to cause serious distress to the inhabitants of the locality". Breach of the statutory requirements is punishable on summary conviction by imprisonment for up to three months and a fine not exceeding level 4 on the standard scale. By section 51 of the Criminal Law Act 1977, as amended, bomb hoaxes are punishable, on conviction on indictment, by a maximum of seven years' imprisonment, with a maximum of six months' and a fine of £1000 on summary conviction. Section 114 of the Anti-terrorism, Crime and Security Act 2001 makes it an offence, attracting similar penalties, to place or send any substance or thing "with the intention of inducing in a person anywhere in the world a belief that it is likely to be (or contain) a noxious substance or other noxious thing and thereby endanger human life or create a serious risk to human health". Section 85 of the Postal Services Act 2000 makes it an offence to send by post anything which is likely to injure a postal worker or anything which is indecent or obscene. On summary conviction the offence is punishable by a fine, on conviction on indictment by imprisonment for a maximum of 12 months and a fine. By section 1 of the Malicious Communications Act 1988, enacted to give effect to the Law Commission's *Report on Poison-Pen Letters* (Law Com. No 147, HC 519 (1985)), as amended, it is an offence to send to another person a letter, electronic communication or article of any description which is indecent, grossly offensive, threatening or known or believed to be false. The offence is punishable on summary conviction with a maximum of six months' imprisonment and a fine on scale 5 on the standard scale. There has recently been enacted, in section 127 of the Communications Act 2003, an offence, attracting the same penalties, of improperly using a public electronic communications network. While it cannot be confidently asserted that there is no conduct which might formerly have been properly prosecuted as public nuisance which is not now the subject of express statutory provision, the appellants are in my opinion correct that the most typical and obvious causes of public nuisance are now the subject of express statutory prohibition.

30. There is in my opinion considerable force in the appellants' second contention under this head. Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited. If the directors in *R v Medley* 6 C&P 292 who were ignorant of what had been done, or the octogenarian owner in *R v Stephens* LR 1 QB 702 who was ignorant of what had been done and whose orders were disregarded, were today to be prosecuted for causing a public nuisance rather than under the relevant statutory provision, they would have powerful grounds for objecting, and the same point applies more generally. It cannot in the ordinary way be a reason for resorting to the common law offence that the prosecutor is freed from mandatory time limits or restrictions on penalty. It must rather be assumed that Parliament imposed the restrictions which it did having considered and weighed up what the protection of the public reasonably demanded. I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.

31. It follows from the conclusions already expressed in paras 29 to 30 above that the circumstances in which, in future, there can properly be resort to the common law crime of public nuisance will be relatively rare. It may very well be, as suggested by JR Spencer in his article cited in para 6 above, at p 83, that "There is surely a strong case for abolishing the crime of public nuisance". But as the courts have no power to create new offences (see para 33 below), so they have no power to abolish existing offences. That is a task for Parliament, following careful consideration (perhaps undertaken, in the first instance, by the Law Commission) whether there are aspects of the public interest which the crime of public nuisance has a continuing role to protect. It is not in my view open to the House in resolving these appeals to conclude that the common law crime of causing a public nuisance no longer exists.

Definition

32. The appellants submitted that the crime of causing a public nuisance, as currently interpreted and applied, lacks the precision and clarity of definition, the certainty and the predictability necessary to meet the requirements of either the common law itself or article 7 of the European Convention. This submission calls for some consideration of principle.

33. In his famous polemic *Truth versus Ashurst*, written in 1792 and published in 1823, Jeremy Bentham made a searing criticism of judge-made criminal law, which he called “dog-law”.

“It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won’t tell a man beforehand what it is he *should not do* – they won’t so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it.”

The domestic law of England and Wales has set its face firmly against “dog-law”. In *R v Withers* [1975] AC 842 the House of Lords ruled that the judges have no power to create new offences: see Lord Reid at p 854G; Viscount Dilhorne at p 860E; Lord Simon of Glaisdale at pp 863D, 867E; Lord Kilbrandon at p 877C. Nor (per Lord Simon at p 863D) may the courts nowadays widen existing offences so as to make punishable conduct of a type hitherto not subject to punishment. The relevant principles are admirably summarised by Judge LJ for the Court of Appeal (Criminal Division) in *R v Misra and Srivastava* [2004] EWCA Crim 2375, [2005] 1 Cr App R 328, paras 29-34, in a passage which I would respectfully adopt:

“29 To develop his argument on uncertainty, Mr Gledhill [for Dr Misra] focussed our attention on art 7 of the Convention, entitled ‘No punishment without law’ which provides:

‘7(1) No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.’

In our view the essential thrust of this article is to prohibit the creation of offences, whether by legislation or the incremental development of the common law, which have retrospective application. It reflects a well-understood principle of domestic law, that conduct which did not contravene the criminal law at the time when it took place should not retrospectively be stigmatised as criminal, or expose the perpetrator to punishment. As Lord Reid explained in *Waddington v Miah* (1974) 59 Cr App R 149 at pp 151 and 152,

‘There has for a very long time been a strong feeling against making legislation, and particularly criminal legislation, retrospective ... I use retrospective in the sense of authorising people being punished for what they did before the Act came into force.’

30 Mr Gledhill demonstrated that the Convention contained repeated references to expressions in English such as ‘prescribed by law’: in French, the same phrase reads ‘prévue par la loi’. We shall assume that the concepts are identical. Article 7 therefore sustains his contention that a criminal offence must be clearly defined in law, and represents the operation of ‘the principle of legal certainty’ (see, for example, *Brumarescu v Romania* (2001) 33 EHRR 35 at para 61 and *Kokkinakis v Greece* (1993) 17 EHRR 397 at para 52). The principle enables each community to regulate itself:

‘with reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible? an individual must have an indication of the legal rules applicable in a given case? and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the criminal law.’ (*S.W. v United*

Kingdom: C.R. v United Kingdom (1995) 21 EHRR 363).

- 31 Mr Gledhill further emphasised that in *Grayned v City of Rockford* 408 US 104 (1972) the United States Supreme Court identified ‘a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vagueness offends several important values ... A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’ He pointed out that Lord Phillips MR had approved these dicta in *R (L and another) v Secretary of State for the Home Department* [2003] EWCA Civ 25 [2003] 1 WLR 1230, para 25.
- 32 We acknowledge the force of these submissions, but simultaneously emphasise that there is nothing novel about them in our jurisprudence. Historic as well as modern examples abound. In the 17th century Bacon proclaimed the essential link between justice and legal certainty:

‘For if the trumpet give an uncertain sound, who shall prepare himself to the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes ... Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known and certain law ... Nor should a man be deprived of his life, who did not first know that he was risking it.’ (Quoted in *Coquille*, Francis Bacon pp 244 and 248, from *Aphorism 8* and *Aphorism 39? A Treatise on Universal Justice*).

The judgment of the Supreme Court of the United States in *Grayned* effectively mirrored Blackstone:

‘... Law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law: which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.’ (*Commentaries*, 3rd ed, 1769, vol 1 p 62)

33 Recent judicial observations are to the same effect. Lord Diplock commented in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] 591 at p 638:

‘The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.’

In *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 279 he repeated the same point:

‘Elementary justice or, to use the concept often cited by the European court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.’

More tersely, in *Warner v Metropolitan Police Commissioner* (1968) 52 Cr App R 373, 414 [1969] 2 AC 256, 296, Lord Morris of Borth-y-Gest explained in terms that:

‘... In criminal matters it is important to have clarity and certainty.’

The approach of the common law is perhaps best encapsulated in the statement relating to judicial precedent issued by Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on July 26, 1966 *Practice Statement (Judicial Precedent)* (1966) 83 Cr App R 191, [1966] 1 WLR 1234.

‘Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.’

In allowing themselves (but not courts at any other level) to depart from the absolute obligation to follow earlier decisions of the House of Lords, their Lordships expressly bore in mind:

‘... the danger of disturbing retrospectively the basis on which contracts, settlements of property

and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.’

- 34 No further citation is required. In summary, it is not to be supposed that prior to the implementation of the Human Rights Act 1998, either this Court, or the House of Lords, would have been indifferent to or unaware of the need for the criminal law in particular to be predictable and certain. Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime any conviction for it would be unsafe. That said, however, the requirement is for sufficient rather than absolute certainty.”

There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. If the ambit of a common law offence is to be enlarged, it “must be done step by step on a case by case basis and not with one large leap”: *R v Clark (Mark)* [2003] EWCA Crim 991, [2003] 2 Cr App R 363, para 13.

34. These common law principles are entirely consistent with article 7(1) of the European Convention, which provides:

“No punishment without law

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

The European Court has repeatedly considered the effect of this article, as also the reference in article 8(2) to “in accordance with the law” and that in article 10(2) to “prescribed by law”.

35. The effect of the Strasbourg jurisprudence on this topic has been clear and consistent. The starting point is the old rule *nullum crimen, nulla poena sine lege* (*Kokkinakis v Greece* (1993) 17 EHRR 397, para 52; *SW and CR v United Kingdom* (1995) 21 EHRR 363, para 35/33): only the law can define a crime and prescribe a penalty. An offence must be clearly defined in law (*SW and CR v United Kingdom*), and a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, the consequences which a given course of conduct may entail (*Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49; *G v Federal Republic of Germany* (1989) 60 DR 256, 261, para 1; *SW and CR v United Kingdom*, para 34/32). It is accepted that absolute certainty is unattainable, and might entail excessive rigidity since the law must be able to keep pace with changing circumstances, some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts (*Sunday Times v United Kingdom*, para 49; *X Ltd and Y v United Kingdom* (1982) 28 DR 77, 81, para 9; *SW and CR v United Kingdom*, para 36/34). But the law-making function of the courts must remain within reasonable limits (*X Ltd and Y v United Kingdom*, para 9). Article 7 precludes the punishment of acts not previously punishable, and existing offences may not be extended to cover facts which did not previously constitute a criminal offence (*ibid.*). The law may be clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence (*X Ltd and Y v United Kingdom*, para 9; *G v Federal Republic of Germany*, pp 261-262). But any development must be consistent with the essence of the offence and be reasonably foreseeable (*SW and CR v United Kingdom*, para 36/34), and the criminal law must not be extensively construed to the detriment of an accused, for instance by analogy (*Kokkinakis v Greece*, para 52).

36. How, then, does the crime of causing a public nuisance, as currently interpreted and applied, measure up to these standards? Mr Perry, for the Crown, pointed out, quite correctly, that offences such as blasphemous libel (*X Ltd and Y v United Kingdom*), outraging public decency (*S and G v United Kingdom* (Application No 17634/91, 2 September 1991) and blasphemy (*Wingrove v United Kingdom* (1996) 24 EHRR 1) had withstood scrutiny at Strasbourg. Only in *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241 had a finding that the applicants had acted *contra bonos mores* been held to lack the quality of being “prescribed by law”. It was suggested, as put by *Emmerson and Ashworth, Human Rights and Criminal Justice* (2001), para 10-23, that

“the standard of certainty required under the Convention, and under comparable constitutional principles, is not a particularly exacting one.”

I would for my part accept that the offence as defined by Stephen, as defined in *Archbold* (save for the reference to morals), as enacted in the Commonwealth codes quoted above and as applied in the cases (other than *R v Soul* 70 Cr App R 295) referred to in paras 13 to 22 above is clear, precise, adequately defined and based on a discernible rational principle. A legal adviser asked to give his opinion in advance would ascertain whether the act or omission contemplated was likely to inflict significant injury on a substantial section of the public exercising their ordinary rights as such: if so, an obvious risk of causing a public nuisance would be apparent; if not, not.

37. I cannot, however, accept that *R v Norbury* [1978] Crim LR 435 and *R v Johnson (Anthony)* [1997] 1 WLR 367 were correctly decided or that the convictions discussed in paras 23 to 27 above were soundly based (which is not, of course, to say that the defendants' conduct was other than highly reprehensible or that there were not other charges to which the defendants would have had no answer). To permit a conviction of causing a public nuisance to rest on an injury caused to separate individuals rather than on an injury suffered by the community or a significant section of it as a whole was to contradict the rationale of the offence and pervert its nature, in Convention terms to change the essential constituent elements of the offence to the detriment of the accused. The offence was cut adrift from its intellectual moorings. It is in my judgment very significant that when, in 1985, the Law Commission addressed the problem of poison-pen letters, and recommended the creation of a new offence, it did not conceive that the existing offence of public nuisance might be applicable. It is hard to resist the conclusion that the courts have, in effect, re-invented public mischief under another name. It is also hard to resist the conclusion expressed by Spencer at p 77 of his article cited above [1989] CLJ 55:

“... almost all the prosecutions for public nuisance in recent years seem to have taken place in one of two situations: first, where the defendant's behaviour amounted to a statutory offence, typically punishable with a small penalty, and the prosecutor wanted a bigger or extra stick to beat him with, and secondly, where the defendant's behaviour was not obviously criminal at all

and the prosecutor could think of nothing else to charge him with.”

As interpreted and applied in the cases referred to in paras 23 to 27 above, the offence of public nuisance lacked the clarity and precision which both the law and the Convention require, as correctly suggested by the commentators in [1978] Crim LR 435, 436 and [1980] Crim LR 234, Spencer, *op. cit.*, pp 55, 77-79, and Professor Ashworth in his commentary on the present cases at [2004] Crim LR 303, 304-306. See also *McMahon and Binchy, Law of Torts*, 3rd ed (2000), p 676 f.n. 6.

Mr Rimmington’s appeal

38. It seems to me clear that the facts alleged against Mr Rimmington, assuming them to be true, did not cause common injury to a section of the public and so lacked the essential ingredient of common nuisance, whatever other offence they may have constituted. The Crown contended that, if persistent and vexatious telephone calls were a public nuisance, it was a small and foreseeable step to embrace persistent and vexatious postal communications within that crime also. I would agree that if the telephone calls were properly covered it would be a small and foreseeable development, involving no change in the essential constituent elements of the offence, to embrace postal communications also. But, for reasons already given, the crime of public nuisance does not extend to separate and individual telephone calls, however persistent and vexatious, and the extension of the crime to cover postal communications would be a further illegitimate extension. The judge and the Court of Appeal, bound by *R v Johnson* [1997] 1 WLR 367, reached a different conclusion. I am of opinion that for all the reasons given above, and those given by my noble and learned friends, this appeal must be allowed.

Mr Goldstein’s appeal

39. The argument in this appeal was very largely directed to the issue of mens rea: what state of mind must be proved against a defendant to convict him of causing a public nuisance? The Crown contended that the correct test was that laid down by the Court of Appeal in *R v Shorrock* [1994] QB 279, 289, that the defendant is responsible for a nuisance which he knew, or ought to have known (because the means of knowledge were available to him), would be the consequence of what he

did or omitted to do. That was a test clearly satisfied on the facts of that case, where the defendant deliberately permitted use of his field and should have known what the result would be. It is a test satisfied, I think, in all the public nuisance authorities considered above, save those based on vicarious liability (which are hard to reconcile with the modern approach to that subject in cases potentially involving the severest penalties, and may well be explained, as Mellor J did in *R v Stephens* (1866) LR 1 QB 702, 708-709, by the civil colour of the proceedings). I would accept this as the correct test, but it is a test to be applied to the correct facts.

40. Mr Goldstein deliberately posted an envelope containing a small quantity of salt. He intended it to reach the addressee, Mr Ehrlich. Had it done so there would have been no public nuisance, as the trial judge correctly directed the jury. The public nuisance alleged was the escape of the salt from the envelope, which led to the evacuation of the sorting office by 110 workers for an hour and the cancelling of a second post. I am willing to assume (without deciding) that those events could be a sufficiently substantial injury to a significant section of the public to amount to a public nuisance. But the escape of the salt was not a result which Mr Goldstein intended. Nor, plainly was it a result which he knew would occur, since it would have rendered his intended joke entirely futile. It would seem far-fetched to conclude that he should reasonably have known that the salt would escape, at any rate without detailed consideration of the type of envelope used and the care taken in sealing it. He himself said that he had no idea the salt would leak out (see the Court of Appeal judgment, para 38). But neither at trial nor on appeal was this question squarely addressed. The emphasis was on a foreseeable consequence if there were an escape and not on the foreseeability of an unintended escape. In the event, I conclude that it was not proved against Mr Goldstein that he knew or reasonably should have known (because the means of knowledge were available to him) that the salt would escape in the sorting office or in the course of post. For these reasons, and those given by my noble and learned friends, his appeal must be allowed and his conviction quashed.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

41. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I respectfully agree with his exposition of the common law offence of public nuisance, its boundaries, and the place this offence now occupies in the criminal law. For the reasons he gives I too would allow both appeals.

42. I add just one footnote, concerning hoax messages. Whether a hoax message is capable of constituting the offence of causing a public nuisance depends primarily upon the content of the hoax. In the ordinary course a hoax message which, as intended, inconvenienced only the recipient would lack the necessary public element. Very different would be a hoax message of the existence of a public danger, such as a hoax telephone call that an explosive device has been placed in a railway station. A hoax message of this character is capable of constituting the offence even though made to one person alone. This is because the message, to whomsoever addressed, was expected and intended to be passed via the police to users and potential users of the railway station. In other words, the message was the means whereby the caller intended to cause public alarm and disruption.

LORD RODGER OF EARLSFERRY

My Lords,

43. I have had the privilege of considering the speech of my noble and learned friend, Lord Bingham of Cornhill, in draft. I agree with it but add some observations in view of the difficulty and importance of the issues involved.

44. The law of nuisance and of public nuisance can be traced back for centuries, but the answers to the questions confronting the House are not to be found in the details of that history. What may, perhaps, be worth noticing is that in 2 Institutes 406 Coke adopts a threefold classification of nuisance: public or general, common, private or

special. Common nuisances are public nuisances which, for some reason, are not prosecutable. See D Ibbetson, *A Historical Introduction to the Law of Obligations*, 106 nn 62 and 65. So for Coke, while all public nuisances are common, not all common nuisances are public. Later writers tend to elide the distinction between common and public nuisances but, throughout, it has remained an essential characteristic of a public nuisance that it affects the community, members of the public as a whole, rather than merely individuals. For that reason, the appropriate remedy is prosecution in the public interest or, in more recent times, a relator action brought by the Attorney General. A private individual can sue only if he can show that the public nuisance has caused him special injury over and above that suffered by the public in general. These procedural specialties derive from the effect of the public nuisance on the community, rather than the other way round. I therefore doubt whether, in a criminal context at least, it is of much help to follow Denning LJ in the civil case of *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169, 191 and to seek to identify a public nuisance by asking whether the nuisance is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it.

45. As Lord Bingham has shown, there have been many attempts to define the scope of public nuisance. The concept was applied to a number of disparate situations at a time when there was no perceived need to define its boundaries very precisely. In consequence, it has been aptly described as “a ragbag of odds and ends”: J R Spencer, “Public Nuisance – a Critical Assessment” [1989] CLJ 55, 59. In his *Digest of the Criminal Law* even the highly rational Sir James Fitzjames Stephen could do little more than reflect this reality. Mr Guthrie QC used this lack of coherence in the definition of the offence as a basis for submitting that its contours were so uncertain as to make it incompatible with article 7 of the European Convention on Human Rights. While a lack of coherence in defining the scope of an offence may offend modern eyes, it does not follow that there is any violation of article 7. If the individual elements of the crime are identified clearly enough and the law is applied according to its terms, potential offenders and their advisers know where they stand: they cannot complain because the law could perhaps have been formulated more elegantly. For present purposes I would be content to adopt the definition in *Archbold, Criminal Pleading, Evidence and Practice 2005*, para 31-40, under deletion of the reference to morals:

“A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by

law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects."

46. Mr Rimmington seems to have embarked upon his vile campaign of letter writing in 1992. At all events, the first entry in the schedule relates to a letter received on 1 June 1992. If – most improbably - after sending a number of letters Mr Rimmington had paused to consider whether he was committing the offence of public nuisance, then he would surely have found enough in the books to put him on his guard. While there was apparently no case where the writer of obscene or objectionable letters had been prosecuted for public nuisance, there were several cases, starting with *R v Norbury* [1978] Crim LR 435, where it had been held or accepted that the making of a large number of obscene or objectionable telephone calls to individuals could constitute public nuisance. It would have been only prudent for Mr Rimmington to assume that the general reasoning behind those decisions would be applicable to the sending of a large number of obscene or objectionable letters. In that situation, superficially at least, the law was sufficiently certain to meet the requirements of article 7 for Mr Rimmington's purposes.

47. Of course, it does not follow that the law as laid down in the *Norbury* line of cases was correct: a statement of the law may be definite but wrong. I am indeed satisfied that the law was misstated in those cases. A core element of the crime of public nuisance is that the defendant's act should affect the community, a section of the public, rather than simply individuals. Obvious examples would be the release of smoke or fumes which affect a village or neighbourhood or the emission of loud noises which disturb the neighbourhood. In such cases the release or emission or - where it is repeated - each release or emission affects the public in the area. Of course, if one were to break it down, the general effect on the community might well be seen to be made up of a collection of private nuisances occurring more or less simultaneously. Romer LJ made this point in *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169, where the court granted an injunction against the defendants carrying on their business in such a manner as to cause splinters to be projected from the confines of their quarry or to occasion a nuisance to Her Majesty's subjects by dust or vibration. In the pleadings as originally framed the Attorney General had included various allegations about the damage caused to occupiers of the adjacent houses and land; that the vibrations were a source of danger to the

houses, and that the dust settled on them and made them dirty and uncomfortable to live in. Counsel had later deleted these allegations on the ground that, in a public nuisance action, evidence of individual experiences should not be received, although such evidence would be highly relevant in cases of alleged private nuisance. Romer LJ rejected this argument, at p 187:

“I cannot for myself accept this contention. Some public nuisances (for example, the pollution of rivers) can often be established without the necessity of calling a number of individual complainants as witnesses. In general, however, a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances.”

Although the number of houses affected by the flying splinters of stone and by the dust and vibration presumably varied a bit from blast to blast, each blast tended to affect homes in the vicinity of the quarry and a picture of the overall effect of the blasting on the community could be built up from the evidence of individual residents about its effect on them.

48. As my noble and learned friend, Lord Nicholls of Birkenhead, points out, a telephone call or a letter, which is intended to be passed on and broadcast to the public, may be the means of effecting a public nuisance. Suppose, however, that someone makes a series of obscene telephone calls to people living in a village or neighbourhood. In that situation each call is heard, and is intended to be heard, only by the recipient. Of course, as the calls mount up, more and more residents will be affected and the general peace of the neighbourhood may be disturbed. But each telephone call affects only one individual, not the community in the village or neighbourhood. Therefore, it does not have that quality which is the hallmark of the crime of public nuisance. And no such individual call can become a criminal public nuisance merely by reason of the fact that it is one of a series. Otherwise, acts which were not criminal when originally done would become criminal at some unspecified point when the defendant had made enough calls for it to be said that, taken together, they were affecting the public in the neighbourhood. In my view, therefore, HH Judge Beezley set the law off down a wrong course in *R v Norbury* [1978] Crim LR 435, 435 – 436, when he ruled that a public nuisance was constituted by

“a repetition over a long period and on a number of occasions of telephone calls of an obscene nature, intending to cause offence and alarm and resulting in such offence and alarm to a large number of Her Majesty’s subjects, selected from a telephone directory or merely by chance dialling.”

In *R v Johnson (Anthony)* [1997] 1 WLR 367, the defendant was charged on an indictment containing one count of public nuisance, but the particulars referred to telephone calls made on hundreds of occasions to at least 13 women in the South Cumbria area. The defendant was convicted and, on appeal, argued that his conduct did not amount to the crime of public nuisance. The Court of Appeal rejected that argument. Applying the same reasoning as in *Norbury*, Tucker J said, at p 438C-D, that it was permissible to have regard to the cumulative effect of the calls in determining whether the appellant’s conduct constituted a public nuisance. In the present case the Court of Appeal were, of course, bound by the decision in *Johnson* and duly applied it. For the reasons which I have given, I am satisfied that this approach was mistaken and that these decisions should be overruled.

49. Like the defendant in *Johnson*, Mr Rimmington was charged on an indictment containing one count of public nuisance. In his case the particulars referred to him sending 538 separate postal packages between 20 May 1992 and 13 June 2001. Details about the individual packages were set out in an extensive schedule. The first package in that schedule was received on 1 June 1992 and the next package that could be dated was received in October 1993. The recorded incidents are somewhat sparse until June 1995, after which there are many more packages, often apparently sent in batches posted about the same time but quite often in different areas. The recipients come from a variety of organisations scattered over different parts of London and the South East. Most of them would not know one another. In these circumstances it would be highly problematical, for Mr Rimmington or for a court, to decide at what point, if any, the cumulative effect of the letters meant that his conduct was materially affecting the reasonable comfort and convenience of a class of Her Majesty’s subjects – and so, ultimately, to make the initial incident in 1992, retrospectively, one component of a single crime of public nuisance committed over nine years. A crime which was defined so as to apply in such an uncertain way would indeed be objectionable, both in terms of the well-recognised standards of English law and in terms of the Convention jurisprudence. Both are conveniently summarised in the passage from the judgment of Judge LJ in *R v Misra and Srivastava* [2005] 1 Cr App R 21, paras 29 –

34, which Lord Bingham has quoted. But, as I have explained, I am satisfied that the particulars in the indictment do not disclose a legally relevant charge of public nuisance. I accordingly agree that Mr Rimmington's appeal must be allowed.

50. The course of conduct which Mr Rimmington pursued in sending these letters was so depraved and offensive that it would be a matter of concern if the criminal law could not deal with it. But that is not the case. As his counsel noted, though with understandable diffidence, there are other offences which might cover the kind of conduct with which he was charged. Section 1 of the Malicious Communications Act 1988, as amended, makes it an offence to send another person a letter, electronic communication or article of any description which conveys a message which is indecent or grossly offensive, or which conveys a threat or information which is false and known or believed to be false. The offence is punishable on summary conviction with a maximum of six months' imprisonment and a fine on scale 5. Similarly, by section 85(1) and (4) of the Postal Services Act 2000 it is an offence to send by post a packet enclosing any thing which is likely to injure a postal worker or which is indecent or obscene. The offence is triable either way: on summary conviction it is punishable by a fine, while on conviction on indictment it is punishable by imprisonment for up to 12 months and a fine. Mr Perry accepted, on behalf of the Crown, that some, at least, of the incidents alleged against Mr Rimmington would have fallen within the scope of one or other of the statutory provisions. So any decision by your Lordships that Mr Rimmington's conduct does not amount to public nuisance would leave it open to the Crown to deal with future offenders by charging them with the appropriate statutory offence.

51. Why then did the Crown not adopt that course in Mr Rimmington's case? Mr Perry gave two reasons. First, by the time that Mr Rimmington was unmasked as the writer of the letters, many of the incidents were so old that there was a bar on any prosecution under statute. Secondly, even where the offences were not time-barred, the sentence available on conviction under statute was regarded as insufficient to mark the seriousness of the appellant's conduct. And, if a number of separate offences were charged together in summary proceedings, the maximum sentence that could be imposed was limited to 12 months. In order to avoid these difficulties, it had been decided to charge Mr Rimmington on indictment with the common law crime of public nuisance.

52. When Parliament enacted the statutory offences, it did not expressly abolish the corresponding aspect of the common law offence of public nuisance. Therefore, if – contrary to my view – Mr Rimmington’s conduct in writing the letters had amounted to a public nuisance, it would presumably have continued to do so even after the statutory offences were introduced. So a charge could not have been regarded as bad simply because it was framed in terms of the common law rather than in terms of the statute. To put the matter more generally, where Parliament has not abolished the relevant area of the common law when it enacts a statutory offence, it cannot be said that the Crown can never properly frame a common law charge to cover conduct which is covered by the statutory offence. Where nothing would have prevented the Crown from charging the defendant under the statute and where the sentence imposed would also have been competent in proceedings under the statute, the defendant is not prejudiced by being prosecuted at common law and can have no legitimate complaint.

53. Here, however, according to what Mr Perry told the House, the Crown had deliberately chosen the common law offence in order to avoid the time-bar which Parliament had enacted and to allow the judge, if he thought fit, to impose a heavier sentence than the one permitted under statute. The issue bears some resemblance to the issue in *R v J* [2005] 1 AC 562. There is no suggestion, of course, that the Crown acted in bad faith. On the contrary, it is easy to understand why they did what they did. In a particular case, such as this, a time-limit which prevents prosecution once a certain time has passed since the act was committed can appear to be arbitrary and to reward an offender for concealing his offences. The sentence available under the statute may also seem inadequate to reflect the gravity of the defendant’s conduct. But Parliament has deliberately chosen to intervene and to prescribe a period within which conduct of this kind can be prosecuted summarily under statute. This must be taken to reflect Parliament’s judgment that, if the conduct has not been prosecuted within that time, the public interest is now against proceeding. That judgment may be based on various factors. Parliament may, for example, consider that after a certain period everyone should move on and prosecutors should turn their attention to other matters. Police and prosecution resources, it may be thought, are better spent on detecting and prosecuting recent, rather than stale, offences of this kind or recent, rather than old, incidents in a course of conduct. More serious matters should be given priority. Similarly, in the matter of sentence, Parliament has reached a view that certain conduct is appropriately covered by an offence which can be tried only summarily and which should attract no more than a particular level of sentence. Parliament has also fixed the maximum sentence to be imposed in summary proceedings, even where the defendant is

convicted of more than one charge. Again, in any particular case, the sentence available under statute may appear to the prosecutor to be inadequate. But Parliament is entitled to place an offence in what it regards as the appropriate level in the hierarchy of offences and to limit the sentencing power of a court where the accused is not tried by jury.

54. It is not for the Crown to second-guess Parliament's judgment as to any of these matters by deliberately setting out to reject the applicable statutory offences and to charge the conduct in question under common law in order to avoid the time-limits or limits on sentence which Parliament has thought appropriate. It may be that, in the light of experience, Parliament's judgment can be seen to have been flawed or to have been superseded by events. Doubtless, the prosecuting authorities have channels through which they can - and perhaps should - draw any such perceived deficiencies to the attention of the Home Secretary. It is then up to ministers and, ultimately, Parliament to decide whether the law should be changed. But, unless and until it is changed, its provisions should be respected and the Crown should not devise a strategy to avoid them.

55. Lord Bingham has described the circumstances of Mr Goldstein's case. It is plain that he put the salt in the envelope intending it to be a humorous message to his friend, Mr Ehrlich, who would have understood the joke. He posted the letter in a period when, following events in the United States, there were fears about the possibility of anthrax germs being sent through the post. It is therefore not surprising that when, just before 6 am, some of the salt spilled out of the torn envelope on to the hands of a sorter, Mr Owen, he raised the alarm. Indeed, Mr Goldstein accepted that the escape of the salt could have terrified Mr Owen. The Wembley sorting office was cleared and the police were called. They soon saw that the powder was salt but the sorters could not return to work for over an hour. For that reason, the first delivery of letters was somewhat later than usual. The management then decided to cancel the second delivery since, by the time the first delivery had been completed, the postal workers had finished their shift and would have had to be paid overtime to do the second delivery. The judge reminded the jury of evidence that over 35,000 businesses missed the second delivery and that some people had telephoned to complain. He was therefore directing the jury that, in deciding whether Mr Goldstein was guilty of public nuisance, they could take account of the inconvenience to the public caused by the cancellation of the second delivery.

56. In *R v Shorrock* [1994] QB 279, 289, the Court of Appeal held that a defendant landowner was responsible for a public nuisance which he knew or ought to have known (in the sense that the means of knowledge were available to him) would be the consequence of activities carried on by him on his land. In the present case the Court of Appeal held that a similar test should be applied to Mr Goldstein. Mr Goldberg argued that the House should disapprove the decision in *Shorrock* and bring the *mens rea* for public nuisance into line with the approach adopted in *R v G* [2004] 1 AC 1034. For my part, I was not persuaded by that submission. In *R v G* the House was considering the proper interpretation of “reckless” in section 1(1) and (2) of the Criminal Damage Act 1971 and, in para 28 of the leading speech, Lord Bingham made it as plain as he could that he was not addressing the meaning of “reckless” in any other statutory or common law context. The decision is therefore not in point. Particularly having regard to the essentially regulatory nature of much of the law of public nuisance, it seems to me that, even if it is unusual, the *mens rea* described in *Shorrock* is apt in situations where the offence truly applies. I would accept the reasoning in *Shorrock*. Applying the test in *Shorrock*, I am, however, satisfied that Mr Goldstein did not have the necessary *mens rea* to be convicted of public nuisance.

57. It was not unlawful for Mr Goldstein to put salt into a packet to be sent through the post. Nevertheless, if he had done so with the intention of provoking an anthrax scare and disrupting the post and if those events had come to pass, he might well have been guilty of public nuisance. But, according to the evidence, he had no such intention and, he said, he had never for a moment foreseen that the salt would leak out. Even if he had done so, however, it seems to me impossible to hold that he either knew or had the means of knowing that the events which happened in the Wembley sorting office and in the surrounding district would occur. In the heightened atmosphere of the time, he might have been able to foresee that there would be some disruption in the sorting office, but he had no means of knowing at what time of day his letter would be sorted or that the second delivery of post would be cancelled and cause inconvenience to the businesses in the area. Indeed, as the judge explained to the jury, the manager only decided to cancel it when he realised that they would have to pay overtime to the postal workers to do the work. The disruption to the public, which the jury were invited to consider, was therefore not an immediate consequence of Mr Goldstein’s act, but the consequence of an independent commercial decision of the post office management which he had no means of anticipating when he posted the letter. To hold Mr Goldstein guilty of public nuisance on the basis of this (relatively minor) inconvenience to the public would be to stretch the offence beyond its legitimate limits. I

accordingly agree that his appeal should be allowed and his conviction quashed.

BARONESS HALE OF RICHMOND

My Lords,

58. I agree, for the reasons given by my noble and learned friend, Lord Bingham of Cornhill, that both these appeals should be allowed. It is not open to the courts, however tempted they might be by the history so attractively presented by John Spencer in his valuable article, “Public Nuisance – A Critical Assessment” [1989] CLJ 55, to abolish existing offences. Nor it is open to the courts to “widen existing offences so as to make punishable conduct of a type hitherto not subject to punishment” (para 33, above). We are not, therefore, engaged in a law reform exercise. Our task is to define and re-establish the essential ingredients of the crime as they emerged after the publication of *Hawkins’ Treatise of the Pleas of the Crown* in 1716. The essence of the crime which he and the later institutional writers identified was, as my noble and learned friend has shown, “the suffering of common injury by members of the public by interference with rights enjoyed by them as such” (para 6, above). It is not permissible to multiply separate instances of harm suffered by individual members of the public, however similar the harm or the conduct which produced it, and call them a common injury. Conduct which was not criminal when the first letter was sent would become criminal at some unknown future time when it was thought that enough such letters had been sent to constitute such a common injury. This must be wrong in principle. Nor can it be right to punish someone who had no reason to think that his letter would cause any harm to anyone, because he had no reason to think that the salt would leak out in circumstances where his joke would not be understood.

59. I am pleased to be able to reach both conclusions, because I was a signatory to the Law Commission’s *Report on Poison-Pen Letters* (Law Com No 147, 1985). This resulted in the Malicious Communications Act 1985, which seems tailor-made to identify any culpable conduct in both these situations. This arose from the Commission’s examination of the common law offence of criminal libel, as part of its programme of codification of the Criminal Law. Neither in that Report, nor in the preceding Working Paper on *Criminal Libel* (LCWP No 84, 1982), was

it suggested that public nuisance might be available to cover campaigns of multiple malicious communications such as that conducted by Mr Rimmington. This is all the more remarkable, as the Commission had briefly considered public nuisance in the context of its work on public order offences, which eventually resulted in the Public Order Act 1986. The Commission had originally intended to include public nuisance in that work, as it had sometimes been used in public order situations, such as ‘sit-down’ demonstrations in central London: see *R v Moule* [1964] Crim LR 303; *R v Adler* [1964] Crim LR 304; cf *R v Clark (No 2)* [1964] 2 QB 315. In its Working Paper on *Offences against Public Order* (LCWP 82, 1982, at paras 1.9 to 1.12), however, the Commission announced that reviewing the offence, either as a whole or insofar as it penalised highway obstructions, would take the project far outside the realms of public order. The “best practicable approach” would be a separate review of the whole offence (para 1.12). Unfortunately, however, this has not been done. The Commission did remark (at para 1.10) that the offence had been used in a wide variety of situations, and referred to the then relatively recent cases of *R v Norbury* [1978] Crim LR 435 (making a large number of obscene telephone calls) and *R v Soul* (1980) 70 Cr App R 295 (assisting in effecting the escape of a patient from Broadmoor). So the offence of public nuisance, as recently employed in the courts, was certainly in the minds of the criminal law team at the Commission in 1982 when they were working on poison pen letters. Yet nowhere was it suggested that public nuisance might be the appropriate response to the more serious and prolonged ‘poison pen’ campaigns, although these are by no means uncommon. I am relieved to be able to conclude that the Commission was right to ignore it. It is of interest to note, however, that in its *Report on Offences relating to Public Order* (Law Com No 123, 1983, at para 1.8) the Commission did say that if the recommended offences were enacted “it will be preferable for public nuisance not to be charged in situations where there are disturbances to public order”, thus foreshadowing the observations of my noble and learned friend at paragraph 30, above.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

60. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. I respectfully agree with all that he says and for the reasons he gives, I too would allow both these appeals.

61. I also agree with what Lord Nicholls of Birkenhead says in paragraph 42 of his speech and with the speeches of Lord Rodger of Earlsferry and Baroness Hale of Richmond.