Matters in practice

Is statutory nuisance a viable means of seeking redress for those affected by sewage in watercourses?

Nicholas Ostrowski

At a glance

- Despite the public outcry there has been little legal redress for those affected by water pollution from sewage effluent
- Pollution from sewage effluent may fall into one of the categories of statutory nuisance set out in s.79 of the Environmental Protection Act 1990
- Caselaw suggests that local authorities can serve abatement notices requiring sewerage undertakers to abate discharges from combined sewage overflows albeit there are some significant legal and evidential hurdles to overcome

The limitations of current solutions to address water pollution

Pollution caused by the discharge of untreated sewage from combined sewer overflows (CSOs) could scarcely have a higher public profile. Yet there is no apparent practical and swift legal redress for those affected by such discharges.

The possibility of the Manchester Ship Canal Company bringing a claim in private nuisance for CSO discharges into private watercourses has been dismissed by the High Court[1] and Court of Appeal[2] and, at the time of writing, the Supreme Court has not handed down a judgment in the Manchester Ship Canal Company's appeal.

Under section 18 of the Water Industry Act (WIA) 1991, the Water Services Regulation Authority (Ofwat) can serve an enforcement order against sewerage undertakers obliging the undertaker to 'take such action as is requisite for the purpose of securing compliance' with the requirement that the sewerage undertaker must 'effectually deal' with the contents of sewers as required under section 94 of the same Act. If Ofwat spots an example of non-compliance, it must serve a section 18 enforcement order and, if the sewerage undertaker then fails to adhere to the terms of the enforcement order and causes a person loss or damage, that person may bring a claim in civil proceedings against the undertaker under section 22 of the WIA 1991. However, to date, Ofwat does not appear to have issued such an order.

If effluent is being discharged from a CSO in breach of its permit, then the Environment Agency can prosecute the sewerage undertaker for discharging from a CSO in breach of its permit. However, the problem is that many, if not most, discharges from CSOs are entirely compliant with the terms of their permit. CSO permit terms typically require that discharges are only permitted if a 'pass forward flow rate' exceeds a certain volume expressed in litres per second as a result of rain water or snow melt. Due to the number of connections on the network significantly exceeding the hydraulic capacity of the network, a network may cope sufficiently with flows which occur in dry weather but spill immediately after it rains even if such rain is only light. In a recent case,[3] the High Court recorded that:

> The [Environmental Agency's] data shows that of the 1,355 outflows they have assessed so far, the reason for the spill was lack of hydraulic capacity in 60% of cases, a maintenance issue for 16% and exceptional rainfall for 0%. The reason for the spills in 21% of storm overflows was still being investigated. Inadequate capacity was the overwhelming cause of the spills from the storm overflows.

So, if a CSO spills only after the 'pass forward flow rate' is achieved the Environment Agency cannot bring a prosecution but, of course, the watercourse still receives untreated (albeit diluted) sewage and the criminal courts cannot order compensation[4] or injunctive relief.

What legal redress is left for someone affected by pollution from sewage spills from CSOs?[5] I suggest that there is, at least in principle, recourse to the doctrine of statutory nuisance.

Types of statutory nuisance which may be engaged

As the editors of *Statutory Nuisance* (4th edn, Bloomsbury Professional, 2019, 1.01, p1) make clear, '[s]tatutory nuisance legislation is designed to provide a summary procedure for the remedy of a disparate

collection of unacceptable states of affairs, most of which put at risk human health or harm the amenity of neighbours'.

Section 79(1) of the Environmental Protection Act (EPA) 1990 sets out the eleven categories of statutory nuisance being matters which relate to:

(a) the state of premises
(b) smoke emissions
(c) fumes or gases from dwellings
(d) effluvia from industrial, trade or business premises
(e) accumulations or deposits
(f) animals
(fa) insects
(fb) light
(g) noise from premises
(ga) noise from vehicles or equipment in a street
(h) other matters declared by other Acts to be statutory nuisances.

The discharge of untreated sewage from a CSO into a watercourse may potentially engage four of these limbs**.**

First, section 79(1)(e) (accumulations or deposits) may be engaged if, for instance, the discharge of sewage from a CSO results in the accumulation or deposit of wet wipes, paper or if excrementitious suspended solids discharged from CSOs settle onto riverbanks and river beds.

Secondly, section 79(1)(fa) (insects) may be engaged if the discharge of excrementitious or otherwise polluted matter from industrial premises results in an infestation of insects.

Thirdly, section 79(1)(h) (other statutory nuisances) may be engaged if untreated sewage is discharged from a CSO into a watercourse by virtue of section 259 of the Public Health Act 1936 (as amended) which states that:

> (1) The following matters shall be statutory nuisances for the purposes of Part III of the Environmental Protection Act 1990, that is to say—
> (a) any pond, pool, ditch, gutter or watercourse which is so foul or in such a state as to be prejudicial to health or a nuisance

Fourthly, section 79(1)(d) (effluvia) could be engaged, but while there may be scope to suggest that sewage discharges are 'effluvia', the leading case on this provision[6] and practitioner commentary[7] suggests it is limited to discharges to the air.

The matters that would have to be proved
Prima facie therefore there seem to be at least three potential grounds for bringing a statutory nuisance arising from a CSO spill or series of spills. What would have to be proved?

First, the complainant would have to show that, as a matter of fact, the category of statutory nuisance did occur. Taking each of the potential types of statutory nuisance in turn:

a) Under section 79(1)(e) and an 'accumulation' or a 'deposit' – the case of *Thames Water v Bromley Magistrates' Court*[8] confirms that the unintended escape of sewage (in that case an escape by means of a leak from the sewerage network onto land[9] rather than, as a matter of deliberate design, a discharge from a CSO into a watercourse) can amount to a deposit under section 33(1)(a) of the EPA 1990 which prevents the deposit of controlled waste without a licence being in force. It seems at least plausible that a court considering the definition of deposit under the statutory nuisance regime would adopt the same approach.

Some concern may arise from the fact that even if a discharge did amount to a 'deposit' onto the banks of a watercourse, such a deposit may be temporary in the sense that, over a greater or lesser period of time, the material may be washed away by further flows of water. This was considered by Carnwath J (as he was then) in *R v Carrick DC exp Shelley*[10] where the judge noted that contamination of Porthtowan beach by sewage related debris (described as sanitary towels and condoms averaging about 1kg a day) brought to the beach from outfalls discharging into the sea 'may, in principle, amount to a deposit or accumulation within the section. The cleaning arrangements are, of course, relevant as to whether the deposit or accumulation amounts to a nuisance'. There is clearly a difference between 1kg of sewage related debris and the deposition of suspended solids and, in addition, most modern permits for CSOs include a condition requiring screening to be installed so it is less likely that most discharges from CSOs in 2024 would consist of gross sewage debris such as sanitary towels. However, this distinction between discharges from CSOs in the form of excrementitious material rather than of gross sewage debris would seem to be a difference of fact and not of principle.

An 'accumulation' is a result of a series of deposits and may be particularly apposite for discharges from CSOs where, for particularly prolific CSOs, it may be difficult to identify the extent of the deposit from any one, particular discharge because the discharge is absorbed or washed away by the receiving watercourse and it is only the accumulation of discharges which create pollution.

b) Under section 79(1)(fa) and 'insects emanating from relevant industrial trade or business premises' – sewers and drains do form part of 'relevant industrial, trade, or business premises' (section 79(7C)). However, it would seem to be much more difficult for this category to be engaged when dealing with discharges from CSOs. This is because, for an actionable statutory nuisance, the insects would have to be traced to the sewer or drain from which the CSO discharges.[11]

c) Under section 79(1)(h) and other matters declared by other Acts to be statutory nuisances – section 259 of the Public Health Act 1936 (as amended) states that 'any pond, pool, ditch, gutter or watercourse

which is so foul or in such a state as to be prejudicial to health or a nuisance' shall be a statutory nuisance. In *R v Falmouth and Truro Port HA ex p South West Water*[12] the Court of Appeal found that a statutory nuisance could occur from discharges from a sewage outfall albeit there was no such statutory nuisance in that case because the discharges was into a large tidal estuary which was not a 'pond, pool, ditch, gutter or watercourse' and so did not, on the facts, fall within s.259 of the Public Health Act 1936.

Secondly, if, as a matter of fact, one of the nine categories of statutory nuisance is engaged, a local authority can only serve an abatement notice if the matters complained of are 'prejudicial to health' or are a 'nuisance'. That will be a matter of fact and degree to be determined in each case and would require the evidence of an Environmental Health Officer but it is not at all unrealistic to suppose that a discharge of untreated sewage from a CSO, particularly if it occurs after no or only a small amount of rain and hence is not diluted, will be prejudicial to health particularly if the discharge occurs into a river or feeds into a body of water that is used for leisure activities such as surfing, sailing or swimming.

In the alternative, it would suffice to show that the discharge amounts to 'a nuisance'. Whether a discharge amounts to a nuisance would involve asking whether the discharge went beyond 'what objectively a normal person would find it reasonable to have to put up with'.[13]

Again, this is a pre-eminent matter of fact and degree that can only be answered with reference to the particular circumstances. Given the anthropomorphic prism of the law of statutory nuisance which protects harm to people but not harm to property[14] this would mean that a CSO discharging closer to human activities would be more likely to be held to amount to a nuisancesome activity than a CSO discharging more polluted material, more frequently, which happened to be situated away from human activities. Given modern sensibilities and society's increasing concern about water pollution it is not, in the author's view, unrealistic to suppose that a discharge or discharges of polluted effluent would be found to be a nuisance.

Conclusion

There are a number of potential limitations with the suggestion that discharges of sewage effluent from a CSO constitute a statutory nuisance which are outwith the scope of this article. For instance, under section 79(10) of the EPA 1990, the consent of the Secretary of State is required before the local authority can institute summary proceedings under this Part in respect of a nuisance arising from section 79(1)(e) (accumulations or deposits). In addition, the decision to serve an abatement notice would require the recipient to abate the nuisance which would mean that no polluting discharges could be made from the CSO. Undertakers may well suggest that such an obligation may result in sewage backing up in the network if they cannot fully utilise CSOs within the terms of its permit. Thirdly, it may well be suggested that it is contradictory to use the statutory nuisance regime to enforce discharges from CSOs when there is an elaborate regulatory regime already in place under the Environmental Permitting (England and Wales) Regulations 2016 which has explicitly authorised such discharges.[15]

However, for those concerned about discharges, the duty on the local authority under section 79 of the EPA 1990 to take such steps as are reasonably practicable to investigate a complaint about a statutory nuisance seems and the duty under section 80 of the EPA 1990 on a local authority to serve an abatement notice seems to be a powerful tool by which those affected by such discharges may seek to stop them.

Nicholas Ostrowski is a barrister at Six Pump Court Chambers (Nicholas.ostrowski@6pumpcourt.co.uk). He is also a co-convenor of the UKELA Water Working Party.

I thank my colleague Charles Morgan from Six Pump Court Chambers for his comments on a draft of this article. All errors are my own.

Endnotes

1 [2021] EWHC 1571 (Ch).
2 [2022] EWCA Civ 852.
3 R (WildFish) v Secretary of State for Environment, Food and Rural Affairs; R (Marine Conservation Society and others) v Secretary of State for Environment, Food and Rural Affairs [2023] EWHC 2285 (Admin) at [15].
4 See, for instance, Cranston J in R v Stapylton [2013] 1 Cr App R (S) 12 at [11].
5 This article concentrates on CSO discharges rather than continuous discharges of treated effluent from sewage treatment works.
6 Hounslow LBC v Thames Water Utilities Ltd [2004] QB 212 (a case about statutory nuisance arising from odour emanating from a sewage treatment works) suggests that effluvia are 'vapours or particles arising from decaying matter' per Pitchford J at [43].
7 Statutory Nuisance 4th edn, Bloomsbury Professional, 2019 at 1.55, p23.
8 [2013] 1 WLR 3641.
9 Although the CJEU does suggest that the escapes were also into 'controlled waters' see R (Thames Water Utilities Ltd) v Bromley Magistrates Court, Case C-252/05 at [20].
10 [1996] Env LR 273 at 278.
11 See Dobson v Thames Water Utilities Ltd [2011] EWHC 3253 (TCC) where a claim in common law nuisance succeeded arising from an insect infestation of a sewage treatment works failed on the facts.
12 [1999] Env LR 833 (and on appeal [2001] Q.B. 455).
13 per Lord Carnwath in Coventry v Lawrence (No. 1) 2014 AC 822, at [179].
14 See Wivenhoe Port Ltd v Colchester Borough Council [1985] JPL 175.
15 This is touched upon by Hale LJ's judgment at [23] in the Court of Appeal hearing in R. v Falmouth and Truro Port HA ex p South West Water [2001] Q.B. 455 and see also Barr v Biffa [2013] QB 455.