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THE CONTROL OF POLLUTION ACT, SECTION 58 - USE OF INAUDIBILITY CRITERION AND THE COMMON LAW PRINCIPLE OF REASONABLENESS

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INTRODUCTION

I first came across inaudibility as a criterion in Edinburgh in 1981. A rock music band was practising in the basement of a tenement flat, disturbing the occupant on the fourth floor. Inaudibility was achieved by finding the band somewhere else to practise, remote from any dwellings. Recently, the criterion is becoming more commonly used as the requirement for Section 58 Notices under the Control of Pollution Act. It is believed that there has been a test case, in Scotland, which has confirmed that use of the inaudibility criterion in Section 58 Notices can be judged to be unfair. The implications of such judgement and the consequences for further Section 58 Notices are discussed briefly. It may prove difficult, in applying the inaudibility criterion to certain specific cases, particularly with low ambient levels, to convince the courts that inaudibility is both possible and reasonable.

RECENT CASES

Legal Search

A legal database enquiry was made to discover whether there are any recent cases relevant to the question of the reasonableness of inaudibility in Section 58 Notices, but none were found under English Common Law.

Relevant Notices Issued

It is early days yet; my investigations revealed that one local authority has issued three such notices, two of which have successfully achieved their objective, although one of these nearly went to Appeal, but was apparently withdrawn the day before the hearing.

In one of these, a flat within the same building as a wine bar, the background noise was considered to be low at 33 dB(A) or NR 30, but the criterion was achieved by a combination of reducing the source by sound limiter to 82 dB(A) or 90 dB Lin (for low frequency control) and increasing the sound insulation of the structure. The noise consisted of popular disco type music played very loud in the bar.

The second example consisted of a wine bar in a basement with flats on first and second floor level in a reinforced concrete building. A similar solution was proposed, to limit the generation of sound and to construct a resiliently-mounted ceiling and independently supported wall linings. Again the local authority thought it was reasonable to require inaudibility.

A Scots Law Decision

I have been advised that in a recent case in Elgin (Morayshire District Council v. D. Littlewood, 1989), brought by the local authority against the owner of the Mosset Tavern, Forres, required inaudibility under a Section 58

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Notice and that this had not been achieved despite a range of construction works carried out and offers of double glazing to the one complainant. The sheriff dismissed the case after hearing the evidence of the environmental health officers under cross examination. It appears that they had relied too heavily on the criterion of inaudibility and were unable to prove that their records were genuine.

The sheriff stated that even though he knew nothing about the science of acoustics he found it very difficult to believe that if you can hear something it is a nuisance. He went on to say that the way the environmental health officers had gone about the exercise was not precise. He said that the environmental health officers had failed to take into account that they are employed as officers, not so much on the side of the complainant but also on the side of the complaine. He stated that they had "failed in their duty".

IMPLICATIONS

This raises the question, is inaudibility a "fair" and "reasonable" criterion, and does "satisfaction" under Section 58 mean reasonable satisfaction or can any criterion be used? If the state of the art is considered to be changing then that has implications at Common Law, and could eventually be incorporated in Statute. At present such decisions can be challenged and can go for a judicial review to see whether in the judgement of the court such a criterion is reasonable or not.

There are many types of reasonableness and unreasonableness. It might be impossible to do the works to achieve the criterion. If that is so, then the requirement of the notice cannot be termed "reasonable". The person who is complaining does not need and is not asking for that standard of remedy, in which case the requirement cannot be termed "reasonable".

But how can such inconsistencies arise? In one case the complainant said, when the level was being turned up, "I can hear it now but it is not yet at sufficient level to be a nuisance - after all, I am a reasonable man." If the complainant himself said he could hear the noise and it was not a nuisance it suggests that the criterion of inaudibility is unnecessary.

If it is possible to achieve a reasonable level of sound insulation by reasonable construction methods, then the Notice could be said to be reasonable. If sound insulation standard greater than the performance of a recording studio is required then it could be said that it was unreasonable.

If the standard of work falling short of the criterion is accepted because it is impossible to meet the criterion it is unreasonable. I understand that this might be the case when sound levels are fixed early in the evening, when ambients are higher.

If the premises owner is expected to defend his works on the grounds of best practicable means because he cannot achieve an impossible design target then the criteria could be said to be unreasonable.

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If an ambient noise level in a dwelling is required which is well below any normally accepted standard then this could be said to be unreasonable. In this respect BS 8233:1967 recommends a level of 30 to 40 dB(A) Leq for bedrooms. The World Health Organisation (1980) recommended a level of 35 dB(A) Leq for affect of noise on sleep: "At night, sleep disturbance is the main consideration and available data suggest a bedroom noise limit of 35 dB(A) Leq." A criterion requiring a level of 6 dB(A), see example below, appears to be well out of step with accepted advice on these matters.

The Building Regulations require that a floor which separates a dwelling from another dwelling or from another part of the same building which is not used exclusively with the dwelling, shall have reasonable resistance to airborne sound. The Regulation standard is 52 DnTw for a separating floor, and yet use of the criterion of inaudibility would appear to suggest that a DnTw of over 90 is required. How can an increase in requirement of 40 dB be reasonable?

TESTING REASONABLENESS FOR INAUDIBILITY

This example involves a Section 58 Notice requiring inaudibility for a new flat built over a pub. The facts are not disputed but the consequence of the criterion does not appear to assist the complainant achieve an effective solution. The practical problem is due to the extremely low ambient created in this flat by the introduction of acoustic double glazing. An ambient level of 21 dB(A) exists at this flat, see Figs 1-2. To achieve inaudibility, at a level of 15 dB(A) below ambient would require excessive efforts, even beyond recording studio standards, to achieve the requirement of the Section 58 Notice, effectively a target level in the flat of 6 dB(A).

For inaudibility, one should consider the weakest band, so the existing 57 DnTw would become 52 at its weakest point, and would have to be increased by some factor depending on the source level. If the existing normal level of music (77 dB(A) Leq) is maintained the DnTw would have to be increased to a value of approximately $57 + 25 = 79$ DnTw. If the pub owner then felt inclined to hold a disco (say 94 dB(A) Leq) to recoup some of his capital costs we would have to consider a target sound insulation of $79 + 17 = 96$ DnTw. Such an extreme level of sound insulation would be unlikely to be achievable in the domestic environment. Even the most rigorous standards for broadcasting studios sound insulation criteria are not set this high.

The traces in Figure 1 are described for each condition:

Condition A: Music in Pub

The onset of music is clearly visible at the start of the trace, coinciding with a group of traffic peaks, then the relatively steady level of a record lasts for some 3 minutes. There is a gap as the next record comes on, then the second record starts. The music was audible and annoying to the complainant.

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Condition B: Party in Pub

During this test nothing was audible in the flat.

Condition C: Pub Shut

There is a very quiet minimum level below 20 dB(A), passing cars providing the sound environment. These conditions are summarised in Table 1 below:

Table 1
Measured Levels

Activity	Level dB(A)					Audible	Acceptable
	Lmax	L10	Leq	L90	Lmin		
Music at normal level	36	30	27	24	21	Yes	No
Party in basement	36	31	27	22	21	No	Yes
Pub shut	38	33	28	21	19	No	Yes

ANY RELEVANT GOVERNMENT CONSIDERATIONS

It would be reasonable for a court to look to a government research establishment to test and if necessary utilise such a criterion. There are however no relevant government recommendations, studies or research which supports the criterion of inaudibility.

What is Nuisance?

Section 58 is concerned with summary proceedings by local authorities. It is relevant that reference is made to "a noise amounting to a nuisance" rather than to any aspect of audibility itself. The local authority has to be satisfied that the nuisance exists. Nuisance is a well-established concept in common law. The nature and extent of interference which constitutes a nuisance has been described, with reference to noise, as: "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober, simple notions among English people (Walter v. Selfe, 1851).

Statutory Duty of Local Authorities

The liability of local authorities is based on their statutory duties to safeguard public health and safety. If the local authority is shown to act unfairly with respect to those duties, then there could be a valid claim of unreasonableness.

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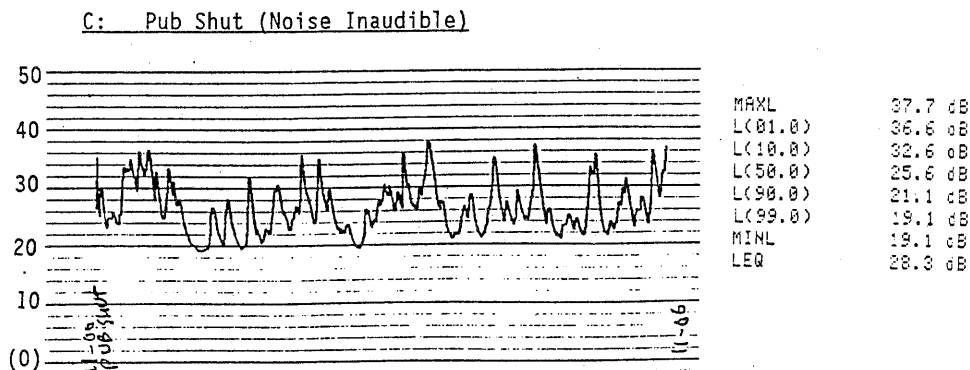
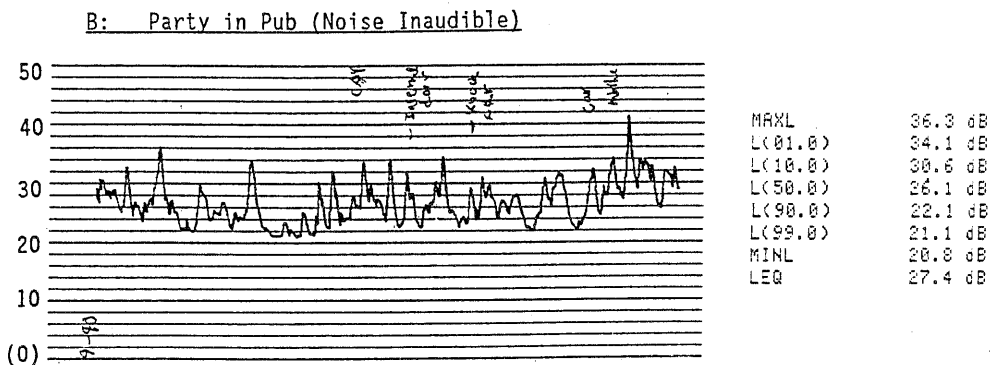
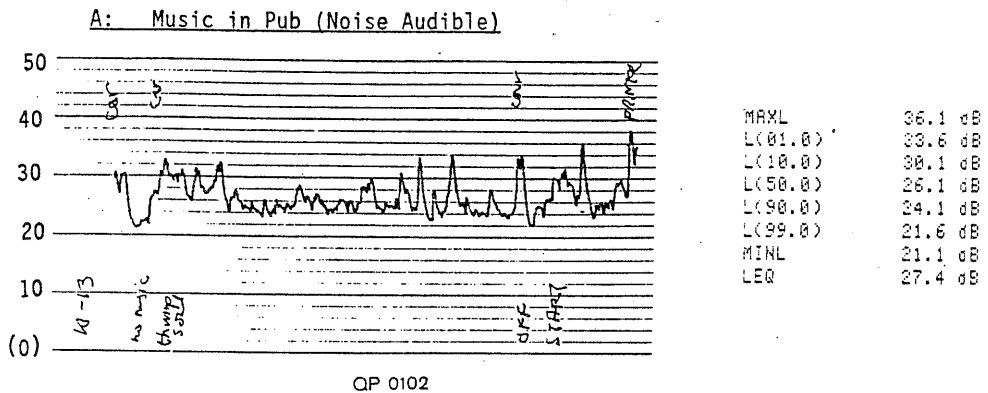


Fig. 1 Typical Measurement Conditions A - C (5 min samples)

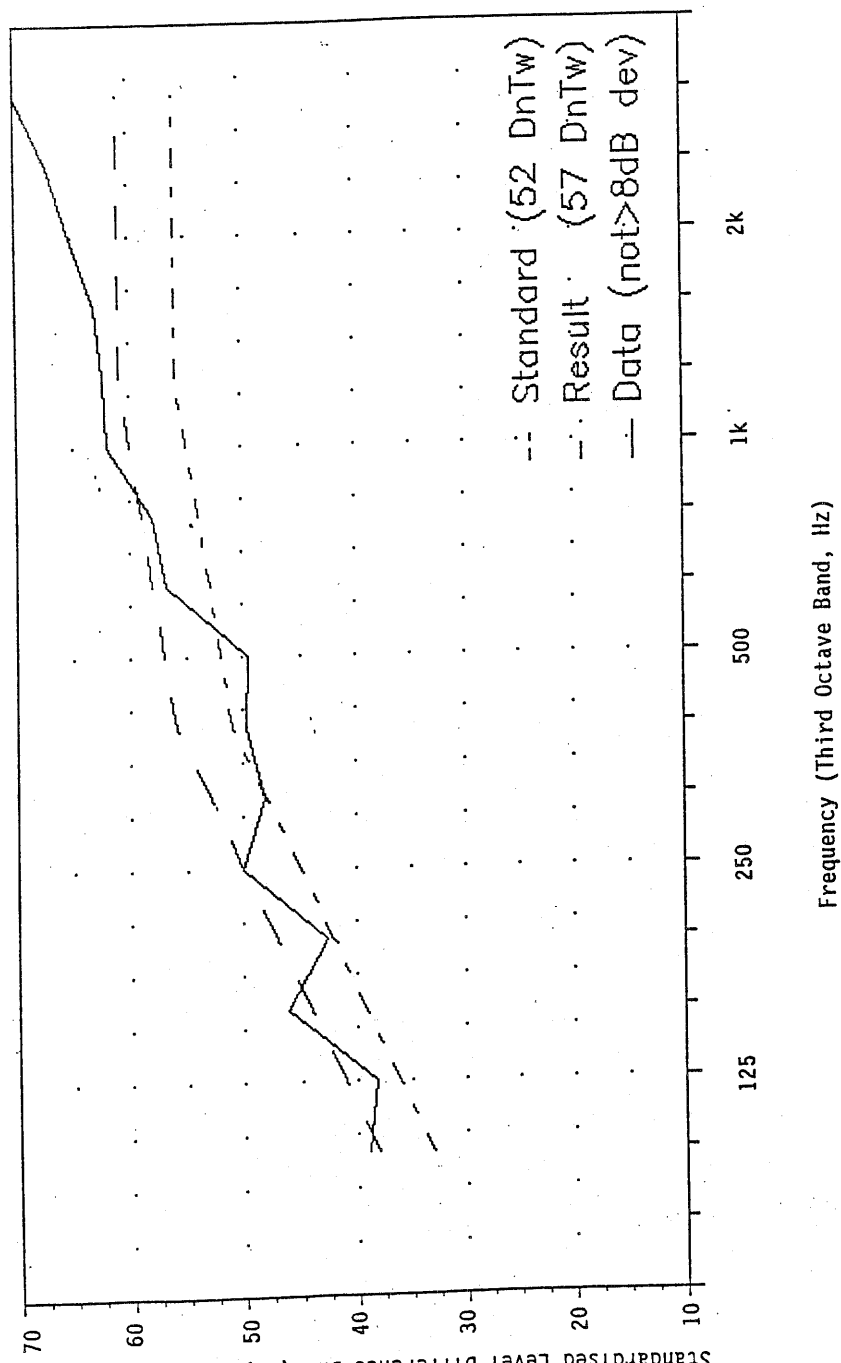


Fig. 2 Airborne Sound Insulation - Floor